

STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

DE 24-066

Liberty Utilities (Granite State Electric) Corp. d/b/a Liberty

**The Town of Salem's Memorandum in Support of its Objection to Liberty Utilities'
(Granite State Electric) Corp. d/b/a Liberty Petition to Amend Tarriff**

The Town of Salem ("Town of Salem") hereby submits this memorandum objecting to Liberty Utilities' (Granite State Electric) Corp. d/b/a Liberty Petition to Amend Tariff, stating as follows:

1. The fundamental flaw with the Petition to Amend Tariff is that it fails to recognize the Town's exclusive authority pursuant to RSA 231:159-182 to permit and/or license equipment within the Town's Right of Way. RSA 231:159-182 fails to provide the Commission jurisdiction regarding equipment being placed within the Town's Right of Way and the Petition is against New Hampshire law as explained below. Accordingly, the Petition should be dismissed.

2. The Town of Salem issued a Demand Letter dated February 19, 2020, to Liberty, for removal of their aerial utility, and subsequent relocation underground as part of the Town's important Depot Intersection Project. Millions of dollars have been spent on the Depot Intersection project to provide increased safety to traffic and pedestrians over many years. *See Intervenor's Ex. A* (Letter dated February 19, 2020).

3. The Town of Salem issued a second Demand Letter dated October 4, 2021, to Liberty, regarding the relocation options of Liberty's aerial utility in relation to several proposed new signalized intersections for the Ring Roads (Nodes 4, 8, 20, and 22). *See Intervenor's Ex. B* (Letter dated October 4, 2021).

4. As the Town summarized in a letter dated August 24, 2023:

The impetus of this request was the Main Street at Pleasant Street signalized intersection project, Node 4. This project utilizes and maximizes all of the right of way as this is a very compact area. Liberty has since provided the Town with an overhead solution and an underground solution. The overhead solution as designed calls for 50' – 55' poles located at the back of sidewalk and approximately 10' off the face of the building façade of Work Force Housing. This is unacceptable and certainly not prudent. It completely disregards the redevelopment to date, ignores the Town's preferred streetscape, and flies in the face of public health and safety. Categorically it affects the Workforce Housing Development, which is on record through Brian Webster of Elm Grove Properties, opposing the proposed overhead solution...

As stated previously, the Depot area presents geometric challenges, has limited right of way, and redevelopment objectives that do not support overhead lines and accompanying poles. A large part of the concept plan was focused on traffic safety improvements and enhancing pedestrian opportunities in the spirit of facilitating people by walking to destinations. Design standards for streets, frontage of buildings, connectivity, and mode shift, can only be achieved by exclusive right of way control. This is no more evident than the placement and design of the Workforce Housing building located on the northwest corner of the intersection.

See Intervenor's Ex. C (August 24, 2023 Letter).

5. As the Town further explained in a Notice of Decision dated September 26, 2023:

At a duly noticed public hearing on September 11, 2023, the Town of Salem Town Council, pursuant to RSA 231:159-182, including RSA 231:177, voted to deny Liberty's request regarding the placing of aerial utility, equipment, and any/all appurtenances from the Depot Intersection Project to a location westerly approximately 900 feet after 41 Main Street, Map 89, Lot 114. The Town Council found, on the evidence before it, that the aerial utility, equipment, and any/all appurtenances do not serve the public good, but, instead, cause safety and health concerns for pedestrians and vehicles as the structures are too close to the Town's maintained road and interfere with the use of the sidewalk. Liberty's alternative plan to place the aerial utility, equipment, and any/all appurtenances to the back of the sidewalk is similarly against the public's good for the reasons stated above, and as an attractive nuisance to neighborhood children. Lastly, Liberty's current and proposed alternative plans placing of aerial utility, equipment, and any/all appurtenances is against the public good as this area has recently undergone significant town and private improvements to which the placing of these structures would harm the aesthetic features of this area.

See Intervenor's Ex. D.

6. RSA 231:161,I(a) provides the Town the exclusive jurisdiction and authority to issue a license or permit for placing equipment in the Town's right of way:

"Jurisdiction. (a) Town Maintained Highways. Petitions for such permits or licenses concerning town maintained highways shall be addressed to the selectmen of the town in which such highway is located; and they are hereby authorized to delegate all or any part of the powers conferred upon them by the provisions of this section to such agents as they may duly appoint."

7. Importantly, permits and licenses are only granted: "if the public good requires."

See RSA 231:161,II and III.

8. RSA 231:161,V provides the municipality the sole discretion to determine where this equipment is placed, including:

The maximum and minimum length of poles, the maximum and minimum height of structures, the approximate location of such poles and structures and the minimum distance of wires above and of conduits and cables below the surface of the highway, and in their discretion the approximate distance of such poles from the edge of the traveled roadway or of the sidewalk, and may include reasonable requirements concerning the placement of reflectors thereon.

9. In the event a utility seeks to place a replacement pole, such shall be "at least 20 feet from the surfaced edge or the edge of public easement therein, provided, however, that for good cause shown the selectmen may waive the 20-foot requirement." RSA 231:161,II; *see also* RSA 231:168 ("The location of poles and structures and of underground conduits and cables by the selectmen shall be made so far as reasonably possible so that the same and the attachments and appurtenances thereto will not interfere with the safe, free and convenient use for public travel of the highway or of any private way leading therefrom to adjoining premises or with the use of such premises or of any other similar property of another licensee.").

10. Licenses or permits may be changed but only after a finding by the municipality that the “public good requires” such change. *See* RSA 231:163.

11. Moreover, RSA 231:177-181 provides municipalities the authority to order poles removed, and in this case, the Town provided notice to Liberty dating back to 2020 of the interference with public travel and corresponding safety issues with the Depot Intersection project.¹

12. Importantly, if Liberty is aggrieved by the Town’s decision, the proper recourse is an appeal to the Superior Court not the PUC:

If the selectmen or the board of mayor and aldermen or other board having authority to locate poles and wires in cities, or the commissioner of transportation, shall neglect or refuse to decide and make return of their proceedings upon any petition authorized hereby within the times limited by RSA 231:164, or if any party whose interests are affected by their decision on any such petition or in granting a license, changing the terms thereof, or revoking the same, is dissatisfied therewith, the petitioner or party so **dissatisfied may apply to the superior court for relief** within 60 days after the expiration of the times limited by RSA 231:164 or after such decision; and like proceedings shall thereupon be had as in the case of appeals from the laying out of highways by selectmen.

RSA 231:166 (emphasis added).

13. The Petition, therefore, ignores the Town’s authority, the Superior Court’s appellate jurisdiction and then improperly shifts the cost onto the Town for relocating the equipment. In this case, the Town has made a determination that Liberty’s equipment interferes with the safe, free and convenient use for public travel of the Town’s highway. *See* RSA 231:168. This Commission lacks authority to overturn such decision.

¹ RSA 231:181 expressly requires that if the utility fails to remove then the Town may remove at the utility’s expense: “All such poles shall be removed within the time designated, and, if not removed by the date stated in such notice, may be forthwith removed by the agency giving notice at the expense of the owner.”

14. Lastly, as the New Hampshire Supreme Court explained, the general rule in New Hampshire is: “utilities are required to relocate their facilities at their own expense whenever public health, safety or convenience require change to be made.” *Opinion of Justices*, 101 N.H. 527, 528 (1957). While the Legislature may amend this general rule, RSA 231:159-182 does not require that a municipality pay for the cost of relocation. *See id.* at 529 (“The common-law rule which places the costs of relocating utility facilities on the owner specifically admits of legislative change.”). Accordingly, the Petition should fail as it is against state law.

WHEREFORE, the Town of Salem respectfully requests that this Honorable Commission:

- A. Dismiss this Petition for the reasons stated herein, and
- B. Provide any other such relief as it deems appropriate.

Respectfully submitted,
TOWN OF SALEM
By its Attorneys
UPTON & HATFIELD, LLP

Date: July 23, 2024

By: 

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CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that a copy of the foregoing has been e-mailed this day to all parties of record.



Michael P. Courtney

SERVICE LIST – DOCKET RELATED

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