State of New Hampshire
Public Utilities Commission

Docket No. DG 21-132

Liberty Utilities (EnergyNorth Natural Gas) Corp. d/b/a Liberty

Winter 2021/2022 Cost of Gas and Summer 2022 Cost of Gas

Objection to Motion in Limine

Liberty Utilities (EnergyNorth Natural Gas) Corp. d/b/a Liberty ("Liberty" or the "Company"), through counsel, objects to the Motion in Limine submitted by the Office of the Consumer Advocate ("OCA") (the "Motion"). OCA's Motion seeks to preclude the New Hampshire Public Utilities Commission (the "Commission") from considering the merits of Liberty's request to recover $4,024,830 in low-income discount revenues that were mistakenly refunded to residential customers through the reconciling Revenue Decoupling Mechanism in two years, 2018-2019 and 2019-2020. Primarily, OCA argues that the Commission should not even consider the Company's request for recovery of the under-collected low-income discount because it would constitute "impermissible retroactive ratemaking" as a matter of "black letter law." Motion at 5-7. Yet, among other deficiencies in the Motion, the Commission has previously established that "retroactive ratemaking" does not apply to reconciling mechanisms, such as the Cost of Gas mechanism. See, Concord Natural Gas Corp., 67 N.H. PUC 113, 114 (1982).

Specifically, OCA is requesting a determination prior to hearing that: (1) recovery of this sum is precluded as a matter of law (and no facts are in dispute); and (2) it would be conducive to the most efficient use of both the Commission's resources and those of the parties to avoid the use of hearing time to this question. Motion at 5. For the reasons discussed below, OCA's Motion on

item (1) should be denied. There are no retroactive ratemaking implications involved in the Company's request and, at a minimum, the dispute over the applicability of this ratemaking principle creates an issue of fact warranting a review of the Company's request on the merits.

As to item (2), the Company agrees that it would be reasonable to separate the issue of the under-collection of low-income discount revenues from the consideration of the cost of gas at the October 25 hearing.[1] The Company is amenable to working with the parties to develop a reasonable schedule to allow for consideration of the Company's proposal on the merits or to proposing a separate schedule to the Commission, as appropriate.

I. Introduction

1. At the direction of the Commission, Liberty has provided a discount to low-income customers for *many year*s and is authorized to do so on a revenue-neutral basis, providing the low-income discount to R-4 rate class and collecting the amount of the discount from all residential customers through a reconciling rate component in the Local Distribution Adjustment Clause ("LDAC"). By operation, the LDAC is designed to recover under- and over-collections from prior periods and the actual rate charged to customers is ever-changing given that its purpose is to reconcile and bring up to date revenue collections from prior periods.

2. This is in stark contrast to base distribution rates, which are established only in general distribution rate cases and are stated in dollars and cents in the Company's tariff, applying to usage in specific time periods. Base rates remain in effect *without change* until the next general distribution rate case, or other authorized base rate change (e.g., a step increase). By its Motion, OCA is asking the Commission to reject any consideration of the Company's under-collection of

[1] The Company received the filing made on this date by the Department of Energy recommending that the Commission bifurcate the hearing and put the consideration of the $4 million under-collection on a separate track from the cost of gas calculation, including the scheduling of a separate hearing. Liberty views this alternative as a reasonable and appropriate solution and thus supports Energy's request.

the low-income discount without any proceeding on the merits, on the false theory that the Commission is barred as a matter of law from considering the recovery of under-collections through a reconciling rate mechanism.

3. In its Motion, OCA concedes that as a "matter of law," the concept of "retroactive ratemaking" does not apply to reconciling mechanisms that, by their very nature, are recovering over- and under-collections from a prior period. Specifically, OCA states that:

> It bears noting why a decoupling mechanism is itself ***not an example of retroactive ratemaking***, given that under such a mechanism future revenue requirements are adjusted in light of previous revenue surpluses or deficiencies. The answer is that the adjustment mechanism is itself spelled out in the tariff so that, unlike customers of the unregulated firm described hypothetically by the Court in Pennichuck Water Works, ***customers of a utility with a decoupling mechanism are on notice of the pending adjustment*** and can, theoretically, adjust their consumption accordingly. See, e.g., Regulatory Assistance Project, "Revenue Regulation and Decoupling (2016) at 50-51 and n.54 (***describing the proper design of a decoupling mechanism to avoid retroactive ratemaking***).[2]

Motion at 6, fn.3 (emphasis added).

4. In this case, the amounts at issue were mistakenly refunded to customers through the Revenue Decoupling Mechanism and, if approved by the Commission, would be properly and lawfully recouped by the Company through that same reconciling mechanism. The concept of "retroactive ratemaking" is applicable exclusively to the recovery of costs through base distribution rates consistent with the theory of the "filed rate doctrine." Retroactive ratemaking does not occur where a reconciling mechanism is collecting or refunding revenues to customers by its normal operation, pursuant to approved tariffs and regulations, without any change in the underlying costs

[2] According to the OCA Motion, the cited treatise is available at https://www.raponline.org/wp-content/uploads/2016/11/rap-revenueregulation-decoupling-guide-second-printing-2016-november.pdf. The referenced treatise does not discuss the potential for "retroactive ratemaking" or the need to take steps to avoid retroactive ratemaking in relation to implementation of the revenue decoupling mechanism. This is likely because it is well established that retroactive ratemaking is not implicated by implementation of a reconciling mechanism operating outside base rates.

recovered through base rates. In fact, OCA's acknowledgement that the Revenue Decoupling Mechanism is "not an example of retroactive ratemaking" concedes, at a minimum, that there is a threshold issue of fact in this proceeding as to *whether* any retroactive ratemaking would occur if the request were granted.

5. In this context, the amount in question is not an operating cost of the Company that Liberty is seeking to recover through new rates applied to past consumption, which is the essence of "retroactive ratemaking." Instead, the amount in question is revenue that the Company was authorized to recover but did not because an ambiguity inadvertently embedded in the approved tariff led to the use of an incorrect input to the RDAF calculations – leaving the Company in an under-collection position. There is absolutely no valid reason that the Company would or should lose recovery of the revenues necessary to reimburse the Company for the low-income discount rate and the OCA Motion does not articulate any valid legal or ratemaking theory, except to cast the aspersion that "retroactive ratemaking" is implicated by the Company's request, which it is not.

II. Factual Background

6. In Liberty's annual cost of gas ("COG") proceedings, the Commission sets rates for the cost of gas and also adjusts the various components of the LDAC.[3] The RDAF at issue in this case is a component of the LDAC.

7. In 2018, the Commission approved the implementation of Liberty's Revenue Decoupling Mechanism effective November 1, 2018. The Revenue Decoupling Mechanism utilizes the "revenue-per-customer" ("RPC") method of reconciling actual, collected revenues to the authorized (or "allowed") revenue target established in the last rate case. Once the Commission

[3] The LDAC includes recovery of several reconciling charges such as the Revenue Decoupling Adjustment Factor ("RDAF") at issue here, as well as the Environmental Surcharges, rate-case expenses, Gas Assistance Program ("GAP") costs (previously referred to as the Residential Low Income Assistance Program ("RLIAP")), and other expenses the Commission may approve from time to time.

has authorized the overall utility revenue requirement in a base-rate proceeding, the Commission then approves the allowed "target" RPC for each rate class, which is used as the basis for reconciliation to actual revenues collected. The Revenue Decoupling Mechanism does not adjust base rates. Instead, the Revenue Decoupling Mechanism operates outside of base rates to either collect, or refund, amounts from/to customers to reconcile actual revenue collections with the allowed revenue targets for each rate class.

8. At the close of each decoupling year, the Company retrospectively compares the authorized revenues approved by the Commission in the last rate case with the actual revenues collected from customers over the prior year. If the Company has collected more than the authorized revenue target, the Company returns the overage amount to customers in the following year through the RDAF. If the Company has collected less than what the Commission has authorized, then the Company collects the difference between the authorized revenue targets and actual revenues obtained through rates from customers (through the RDAF surcharge) over the following year.

9. In this Cost of Gas proceeding, the Company is requesting to recover, over a two year period, the amount of $4,024,830 representing a portion of the annual revenue that the Commission authorized for recovery in 2019 and 2020. The amount that the Company seeks to recover through the RDAF component of the LDAC is an amount that was refunded to customers as a result of the reconciliation of the authorized and actual revenues of the R-4 rate class for the first two decoupling years. This refund left the Company in an under-collection position and the function of the RDAF is to collect the over- or under-recovery of revenues existing from time to time.

10. Liberty's R-4 rate is a low-income discount rate. Residential customers on the R-4 rate are no different from the customers on Liberty's residential heating rate (R-3), except that they are eligible for the discounted distribution rate. To derive the discounted R-4 rate, the Company applies a straight 60-percent discount to the R-3 distribution rate, so that customers in the R-4 rate class experience a distribution rate discounted by 60 percent. To maintain revenue neutrality, the Company is reimbursed for the revenues lost as a result of the discount (approximately $2 million per year) through another reconciling component of the LDAC, formerly the RLIAP, and now the GAP.[4] The R-4 rate discount, and the offsetting reconciliation of base revenues associated with the discount, have been in effect for many years, long before implementation of revenue decoupling. The implementation of the Revenue Decoupling Mechanism should not have disturbed this framework.

Chronology

11. In the Company's 2017 rate case in Docket No. DG 17-048, the Commission approved a revenue requirement that increased distribution rates based on the 2016 test year and implemented a step increase for certain capital investments made through the end of 2017. This overall, authorized revenue requirement formed the basis of the calculations of authorized RPCs in the Revenue Decoupling Mechanism, through which the Company would collect future approved revenue in each Decoupling Year.

12. In Docket No. DG 17-048, the Commission also approved the revenue decoupling mechanism. *See,* Order No. 26,122 (Apr. 27, 2018). The Commission subsequently approved tariff

[4] Under the GAP, effective November 1, 2020, the discount changed to a 45 percent discount on both distribution rates and COG rates during only the November through April six-month winter period, but that change took place subsequent to the periods of time at issue.

language establishing the terms and conditions of the Revenue Decoupling Mechanism. *See,* Order No. 26,187 (Nov. 2, 2018).

13. The 2018 tariff governing the Revenue Decoupling Mechanism established the method by which the authorized RPC for each customer class (including R-3 and R-4) would be computed so that the total revenues collected from all customers would equal the allowed revenue target, which is the fundamental purpose of the Revenue Decoupling Mechanism. From a conceptual basis, the total amount of revenue per customer that the Company is allowed to collect for each R-4 customer should be the same as for each R-3 customer because the low-income discount rate would be accounted for through the long-standing practice involving the RLIAP component of the LDAC. However, the approved tariff did not clearly and unambiguously address this issue. Instead, the approved tariff stated that the authorized, "benchmark" revenue per customer was to be calculated for a Customer Class, defined as:

> All customers taking service pursuant to the same Rate Schedule based on the distribution rates in effect at the start of the Decoupling Year and will be revised for the remaining months of each Decoupling Year if there is a distribution rate change that occurs following the beginning month of each Decoupling Year."[5]

14. This guidance implied that the RPC target would be set separately for the R-3 rate class and the R-4 rate class and, further, that the low-income discount should apply to the RPC target, resulting in an RPC target for the R-4 rate class that was lower than the RPC target for the R-3 rate class by the 60 percent discount. For example, for the month of November 2018, the first month of the 2018-2019 decoupling year, the authorized RPC for the R-3 rate class was computed as $57.780 per customer, as compared to the authorized RPC for R-4 customers of $22.047 per customer.

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[5] Liberty Utilities NHPUC Tariff No.10, First Revised Page 35.

15. As a second step, the 2018 revenue decoupling tariff compares *actual* revenues collected for each class to the authorized revenues, with the difference returned to, or collected from, customers through the reconciling RDAF mechanism. For R-4 customers, the tariff called for the calculation of actual revenues collected using R-3 distribution rates, which *did not* take into account the 60-percent discount. This created an asymmetry where the revenue target (i.e., the authorized RPC) was discounted by 60 percent, but the actual revenue collected was *not* computed at the discounted rate, introducing an error in the calculation that would make it appear that actual revenues were greater than the revenue target, although this was not the case.

16. The 2019 COG proceeding, Docket No. DG 19-145, was the first reconciliation proceeding following implementation of the Revenue Decoupling Mechanism. This means that the Company's filing was the first filing to reconcile authorized revenues with actual revenues collected over the 2018-2019 decoupling year -- and conversely -- the first to calculate the difference to be collected or refunded to customers through the RDAF. In that filing, the Company put forth a calculation of the actual revenue collected for the R-4 customer class through the revenue decoupling mechanism using the discounted R-4 RPC applied to actual billing determinants for that rate class. If approved, this method would have achieved the required revenue neutrality for the Company.

17. During technical sessions in that proceeding as well as in direct testimony, Staff opined that the Company's calculations were incorrect and that the Company should return approximately $2 million to customers relating primarily to the difference between actual and authorized revenues for the R-4 rate class.[6] Ultimately, the Company agreed to revise its filing to

[6] The 2019 COG proceeding involved other issues related to the decoupling tariff that are not relevant here.

incorporate Staff's calculations. The Commission approved the revised filing with only limited discussion of the R-4 mismatch, expressly acknowledging the Commission would revisit these issues after "further inquiry" as the parties worked through the complexities of the Revenue Decoupling Mechanism. This "revisit" to the issues was possible due to the reconciling nature of the Revenue Decoupling Mechanism. Specifically, the Commission stated in the final order that, "[b]ecause actual costs and revenues are reconciled every year, any adjustments needed as a result of further inquiry into the matters addressed in this order, including final audits, can be made in Liberty-EnergyNorth's COG filing for 2020-2021." Order No. 26,303 at 7 (Oct. 31, 2019).

18. In compliance with the 2019 COG Order, Liberty refunded approximately $7 million to customers over the 12-month period, 2019-2020, including approximately $1.9 million related to the low-income discount that the Company was actually entitled to retain.

19. Contemporaneous with the commencement of revenue decoupling in November 2018, the Commission authorized the Company to collect a projected RLIAP discount of $2,409,164 from customers over the period November 1, 2018 through October 31, 2019. Order No. 26,188 (Nov. 1, 2018) (the 2018-2019 COG proceeding). Due to the low-income tariff mismatch between the authorized revenue target for the R-4 rate class and the actual revenues collected for that class, it appeared that a refund was due to customers. Therefore, in Order No. 26,306 (Oct. 31, 2019) in the next year's COG proceeding, Docket DG 19-145, the Company was required to refund $7,016,791 to customers through the RDAF from November 1, 2019 through October 31, 2020. In fact, this amount included $1,932,224, the amount of the RLIAP discount collected from customers November 1, 2018 through October 31, 2019, which should have been retained by the Company.

20. No further action was taken prior to the 2020 COG filing, in Docket No. DG 20-141. As with the 2019 COG filing, Liberty's 2020 filing encompassed a calculation of the R-4 authorized revenue target as compared to the actual revenues collected, applying the computation from the approved 2018 tariff and a calculation of revenue from the RLIAP charge. On a combined basis, recoveries through the two reconciling factors (RDAF and RLIAP) would have allowed the Company to recover its allowed revenue for the Decoupling Year. Staff did not file testimony in the 2020 docket and the topic of the R-4 rate mismatch was not discussed at hearing. However, as the result of technical sessions and informal discussions with Staff and the OCA, the Company again revised its filing to return another $2 million to customers over the 2019-2020 decoupling year. The parties agreed to address the R-4 rate issue in detail in the then pending distribution rate case, Docket No. DG 20-105.

21. With respect to the 2020 COG filing, the Commission approved the revised filing, including the revised RDAF calculation, in Order No. 26,419 (Oct. 30, 2020), without substantive discussion of the R-4 issue. Order No. 26,419 repeated that all components of a COG filing are reconciling and thus can be adjusted in future proceedings to correct any earlier mistakes discovered after "further inquiry," stating "[b]ecause actual costs and revenues are reconciled every year, any adjustments needed as a result of further inquiry into the matters addressed in this order, including final audits and actual costs, can be made in Liberty EnergyNorth's COG filing for 2021-2022." Id. at 7.

22. As was the case with Order No. 26,188 issued on November 1, 2018, the Order issued in Docket DG 19-145 (Order No. 26,306), dated October 31, 2019, authorized the Company to collect a projected RLIAP discount of $2,307,356 from customers from November 1, 2019 through October 31, 2020. However, due to the low-income tariff mismatch between the

authorized target revenues for the R-4 rate class and the actual revenues collected from the R-4 rate class, it appeared to show that a refund was due to customers. NHPUC Order No. 26,419 in Docket DG 20-141, dated October 30, 2020, required the Company to refund to customers through the RDAF the amount of $4,965,947, in the period November 1, 2020 through October 31, 2021. In fact, this refund included the amount of $2,092,605, representing the RLIAP discount collected from customers November 1, 2019 through October 31, 2020, which should have been retained by the Company.

23. In both 2018-2019 and 2019-2020, the refunds to customers that the Company was directed to make were improper ($1,932,224 and $2,092,605, respectively). Effectively, the Company was providing the discount to low-income customers through the RLIAP portion of the LDAC, as well as through the Revenue Decoupling Mechanism (due to the reduction of the RPC for the R-4 rate class to account for the low-income discount rate). In the Settlement Agreement approved by the Commission in Docket No. DG 20-105, this double discount was eliminated by a tariff change that all parties agreed to and that was approved by the Commission. Exhibit 49 in Docket No. DG 20-105.[7]

24. In its filing in this proceeding to consider the 2021 COG, the Company is requesting to recover the amount of $4,024,830 erroneously refunded to customers through the RDAF in relation to the R-4 rate class decoupling calculations. This outcome is the product of the "further

[7] See, Docket No. DG-20-105, Transcript dated July 13, 2021, at 134-135 ([Kreis] "As was established earlier, we haven't really altered decoupling fundamentals, as they were previously approved by the Commission, but we have managed to fix the decoupling mechanism, so that we think now that it operates correctly, in relation to the other regulatory mechanisms that it operates alongside. So, you know, here we reset the Company's revenue requirement, and we have the right mechanism in place now to assure that rates are adjusted so that there is a fair and symmetrical process of accounting for changes in revenue that will benefit customers and benefit shareholders alike."). See, also, Transcript dated July 13, 2021, at 140 ([Dexter] "With respect to decoupling, I think this case has highlighted how important decoupling is, how complicated it is, and I should say how important it is to understand it, and how complicated it is.")

inquiry" expressly referenced by the Commission in its Orders pertaining to the 2018-2019 and 2019-2020 COG filings. The Company is owed these amounts as the low-income discount rate is supposed to be a revenue-neutral process for the Company and there is no legitimate reason that the Company would or should lose these revenues due to the Revenue Decoupling Mechanism reconciliation process. To the contrary, the Commission's Orders expressly leave open the resolution of the R-4 rate class mismatch for further resolution.

25. At a technical session conducted on October 13, 2021, the Company committed to develop and submit a detailed chronology and documentation of the approvals and rulings made in past LDAC and base-rate dockets, as well as the derivation and application of the "formula" for recovery under the Revenue Decoupling Mechanism, to provide a foundation for further review. The Company will develop and submit that analysis on an expedited basis to further the purposes of the proceeding.

III. Legal Analysis

26. In the Motion, OCA claims that "Liberty is seeking an illegal act of retroactive ratemaking." This is incorrect. There are two inherent flaws in this argument: (1) the cited case law, and the ratemaking principle established therein, pertain to base-rate changes and not to the operation of any reconciling mechanism; and (2) the cited case law contemplates a retroactive "increase" in cost recovery, whereas here the Company is rightfully seeking to obtain recovery of under-collected revenues that are necessary to maintain ***revenue neutrality*** associated with provision of the low-income discount rate. Although customer rates may be higher than would otherwise occur to pay back the Company, this does not mean that there has been an increase in rates to allow for greater cost recovery in the past, which is the essence of retroactive ratemaking.

27. Historically, the prohibition against retroactive ratemaking arose from the "filed rate doctrine." The filed-rate doctrine generally prohibits a regulated utility from charging rates for its services other than those approved and filed with the public utility commission. The New Hampshire legislature has codified this requirement of previously approved rates applying to prior consumption in the provisions of RSA 378:1, as follows:

> Every public utility shall file with the public utilities commission, and shall print and keep open to public inspection, schedules showing the rates, fares, charges and prices for any service rendered or to be rendered….

28. RSA 378:3 also precludes utilities from charging any other rates absent prospective Commission approval, stating as follows:

> Unless the commission otherwise orders, no change shall be made in any rate, fare, charge or price, which shall have been filed or published by a public utility in compliance with the requirements hereof, except after 30 days' notice to the commission and such notice to the public as the commission shall direct.

29. RSA 378:14 further clarifies that:

> No public utility shall grant any free service, nor charge or receive a greater or lesser or different compensation for any service rendered to any person, firm or corporation than the compensation fixed for such service by the schedules on file with the commission and in effect at the time such service is rendered.

30. The considerations underlying the filed-rate doctrine as reflected in RSA 378 include preserving the Commission's primary jurisdiction over the reasonableness of rates and ensuring that utilities charge only those rates of which the Commission has been made cognizant, establishing the predictability of filed rates, and preventing unjust discrimination. *See* Appeal of Lakes Region Water Company, 171 N.H. 515 (2018).

31. The OCA Motion rests solely on this principle that utilities may not charge new rates to past consumption, referencing the precedent set in Appeal of Pennichuck Waterworks, 120 N.H. 562, 566 (1980). Specifically, OCA argues as follows:

> Lofty constitutional principles aside, the Court in *Pennichuck Water Works* offered a straightforward and commonsense explanation, viz:
>
> > We are mindful of the fact that public utilities may not increase their rates with the same freedom as an unregulated business. However, even where a product is unregulated, the consumer is confident once he purchases a product that the merchant will not later claim ***that he is liable for a retroactive price increase on the product.***

Motion at 6, citing, Appeal of Pennichuck Waterworks, 120 N.H. 562, 566 (1980) (emphasis added).

32. In the Pennichuck case, the utility filed a request for an increase in base rates including a temporary rate. The issue of retroactive ratemaking arose with respect to a request for approval of those temporary rates. The utility in that proceeding used quarterly billing *that would have resulted in customers being charged the temporary rate for water already consumed.* i.e., the change would have been a retroactive change in base rates, charging the customer a rate for water consumed although such rate had not been approved by the Commission at the time the water was consumed. To avoid the potential for "retroactive ratemaking," the PUC allowed the temporary rates to go into effect, but on a date that was no earlier than when the company had put its customers on notice of the proposed increase through its filing, to ensure that quarterly-billed customers would not be billed under the new rates for past consumption.

33. The precedent in Pennichuck is not applicable to the circumstances in this case involving the Company's request for repayment of the $4 million in low-income discount revenue that were inadvertently refunded to customers. If recovery of the lost revenues through the LDAF

is approved by the Commission, the LDAF will collect a prior under-collection consistent with the intended operation of the Revenue Decoupling Mechanism to collect the approved revenue target. Therefore, there can be no argument that this is retroactive ratemaking. See Aquarion Water Company of New Hampshire, Docket DW 21-085 Order No. 25,412, at 3 citing Pennichuck (approving AWC-NH's temporary rates based on a finding that customers were put on notice of the proposed changes in rates and that customers were provided with an opportunity to adjust their consumption or adjust to the proposed increased rate).

34. OCA's Motion does not provide any "black letter law" to substantiate the claim that, in this proceeding, "recovery of this sum is precluded as a matter of law." OCA's Motion simply raises the specter of retroactive ratemaking with reference to the Pennichuck case, which is not applicable to the circumstances at hand. OCA's Motion does not offer any explanation as to how the Pennichuck principle applies to the facts in this case, which would be necessary to demonstrate that retroactive ratemaking, is in fact, implicated in this case.

35. To the contrary, OCA makes a point in the Motion to explain that the Revenue Decoupling Mechanism "is ***not*** an example of retroactive ratemaking." OCA Motion at 6, fn.3 (emphasis added). OCA points out in its Motion that the requisite notice to customers is inherent with a reconciling mechanism like the LDAC because reconciling mechanisms by their very design put customers on notice that rates will adjust from time to time, thereby providing notice to customers that they should plan for those future adjustments. Motion at 6, fn. 3. This "notice" to customers was one of the reasons cited by the court in support of its determination in Pennichuck that allowing the temporary rates to go into effect on a date that would have, at least partially, applied a new rate to former consumption due to the quarterly billing cycle was improper and in violation of the N.H. Constitution. Specifically, the Court found that customers "have a right to

rely on the rates which are in effect at the time that they consume the services provided by the utility, at least until such time as the utility applies for a change." Pennichuck at 566.

36. OCA also argues in its Motion that the danger of a "confiscatory" rate is only relevant where the utility is forced to "provide service to the public at rates which are inadequate for its to realize a rate of return." Motion at 7, citing, Pennichuck Water Works, 120 N.H. at 566. However, it is this very point that underscores the ***absence*** of retroactive ratemaking in this case. The revenues that the Company is requesting to collect ***are not part of the Company's cost of service*** and have nothing to do with the Company's rate of return. Instead, these are revenues that were required, by the Commission, to be returned to customers due to the implementation of the Revenue Decoupling Mechanism based on an adjustment sought by OCA staff.[8]

37. In arguing that "black letter law" in New Hampshire prohibits "a public utility from imposing a rate increase on a retroactive basis," OCA does not examine the difference between collecting an increased cost through base rates (and applying the increased base rate retroactively to past consumption) and collecting revenues on a pass-through basis through a reconciling mechanism. On that point, the Commission has previously ruled that:

[8] OCA's Motion states that "any deficiency is not attributable to regulation but, rather, to Liberty simply having made a mistake for which only the Company is responsible." OCA Motion at 7. However, this is not an accurate statement of fact. See, e.g., Testimony of Al-Azad Iqbal, Docket No. 19-145, October 8, 2019 (recommending a change in the computation that led to the double-credit to customers).

> The Commission does not accept the Company's argument that the disallowance of any portion of the penalty that was included in the summer cost of gas adjustment is retroactive ratemaking. The nature of the fuel clauses approved by this Commission are such that they are always based on estimated costs for a forward-looking period and a ***subject to reconciliation***. Over and under-collections are carried in deferred accounts and are brought forward to a future adjustment period. ***Furthermore, if the Commission Staff found errors in the past bookings of the cost of gas adjustment, an adjustment would be made***."

Concord Natural Gas Corp., 67 N.H. PUC 113, 114 (1982) (emphasis added).

38. In New Hampshire, the courts have not yet examined whether the concept of "retroactive ratemaking" would apply in relation to the operation of a reconciling mechanism. However, in Massachusetts, rulings of the Massachusetts Supreme Judicial Court follow the same concept articulated by the Commission in Concord Natural Gas Corp., i.e., that the nature of reconciling mechanisms is to allow prospective recovery of past over- or under-collections. Specifically, the Massachusetts Supreme Judicial Court has affirmed that reconciling mechanisms like the cost of gas adjustment are an ***exception*** to the prohibition against retroactive ratemaking. Southern Union Co. v. Dep't of Pub. Util., 458 Mass. 812, 822-823 (2011); Fitchburg Gas & Elec. Light Co., D.T.E. 99-66-A at 16, 24-27 (2001) ("[I]nsofar as this case arose from the operation of the [Cost of Gas Adjustment], it implicates a reconciling mechanism that lies outside the retroactive ratemaking stricture that constrains Department action under G.L. c. 164, s. 94."), affirmed, Fitchburg Gas & Elec. Light Co. v. Dep't of Telecomm. & Energy, 440 Mass. 625, 637 (2004) ("Fitchburg").

39. In Fitchburg, Fitchburg Gas and Electric Light Company appealed from a decision of the Massachusetts Department of Public Utilities (then the Department of Telecommunications and Energy) ("MDPU"), ordering that the utility repay its customers for overcharges that resulted when the utility included identical inventory finance charges in both its base rate and supplemental

cost of gas adjustment clause ("CGAC"). The utility claimed that the MDPU's directive to return revenues to customers through the CGAC constituted retroactive ratemaking. However, in affirming the MDPU's decision, the Court explained:

> In contrast, the [Cost of Gas Adjustment] is a price component established by departmental regulations that permits a utility, on a semi-annual basis, to recoup the actual costs of gas by passing those costs on to the ratepayers. The department computes the CGAC according to a complex mathematical formula that factors both projected gas costs for a certain period and a "reconciliation adjustment" of the difference between the actual costs incurred during the relevant period and the forecast. Unlike the base rate, which is not subject to retroactive adjustment and may only be changed pursuant to the hearing procedures set out in G.L. c. 164, § 94, the CGAC "may, for good cause shown, be modified by the [d]epartment" in such manner as it "may determine to be in the public interest.

Fitchburg, 440 Mass. at 628.

40. The Massachusetts Supreme Judicial Court further explained:

> We have not previously been asked to determine whether the rule against retroactive ratemaking should be applied to adjustments in the CGAC, but we have no difficulty in concluding that an order retroactively adjusting a CGAC is well within the department's general supervisory authority over utility costs … and is consistent with its "broad authority to determine ratemaking matters in the public interest." ***Retroactivity is inherent in the very nature of a CGAC.*** Unlike the base rate, which is a calculation of rates going forward based on historical data, ***the CGAC adjusts semi-annually for utility costs as they actually have been incurred, according to a mechanically applied technical formula***. The formula itself is a fixed "rate" that cannot be changed outside the hearing procedure mandated by G.L. c. 164, § 94. ***But the "dollars and cents" amount inserted into the flow-through formula is presumptively not fixed***. They represent costs over which utilities often have little bargaining power or control, and it would defeat the very purpose of a CGAC to require these costs to be frozen until the expensive and cumbersome process of a rate change hearing is completed.

Fitchburg, 440 Mass. at 637 (emphasis added).

41. OCA's Motion argues that "this issue was *not* resolved in Liberty's favor via DE 20-105," referring to the issue of the lost revenues in 2018-2019 and 2019-2020 attributable to the interaction of the low-income discount and the Revenue Decoupling Mechanism. This argument

is a factual contest, defeating the claim that the Motion should be granted because there are "no facts at issue." Motion at 5, 7-8.

42. OCA's Motion argues that "symmetry" is not an issue in this case because it is Liberty's "sole responsibility to operate its business effectively – by *inter alia*, designing a decoupling mechanism that works." Motion at 10 (emphasis included). Here too, OCA implicates a factual contest as to why the decoupling mechanism did or did not work and whether the Company was "solely" responsible for the difficulties in implementation. This factual claim therefore defeats OCA's Motion arguing that the Company's request for recovery should be dismissed as a "threshold" matter because there are "no facts at issue." Motion at 5.

WHEREFORE, Liberty respectfully requests that the Commission:

A. Deny the OCA's Motion in Limine;

B. Address the merits of Liberty's request to recover the $4,024,830 at a separate hearing to be scheduled after the October 25, 2021, hearing; and

C. Grant such other relief as is just and equitable.

Respectfully submitted,

Liberty Utilities (EnergyNorth Natural Gas) Corp.
d/b/a Liberty

Date: October 14, 2021 By: _____

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Certificate of Service

I hereby certify that on October 14, 2021, a copy of this objection has been electronically forwarded to the service list in this docket.

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Michael J. Sheehan