

STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

Docket No. DG 19-161

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

Distribution Rate Case

Memorandum Regarding the 2-Year Period of RSA 378:7

Liberty Utilities (EnergyNorth Natural Gas) Corp. d/b/a Liberty Utilities (“Liberty” or the “Company”) respectfully submits the following memorandum to address the issues raised in the Commission’s Suspension Order regarding whether the Commission must act on the Company’s rate filing. As detailed below, the Company’s last permanent rate increase was effective May 1, 2018, and, in this case, permanent rates would not be effective until late in 2020, which is well over two years from the last effective rate increase.¹ Thus, RSA 378:7 is not in play and the Commission must address the merits of Liberty’s request for a distribution rate increase in this docket.

Background

On December 24, 2019, the Commission issued Order No. 26,319, which suspended the Company’s proposed rates, scheduled a January 10, 2020, prehearing conference, and indicated its intention to address the applicability of RSA 378:7:

In addition, Liberty’s filing raises issues under RSA 378:7 which states that the Commission shall be under no obligation to investigate any rate matter which it has investigated within a period of two years, but may do so within said period at its discretion. Issues raised under this provision include but are not limited to: (1) whether two years has passed since the Commission last investigated Liberty’s distribution rates; and (2) whether deciding not to investigate Liberty’s proposed rates at this time would constitute an unconstitutional taking as discussed by the New Hampshire Supreme Court in

¹ The Company requested permanent rates to be effective as of November 21, 2020. The Commission has discretion under RSA 378:6, I(a) to issue a permanent rate order through December 24, 2020.

Appeal of Gas Service, Inc., 121 NH 602 (1981). After hearing from parties on these issues at the Prehearing Conference scheduled below, the Commission will issue an order indicating whether it will use the discretion provided under the statute to investigate the proposed rates.

Order No. 26,319 at 3-4.

The facts in this case are simple. In the Company's last rate case, Docket No. DG 17-048, permanent rates took effect on May 1, 2018. Order No. 26,122 (April 27, 2018). While there were motions filed and decided after permanent rates took effect, *see* Order No. 26,146 (June 22, 2018) (granting rehearing to investigate whether the permanent rate order would provide the intended revenue), Order No. 26,156 (July 10, 2018) (providing clarification on various aspects of the permanent rate order), and Order No. 26,187 (November 2, 2018) (resolving all issues raised on rehearing), it is undisputed that the permanent rate increase was in effect as of May 1, 2018, and remained in effect as the Commission addressed the motion for rehearing. It would have required a specific order to prevent those rates from remaining in effect. *See* RSA 365:28 (the Commission may "alter, amend, suspend, annul, set aside, or otherwise modify" a prior order, but only "after notice and hearing"); RSA 541:5 (the filing of a motion for rehearing authorizes, but does not require, the Commission to suspend the subject order). The Commission did not issue an order suspending the approved permanent rates.

In any rate case, permanent rates must take effect no later than twelve months from the date that the Commission suspends currently effective rates:

Pending any investigation of a rate schedule which represents a general increase in rates and decision thereon, the commission may, by an order served upon the public utility affected, suspend the taking effect of said schedule and forbid the demanding or collecting of the rates, fares, charges or prices covered by the schedule **for such period or periods, not to exceed 12 months in all, as in the judgment of the commission may be necessary for such investigation**, except as provided in Paragraph II.

RSA 378:6, I(a) (emphasis added). The statute establishes a straightforward process where, upon the filing of a request for a permanent rate increase, the Commission must first suspend the proposed rates and then has a period to investigate those proposed rates, which investigation must conclude within 12 months of the suspension date. In this docket, the Commission suspended the Company's proposed rates on December 24, 2019, and thus the Commission must rule on permanent rates by December 24, 2020.

Argument

In its Suspension Order, the Commission raised the question whether two years have passed since the Commission last investigated the Company's distribution rates. The Commission raised this question based on RSA 378:7, which states, in part, that "[t]he commission shall be under no obligation to investigate any rate matter which it has investigated within a period of 2 years, but may do so within said period at its discretion." While the New Hampshire Supreme Court has not directly ruled on this provision in RSA 378:7, it has stated in *dicta* that RSA 378:7 "...locks utilities into a two-year period **between rate increases.**" *Appeal of Pennichuck Water Works, Inc.*, 120 N.H. 562, at 567-568 (emphasis added).

In this case, the facts amply demonstrate that there will be two years between rate increases, no matter how that period is measured. As explained above, the Company's last permanent rate increase in DG 17-048 was effective May 1, 2018, and in this case permanent rates would not be effective until November 1, 2020 (the date requested by Liberty) or as late as December 24, 2020, assuming the Commission takes the full twelve months to investigate. Even if the Commission were to take less than twelve months to investigate and rule on permanent rates, it is highly unlikely

that the Commission would do so before May 1, 2020, two years from the date of the last permanent rate increase.²

Other language in RSA 378:7 supports this interpretation. For example, the statute states that “the commission shall determine the just and reasonable or lawful rates ... to be thereafter observed ... and shall fix the same by order to be served upon all public utilities by which [order] such rates, fares and charges are thereafter to be observed” (emphasis added). The statute says nothing of filing dates, test years, or other timing guideposts. It only mentions rate “orders” which must “thereafter be observed.” This language demonstrates that “the period of 2-years,” which immediately follows, intends to measure the time between such rate changes and not the timing of other procedural events.

The Commission issued several orders regarding RSA 378:7 and its 2 year period in the 1970s that are consistent with the discussion above. For example, in the order rejecting the rate filing of Gas Service, Inc., which order was later reversed in *Appeal of Gas Service, Inc.*, 121 N.H. 602 (1981), the Commission acknowledged that it was the effective dates of rate changes to which the 2-year period applied:

Whereas, this filing is similar to a previous filing which was fully considered, investigated, and decided upon by this commission and which became effective on June 10, 1976; and

Whereas, it now appears to this commission that an insufficient period of time has elapsed since the previous rates became effective to properly develop a need for a new increase in basic rates; and

Whereas, RSA 378:7 provides that the commission is under no obligation to investigate any rate matter which it has investigated within a period of two years; it is

² Measuring from the effective date of temporary rates leads to the same result. In DG 17-048, temporary rates took effect on July 1, 2017, and in this case the Company proposed that temporary rates take effect on February 1, 2020, which is a conservative date given that no hearing on temporary rates has been set as of this writing.

Ordered, that the aforementioned pages to Gas Service, Inc., tariff NHPUC No. 5 — Gas, be, and hereby are, rejected.

Gas Service Inc., 61 NH PUC 287 (1976) (emphasis added). The Commission similarly recognized that rate effective dates were the critical measuring points two years later:

We are cognizant of our duty as enunciated concisely in *New England Teleph. & Teleg. Co. v. New Hampshire* [113 NH 92 (1973)] that the commission's duty is "... to fix a rate of return which will meet the constitutional standards not only at the time its order is made but for a reasonable time thereafter." The court then followed this statement with an express reference to the two-year statute (RSA 378:7). We are hopeful that the rates established in this decision are sufficiently prospective in nature as to satisfy the supreme court's test, thereby compensating the company for at least a two-year period from the date of this report and order.

Concord Natural Gas Corporation, 63 NH PUC 303 (1978) (emphasis added).

In addition to the above authority, the Commission is obliged to accept this rate case under the constitutional standard articulated in *Appeal of Gas Service, Inc.*, 121 N.H. 602 (1981):

[The company] maintains that, because of events which have occurred since February 1980, its cost of capital and attrition are now greater than that reflected in the rates approved by the PUC at that time, thereby resulting in an earnings deficiency which constitutes an unconstitutional confiscation of its property. It has produced exhibits which could be found to support its claims. If the facts are as claimed by the company, its property is being unconstitutionally taken from it with each passing day.

121 N.H. at 603.

The Company's allowed rate of return as established in its prior rate case is 6.86%, which is a weighted calculation of the Company's actual cost of debt and the Commission-approved return on equity of 9.3%. Order No. 26,122 at 43 (April 27, 2018). This rate of return is intended to fall between "the lowest rate that is not confiscatory and the highest rate that is not excessive and extortionate." *Public Service Co. of N.H.*, Order No. 24,552 at 6 (Dec. 2, 2005) (citation omitted). A rate of return that falls below such an approved rate is thus, by definition, "confiscatory."

The objectives of setting a reasonable rate of return on a utility's rate base ... include compensating the company's investors for the risks they assume when they lend to the company and buy its stock. The anti-CWIP statute, for example, places the entire risk of loss from an uncompleted plant on the company's investors, and the same is true when a plant has been completed but never placed in operation. The "constitutional consequence of this type of risk allocation is that those who bear the risk must be compensated by a return on their investment that reflects the risk that the statute places upon them."

Appeal of Public Serv. Co. of N.H., 130 N.H. 748, 751 (1988).

As described in Liberty's pre-filed testimony, the Company's rate of return during the July 2018 through June 2019 test year was only 5.14%, as compared to the authorized return on rate base of 6.86%. *Temporary Rates Testimony of David B. Simek and Kenneth A. Sosnick* at Bates II-007. The return on equity component of this rate of return was 5.86% during the test year, well below the authorized ROE of 9.3%. This rate attrition will cease as of the effective date of temporary rates since permanent rates are reconciled back to the date of temporary rates. RSA 378:29. Should the Commission dismiss this filing pursuant to the 2-year period of RSA 378:7, however, the rate attrition will continue until the Company re-files this case at the future date when the Commission determines the 2-year period has been met and the Commission approves temporary rates in that docket. The conclusion reached by the *Gas Service* court applies equally here: "If the facts are as claimed by the company, its property is being unconstitutionally taken from it with each passing day." 121 N.H. at 603.

Finally, the chronology of this docket alone supports a finding of confiscation. In *New England Telephone and Telegraph Company*, 67 NH PUC 349 (1982), the Commission denied a motion to dismiss a rate proceeding under RSA 378:7 based on its finding that the time between two rate proceedings, which was similar to that experienced by Liberty here, raised constitutional concerns:

However, if the Court [in *Appeal of Gas Service*] found that we committed an abuse of discretion in denying hearings on a rate request (a) fourteen months after the filing of tariffs for a previous case; (b) ten months after the filing of testimony in a previous proceeding; and (c) six months after the issuance of a final order in a previous case, it is clear that to deny NET hearings on this petition which comes (a) twenty-seven months after their previous basic rate proceeding; (b) twenty-four months after the filing of testimony in their previous rate proceeding; (c) nineteen months after the issuance of a final Commission order in that proceeding, would be an abuse of discretion.

67 NH PUC at 350-51 (emphasis added). Without conceding that these filing dates are the appropriate markers under RSA 378:7, as discussed above, the time between parallel events in Liberty's current and prior rate cases are similar. Liberty filed this case 31 months after its filing in DG 17-048, compared to 27 or 24 months in *New England Telephone*, and Liberty filed 19 months after the order granting the permanent rate request in DG 17-048 (or 12 months after the final order on rehearing), compared to 19 months in *New England Telephone*. Thus, the time between Liberty's two rate filings, alone, is sufficient to require the Commission to accept this filing to avoid a constitutional violation.

For these reasons, Liberty respectfully requests that the Commission proceed with its investigation of the Company's rate filing.

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

By its Attorney,



Date: January 9, 2020

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Certificate of Service

I hereby certify that on January 9, 2020, a copy of this memorandum has been electronically forwarded to the service list.

A handwritten signature in black ink, appearing to read "M. Sheehan", written in a cursive style.

Michael J. Sheehan