STATE OF IOWA

DEPARTMENT OF COMMERCE

UTILITIES BOARD

IN RE: LIBERTY UTILITIES (MIDSTATES NATURAL GAS) CORP., d/b/a LIBERTY UTILITIES	DOCKET NO. RPU-2016-0003 (TF-2016-0303, TF-2016-0304, TF-2016-0305, TF-2016-0306)

ORDER DENYING MOTION FOR REHEARING

(Issued June 9, 2017)

BACKGROUND

On July 25, 2016, Liberty Utilities (Midstates Natural Gas) Corp., d/b/a Liberty Utilities (Liberty or Liberty Midstates), filed with the Utilities Board (Board) an application seeking to increase its annual Iowa gas revenues by approximately $1 million and to change its rate design. The rate increase application was identified as Docket No. RPU-2016-0003. On August 23, 2016, pursuant to the Board's rule at 199 IAC 26.4(1), Liberty filed its estimated rate case expense. Liberty's estimated expense was $389,979.

On February 17, 2017, Liberty, the Office of Consumer Advocate (OCA), a division of the Iowa Department of Justice, and intervening parties the City of Keokuk (Keokuk) and Roquette America (Roquette) filed a joint unanimous settlement (Settlement) which allowed for a permanent increase of $870,315 in annual revenue requirement along with certain rate design changes. The Settlement resolved all

issues among all parties except for the amount of rate case expense to be recovered by Liberty.

On February 20, 2017, the Board issued an order informing the parties that a hearing on the proposed settlement would be held on February 22, 2017, as scheduled, and informing the parties they should bring witnesses able to address rate case expense issues, among others.

The Board conducted a hearing February 22, 2017.

On March 22, 2017, Liberty filed a report of its actual rate case expense showing that its expenses totaled $608,931 and expenses for the Board and OCA totaled $230,712. Liberty explained it had based its initially-filed estimate on the expectation that it would reach an early settlement with OCA.[1] Keokuk filed an objection to Liberty's report of actual rate case expenses on March 30, 2017. OCA filed an objection on March 31, 2017.

On April 28, 2017, the Board issued an "Order Approving Settlement with Reporting Requirement, Denying Motion to Strike, and Addressing Rate Case Expense" (Final Order). In the Final Order, the Board disallowed $25,000 of Liberty's reported actual rate case expenses and approved Liberty's recovery over a seven-year period of $814,643 of rate case expense through the use of a rider. (Final Order, p. 35.)

[1] *See* Liberty's "Report of Actual Rate Case Expense," March 22, 2017, p. 1; Liberty's "Response to Second Board Order Requesting Additional Information," November 10, 2016; Tr. 16-19.

On May 16, 2017, pursuant to Iowa Code § 476.12, Keokuk filed a "Motion for Rehearing" (Motion) asking the Board to grant rehearing on the question of whether Liberty's rate case expenses approved by the Board are reasonable and just under Iowa Code § 476.6(5). On May 30, 2017, OCA filed an "Answer to Motion for Rehearing" (Answer) supporting Keokuk's Motion. Also on May 30, Liberty filed a resistance to the Motion (Resistance).

MOTION FOR REHEARING

In its Motion, Keokuk asserts that the Board did not explicitly rule on Keokuk's March 30, 2017, objection to Liberty's reported actual rate case expense. Keokuk states that the per-customer cost of Liberty's actual rate case expense of $839,643 comes to $190.83. Subtracting the amount disallowed by the Board results in a per-customer share of $185.15. Keokuk points out that the per-customer share of the rate case expense incurred by Iowa-American Water Company in a recent Board rate proceeding was $13.15. Keokuk says the Board did not address why it is reasonable for a customer in Keokuk to pay a share of rate case expense that is 14 times higher than a customer of Iowa-American Water pays.

Keokuk contends the per-customer rate case expense allowed by the Board punishes Liberty's customers for objecting to the large proposed rate increase and will deter customers from objecting to future rate increase applications, while Liberty plans to file a new application in three to five years. Keokuk asserts the Board did not address in the Final Order why it is reasonable and just to allow such a large per-

customer cost in this case while customers of other utilities pay far less for litigation expenses.

Keokuk also asserts that the Board did not analyze why the expenses it allowed are reasonable and just. Keokuk asserts the Legislature did not intend Iowa Code § 476.6(5) to allow the Board to approve unreasonably large expenses. Keokuk suggests the Board could have used an analogy to explain why the expenses were reasonable, perhaps by pointing to Iowa Code § 476.10, the statute that authorizes the Board to charge the expenses attributable to its duties and those of OCA to the person bringing a proceeding before the Board. In this way, Keokuk suggests the Board could have considered "the impact of assessment on participation by intervenors," as provided in Iowa Code § 476.10(1)(a).

Keokuk contends the Board did not address any of the points raised in Keokuk's March 30, 2017, objection to Liberty's report of actual rate case expenses. Keokuk reasserts all of those points and asks the Board to grant rehearing, enlarge its findings, and reduce Liberty's approved rate case expenses to a reasonable and just amount supported by the record.

OCA'S ANSWER TO MOTION FOR REHEARING

In its Answer to Keokuk's Motion, OCA urges the Board to grant rehearing. OCA explains that in its March 31, 2017, objection to Liberty's report of actual rate case expense, it asked the Board to disallow a portion of the expense because Liberty failed to comply with Iowa Code 476.6(5) by not including the costs of a fully-

litigated rate case in its estimate. OCA also argued that Liberty did not provide sufficient detail in its report of actual expenses as required by the Board's rule at 26.4(6).

OCA states in its Answer that on April 6, 2017, Liberty filed an updated report of actual rate case expense, followed on April 7 by a reply to the objections of OCA and Keokuk. OCA filed a motion to strike Liberty's updated report of actual rate case expense and the reply to OCA's objection. OCA argued it had not had an opportunity to respond to the new factual information OCA said Liberty included in the updated report and reply.

In support of Keokuk's Motion, OCA now argues that the Board's Final Order lacks support for the amount of rate case expense disallowed by the Board. OCA contends that the Board's decision to disallow $25,000 conflicts with the Board's statement in the Final Order that the relevant violation, i.e., failing to provide a proper initial estimate, was present from the start of the case. (OCA Answer, p. 3, citing Final Order at p. 24.) According to OCA, the failure to present a complete estimate of rate case expense was under Liberty's control. OCA argues that the Board's decision to disallow $25,000 has no relationship to the violation identified by the Board. OCA also argues Liberty could have remedied the violation but did not do so, a failure OCA says was noted by the Board when it said that "Liberty did not file an updated estimate of rate case expense when it became apparent that there would be no early settlement." (OCA Answer, p. 3, citing Final Order at p. 24.)

OCA points out what it claims are inconsistences between the Board's decision to deny the motion to strike and the memo prepared by Board staff. With respect to comments on the memo regarding OCA's role in contributing to the increased rate case expense, OCA says that OCA disputed Liberty's characterization of the settlement negotiations, but the Board did not ask OCA to provide responsive information. OCA also notes it did not cause Liberty to use multiple witnesses.

OCA contends there is no finding of fact in the Final Order supporting the Board's decision to disallow $25,000. According to OCA, the Board's decision to disallow $25,000 (approximately ten percent of the difference between the estimate and the actual expense) conflicts with the Board's statement that Liberty's violation was present at the start of the case. OCA argues it is not reasonable or just for Liberty's customers to bear 90 percent of the cost of Liberty's violation.

OCA argues further that Liberty's failure to provide a proper estimate prevented the other parties from challenging the reasonableness of the rate case expense early in the proceeding. According to OCA, the Board's decision to disallow only $25,000 of rate case expense and allowing Liberty to collect $225,000 more than the estimate unreasonably burdens Liberty's customers.

LIBERTY'S RESISTANCE

In its resistance to Keokuk's Motion, Liberty argues that Keokuk has not raised any new issues which were not already addressed at the hearing or through briefs;

the Board has already addressed Keokuk's concerns about rate case expense; and the Board's findings are supported by the record. Liberty points to Iowa Code § 476.6(5), which provides that the Board "shall allow recovery of costs of the litigation expenses over a reasonable period of time to the extent that the board deems the expenses reasonable and just." Liberty states that even though its overall expenses were lower than expenses incurred by other utilities in recent rate cases, the Board's decision to disallow $25,000 of Liberty's actual rate case expense is reasonable and supported by the record.

Liberty disagrees with Keokuk's assertion that the Board did not address Keokuk's objection in the Final Order. Liberty contends the Board understood and considered Keokuk's objection, including the concern that the rate case expense would be borne by Liberty's small customer base.

Liberty also disagrees with Keokuk's assertion that the Board did not analyze why the expenses would be allowed by the Board's rules. Liberty points out that the Final Order includes a reference to Iowa Code § 476.6(5); an explanation of the procedure by which a utility demonstrates that its rate case expense is reasonable and just under Board rule 26.4; and the conclusion that a portion of the rate case expense was unreasonable and unjust. (Liberty Resistance, p.3, citing Final Order at 30, 35.)

Liberty disagrees with Keokuk's suggestion that the Board could have relied on Iowa Code § 476.10 to guide its consideration of whether the actual rate case expenses were reasonable and just. Liberty argues that the specific statute in this

context, Iowa Code § 476.6(5), governs a utility's recovery of rate case expenses, not Iowa Code § 476.10, the general statute that applies to the Board's assessment of its costs to participants in Board proceedings. (Liberty Resistance, p. 3, citing *Oyens Feed & Supply, Inc., v. Primebank*, 879 N.W.2d 853, 860 (Iowa 2016).)

With respect to Keokuk's concern about the effect of rate case expense on Liberty's small customer base, Liberty's position is that the Board was correct not to base the amount of allowed rate case expense on the number of Liberty's customers. Liberty emphasizes that state law does not link rate case expense to the number of customers. More particularly, Liberty states that neither the statute nor the Board's rules include a condensed rate case procedure for a small utility. Further, Liberty states that rate case expense is a function of filing requirements set by statute and rule; the burden of proof which, by law, rests with the utility; the volume and nature of discovery; and the number of requests by the Board for additional information from the utility.

BOARD DISCUSSION

Iowa Code § 476.12 provides that "any party . . . to a contested case before the board may within twenty days after the issuance of the final decision apply for a rehearing. The board shall either grant or refuse an application for rehearing within thirty days after the filing of the application . . ." Iowa Code § 476.12 gives the Board specific authority to grant or refuse an application for rehearing, but does not specify the standards the Board should apply.

The Board's rule at 199 IAC 7.27(2) provides that applications for rehearing or reconsideration shall specify the findings of fact and conclusions of law alleged to be erroneous, along with a brief statement of the alleged grounds of error. As the rule indicates, an appropriate ground for rehearing or reconsideration of a final decision by the Board is an error of fact or law.

Keokuk limits its Motion for Rehearing to the question of whether the rate case expenses allowed by the Board are reasonable and just as required by Iowa Code § 476.6(5). Keokuk alleges the Board did not explicitly rule on its objections and did not address, analyze, or make any finding about how the relatively large per-customer cost of the approved rate case expense was reasonable and just. Keukuk does not specify an amount by which the rate case expense approved in the Board's Final Order should be reduced.

OCA did not file its own motion for rehearing but supports Keokuk's request that the Board reconsider the amount of rate case expense Liberty will be allowed to collect from its customers. OCA faults the Board's Final Order for not disallowing a larger amount of rate case expense in response to Liberty's violation of the statutory requirement to provide an estimate of the expense of litigating a rate increase application from start to finish. OCA did not specify an amount by which the Board should reduce the approved rate case expense.

The Board has reviewed its Final Order, the Motion for Rehearing, OCA's Answer, and Liberty's resistance and concludes that neither Keokuk nor OCA has provided sufficient reason for rehearing. First, with respect to Keokuk's claim that the

Board did not address Keokuk's objection, the Board in its Final Order reviewed in detail the elements of the objection, specifically articulating Keokuk's concern that in light of the small customer base, the rate case expense per customer is higher in this case than in other recent cases. In describing the objection, the Board mentioned Keokuk's reference to the $13.15 per-customer cost in the Iowa-American Water Company rate case. The Board also identified Keokuk's concern about the possibility of another rate case and associated expenses on the horizon. (Final Order, p. 25.) The Board's decision to disallow $25,000 in rate case expense represents a response to Keokuk's objection to the reasonableness of the expense.

Second, Keokuk argues that the Board did not make any finding regarding why the approved rate case expense is reasonable. OCA agrees, stating that the Final Order does not include a finding of fact supporting the Board's decision to disallow $25,000 or approximately ten percent of the amount the actual expenses exceeded the estimate. Rehearing or reconsideration of the Board's Final Order is not appropriate on this point. Separate statements announcing findings of fact or conclusions of law are not necessary where it is possible to read an order and deduce what must have been the agency's legal conclusions and findings of fact. *Ward v. Iowa Department of Transportation*, 304 N.W.2d 236, 239 (Iowa 1981). In this case, the Board analyzed whether the actual rate case expense reported by Liberty was reasonable and just in light of Liberty's failure to provide a proper estimate of rate case expense (Final Order, pp. 30-35), and then exercised its discretion to disallow recovery of a portion of the total expense to bring "the total rate

case expense to be recovered to $814,643, an amount the Board concludes is reasonable and just in these particular circumstances." (Final Order, p. 35.) It is clear that the Board determined a portion of Liberty's rate case expense was unreasonable and disallowed part of the overall expense on that basis.

Third, Keokuk and OCA argue the Board should have disallowed a greater portion of the actual rate case expense. Keokuk asks the Board to enlarge its findings to conclude that Liberty's rate case expenses should be reduced to a reasonable and just amount supported by the record. On this point, OCA argues that the Board's decision to disallow $25,000 bears no relationship to Liberty's failure to file a proper estimate at the start of the case. Neither Keokuk nor OCA suggests a specific amount to be disallowed.

The Board concluded in the Final Order that it was not reasonable and just to allow Liberty to recover the full amount of its reported actual rate case expense over the seven-year amortization period where Liberty failed to provide a proper estimate. (Final Order, p. 34.) Giving a proper estimate at the outset would have allowed an earlier opportunity to examine, and challenge, the expected cost of the entire proceeding. The Board acknowledged that Liberty's failure had compromised the ability of the parties to contest Liberty's expenses during the regularly-scheduled hearing. (Final Order, p. 33.)

This did not, however, deprive the parties of an adequate opportunity to litigate the rate case expense issues. The Board had alerted the parties to the fact that rate case expense would be an issue at the hearing scheduled for consideration of the

Settlement Agreement. Before the hearing, the Board issued an order requiring Liberty to prepare an updated estimate of its rate case expense incurred to date to be introduced at the hearing and asked the parties to have witnesses prepared to discuss rate case expense. *See* "Order Regarding Hearing on Settlement Agreement and Requesting Additional Information," issued February 20, 2017.

After the hearing, the Board issued an order setting deadlines for objections to actual rate case expense and specifically requiring the parties to indicate in their objections whether there are any disputed issues of material fact that would require a hearing. *See* "Order Regarding Rate Case Expense and Setting Time for Objection and Response," issued March 20, 2017. Neither Keokuk nor OCA identified any such issue in their filed objections. While Keokuk and OCA objected to Liberty's actual rate case expense as being unreasonable and unjust, they did not quantify an amount the Board should disallow or identify any issue that should have been explored at a hearing. Thus, in setting the amount to be disallowed as unreasonable, the Board did not have the benefit of specific recommendations from Keokuk or OCA as to how much should be disallowed, and the Board exercised its discretion to specify the amount to be disallowed.

The Board considered several options for responding to Liberty's violation. The $25,000 disallowed by the Board represents approximately ten percent of the variance between the estimate and actual rate case expense. Thus, where the relevant violation was failing to provide a proper estimate, and the response to that

violation was to disallow a portion of the variance between the estimate and the actual reported expenses, the response was related to the violation.

Liberty's failure to file a proper estimate did not affect what Liberty ultimately had to spend in litigating the rate case and does not by itself support a finding that all of the expenses making up the difference between the estimate and the actual expenses were unnecessary or unreasonable. The Board recognized that because the case settled only days before the scheduled hearing, not all of the expenses that contributed to the variance were necessarily unreasonable. (Final Order, p. 35.) The Board also recognized that certain factors that caused Liberty to have to litigate the rate case almost to completion might have been out of Liberty's control. (Final Order, p. 34.) There is information in the record of this case supporting a conclusion that OCA's approach to the case limited the possibility of an early settlement.[2] The Board is not faulting OCA for its effort to develop the record to the point that would allow adequate examination of the company's revenue requirement, especially since it had been many years since the company's last rate case. However, OCA's role in how the case developed was one factor the Board considered when determining whether

[2] In response to the Board's October 21, 2016, "Order Requiring Additional Information and Outlining Settlement Process," Liberty explained in a response submitted on November 10, 2016, that OCA would not agree to discuss settlement until the company filed its application with the Board.

and to what extent Liberty's expenses incurred in prosecuting the case for its rate increase application should be disallowed.[3]

Under current law, because rate case expense is a function of complying with the statutory and administrative requirements governing rate increase applications, the per-customer cost of rate case expense is not controlling in a determination of whether a utility's rate case expense is reasonable and just. Rate case expense is ultimately a function of litigating the rate case. It had been approximately 15 years since Liberty had applied to the Board to raise its rates. Liberty's customers had been spared having to pay new rate case expense for a significant length of time. When Liberty filed this rate case proceeding, the Board agreed to waive certain requirements in the Board's rules as one way to limit the costs of the proceeding. And, ultimately, the Board disallowed $25,000 in rate case expense and required Liberty to use a rider to recover the approved amount. Neither Keokuk nor OCA has identified a sufficient reason to rehear the question of whether the rate case expense approved by the Board is reasonable and just under Iowa Code § 476.6(5).

[3] On this point, OCA refers to notations of one Board member on a memo prepared by the Board's staff. The Board reads and considers staff memos and Board members may write comments on memos; the memos are uploaded to the Board's electronic filing system for purposes of transparency. However, the Board's order, not a staff memo or comments of individual Board members, constitutes the Board's decision.

ORDERING CLAUSES

IT IS THEREFORE ORDERED:

1. The Utilities Board denies the "Motion for Rehearing" filed by the City of Keokuk on May 16, 2017.

2. The Utilities Board denies the request for rehearing included in the "Answer to Motion for Rehearing" filed by the Office of Consumer Advocate, a Division of the Department of Justice, on May 30, 2017.

UTILITIES BOARD

/s/ Geri D. Huser

/s/ Nick Wagner

ATTEST:

/s/ Trisha M. Quijano
Executive Secretary, Designee

Dated at Des Moines, Iowa, this 9th day of June 2017.