STATE OF NEW HAMPSHIRE

BEFORE THE

PUBLIC UTILITIES COMMISSION

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

Petition to Amend Tariff

Docket No. DE 24-066

Memorandum of Law of the Office of the Consumer Advocate

NOW COMES the Office of the Consumer Advocate ("OCA"), a party to this docket, and, congenial to the procedural schedule approved by the Commission in this proceeding, submits the following memorandum of law in response to the pleading captioned "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 Tariff" (tab 16) ("Salem Memorandum") filed by the Town of Salem on July 23, 2024.

The Town of Salem contends that the "fundamental flaw" in the petition at issue in this docket is that the subject utility "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." Salem Memorandum at 1. This is incorrect. No party to this proceeding has questioned the Town's authority to exercise its rights under RSA 231:160 *et seq*. to determine how, when, and where "power poles and structures and underground conduits and cables, with their respective attachments and appurtenances" are "erected, installed and maintained" in the Town's public highways." The extent of the Town's authority to direct the subject utility to move

its electric distribution facilities underground may be a matter of dispute but, as has already been established in this docket, any such dispute is not within the authority of the Public Utilities Commission. *See* Salem Memorandum at 4 ("if Liberty is aggrieved by the Town's decision" under RSA 231, "the proper recourse is an appeal to the Superior Court").

Rather, the question presented by this docket is whether the Town may lawfully require this utility'ss ratepayers – the vast majority of whom do not reside in, work in, or even pass through Salem – to bear the incremental cost of the Town's unilateral decision to force the utility to move its facilities underground when rebuilding overhead lines would be a lower cost alternative. In support of its claim that Salem may impose these costs on all ratepayers, the municipality relies entirely on one authority: *Opinion of the Justices*, 101 N.H. 527 (1957) – a 67-year-old advisory opinion (i.e., not binding precedent of the New Hampshire Supreme Court) on a subject completely distinct from the question at issue here.

In *Opinion of the Justices*, the General Court sought advice on a question that arose not under the statutory law of public utilities but, rather, under the New Hampshire Constitution. In 1957, the construction of the nation's interstate highway system, supported largely by federal funds, was well under way. To support the buildout of this massive national project in New Hampshire, the General Court was considering a bill that authorized the State use toll revenue and other highway funds to match available federal money to cover the cost of relocating facilities of public utilities made necessary by the construction of Interstate routes.

At issue was Article 6-a of Part 2 of the New Hampshire Constitution, which requires money collected by the state via tolls, motor vehicle registrations, and the like to be used exclusively for the construction, reconstruction, and maintenance of public highways. In their advisory capacity, the Justices of the Court concluded that, the limitation in Article 6-a of Part 2 notwithstanding, the Legislature could "validly declare that the relocation of utility facilities is part of the cost of highway relocation and reconstruction and shall be paid out of highway funds." *Opinion of the Justices*, 101 N.H. at 531-32.

In the course of reaching this conclusion, the Justices suggested, in *dicta*, that "utilities are required to relocate their facilities at their own expense whenever public health, safety or convenience require change to be made." *Id.* at 529-30 (citing opinions of state courts in Michigan and New York as well as a Congressional document stating that "[t]here has been no dissent from the common law rule as enunciated by numerous courts that, in the absence of a clear statutory mandate shifting the burden to *the State*, utilities are obliged to relocate at their own expense their facilities located in public highways when required to facilitate highway improvements") (emphasis added). The justices then noted that this common law rule, shielding the state from bearing the cost of such relocations, can be changed by legislation. *Id.* (citing authorities from courts in Maine and New York). The point here was that the General Court could do exactly what it was contemplating: reorder the financial responsibility, as between the state and a

utility, for facility relocations, in order to take advantage of available federal largesse.

This has precisely nothing to do with the question presented by the instant case, which concerns allocation of financial responsibility for facility relocations between a utility (and, more precisely, its ratepayers) and a *municipality* (rather than the state and its taxpayers). There are no principles of common law at issue here. Rather, the question is whether the Commission's authority under RSA 374:1 and :2, to assure that rates, charges, and utility service are "safe and adequate and in all other respects just and reasonable," is subject to limitation via any language in the sections of RSA 231 on which the Town relies.

The only plausible answer to this question is "no." As noted in its memorandum, the Town informed Liberty on August 24, 2023 that the municipality insisted upon undergrounding the facilities in question in light of "the Town's preferred streetscape" as well as the existence of utility lines "approximately 10 [feet] off the face of the building façade of Work Force Housing" in a manner that apparently displeased the developer of the real estate project in question. Salem Memorandum at 2. The letter referenced "geometric challenges" and "redevelopment objectives that do not support overhead lines and accompanying poles" as well as "enhancing pedestrian opportunities in the spirit of facilitating people by walking to destinations." *Id.* These considerations may be virtuous as a matter of public policy, or elegant as a matter of Euclidian geometry, but it is inconsistent with the statutory mandate for just and reasonable utilities rates to

expect all of a utility's ratepayer to bear costs associated with one municipality's aesthetic objectives, commitment to geometric perfection, and/or its quest for affordable housing. These costs simply have nothing to do with the provision of electric service by Liberty to its customers.

The subsequent claim of the Town, as reflected in its Notice of Decision issued on September 26, 2023, that overhead utility facilities are an "attractive nuisance to neighborhood children," *id.*, is an even less persuasive basis for imposing costs on utility ratepayers. That much is self-evident, roughly a century into the era of universal electric service. To suggest that New Hampshire law allows a municipality to mandate the undergrounding of any new electric facilities that must be built in a public way, to protect miscreant youth from climbing utility poles and electrocuting themselves, would amount to an invitation for every city and town in the state to forbid new overhead facilities and impose the resulting costs on customers everywhere. If that is to be the public policy of New Hampshire it is a matter for the General Court to consider. In the meantime, the Commission and the public can comfort themselves with the knowledge that overhead utility facilities are built to exacting safety standards.

The sad irony of this docket is that it raises an important question that must, in these circumstances, go unaddressed: whether a prudent electric utility could or should opt to underground substantial portions of its distribution network because that is actually the least-cost option when considering the life-cycle value of the incremental cost compared to the traditional overhead approach. The correct

frame for such an inquiry is not one in which individual towns opt for underground networks for aesthetic or economic development reasons (or in the name of geometry) and then seek to force neighboring communities and their ratepayers to share the cost via their electric bills.

In fact, newly adopted New Hampshire law creates a mandatory framework for the Commission to employ in assessing such questions. *See* Chapter 242 of the 2024 New Hampshire Laws, codified as RSA 378:38, :39, and :40 (requiring electric and gas utilities to submit integrated distribution plans for Commission approval at least every five years). The new statute requires each integrated distribution plan to include "[a]n assessment of distribution infrastructure necessary to ensure a reliable and resilient electric system capable of meeting the forecasted customer demand." RSA 378:38. An integrated distribution plan must "serve as the foundation to establish all the applicable distribution programs necessary to improve reliability and resilience, grid modernization and grid capacity to enable electrification for its residential, commercial, and industrial customers." *Id.* A municipality with the degree of policy vision implicit in the official pronouncements quoted in the Salem Memorandum would be a welcome and helpful party to the adjudicative proceeding the Commission is required to open when the subject utility makes its first plan filing.

For the reasons stated above, the Commission should reject the arguments tendered by the Town of Salem in its legal memorandum. The municipality has the authority to determine that new electric distribution facilities in town-owned

highways must be built underground, but it lacks the authority to require the utility's costs to be covered all if the company's ratepayers.

WHEREFORE, the OCA respectfully request that this honorable Commission:

A. Grant the petition of Liberty Utilities (Granite State Electric) Corp. d/b/a Liberty to amend its tariff, and

B. Grant such further relief as shall be necessary and proper in the circumstances.

Sincerely,

Donald M. Kreis
Consumer Advocate
Office of the Consumer Advocate
21 South Fruit Street, Suite 18
Concord, NH 03301
(603) 271-1174
donald.m.kreis@oca.nh.gov

August 6, 2024

Certificate of Service

I hereby certify that a copy of this pleading was provided via electronic mail to the individuals included on the Commission's service list for this docket.

Donald M. Kreis