

**THE STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DG 16-827

Concord Steam Corporation Non-Governmental Customers

Joint Petition to Establish Interconnection/Transition Fund for
Non-Governmental Concord Steam Customers

City of Concord's and Senator Dan Feltes' Prehearing Memorandum of Law

I. **Introduction**

This Petition, which was filed on October 14, 2016, arises out of Docket Numbers DG 16-769 and DG 16-770, wherein the Public Utility Commission approved a settlement agreement for Concord Steam to increase its distribution rates, and to close its public utility operation on or about May 31, 2017. PUC Order No. 25,966 (DG 16-796) (November 10, 2016). The Commission simultaneously approved a settlement agreement, which, *inter alia*, authorized Liberty Utilities (Energy North Natural Gas) Corp. d/b/a Liberty Utilities ("Liberty") to provide a \$1.9 million dollar payment to Concord Steam Corporation. PUC Order No. 25,965 (DG 16-770) (November 10, 2016).

In Order No. 25,966, the Commission observed that in accordance with RSA 374:28, it "may authorize any public utility to discontinue . . . any part of its service . . . permanently and remove the equipment essential to the same, whenever it shall appear that the public good does not require the further continuance of such service." PUC Order No. 25,966 at 12. In making its determination of whether the public good does not require further continuation of a utility's service obligation, the Commission recognized that it "is obliged to consider whether the utility would be providing service at a loss if required to continue and whether customers can be conveniently converted to an alternate fuel source, along with ensuring the safety of the

abandonment of utility plant.” *Id.* at 12-13 (citing *Claremont Gas Corporation*, Order No. 21,309 (August 5, 1994), 79 NH PUC 426, 430-431 (1994)).

With respect to whether Concord Steam’s customers could conveniently convert to an alternative fuel source, the Commission stated that it was “confident that conversion to alternative fuel sources before the 2017-2018 heating season is feasible for Concord Steam customers.” PUC Order No. 25,966 at 14. However, the Commission recognized that more customer protection may be necessary “for a Liberty Utilities-funded means of supporting Concord institutions’ and business’ conversion costs.” The Commission stated that it would address this in “the petition in the Docket No. 16-827.” *Id.* at 17.

Similarly, in the Commission’s Order No. 25,965, it recognized the “public comments by the South Congregational Church, the Concord Community Music School, and the petition filed by Senator Feltes and others for a Liberty fund to help defray the costs of conversion from Concord Steam.” PUC Order No. 25,965 at 10. The Commission stated that “it will soon take up Senator Feltes’ and the joint petitioners’ petition in a separate proceeding.” *Id.*

The instant docket involves the petition requesting that the Commission establish a \$1 million interconnection/transition fund to assist non-governmental customers with their transition from Concord Steam to natural gas service. This request is just and reasonable under the discounted cash flow (“DCF”) analysis that the Commission approved in authorizing Liberty’s \$1.9 million asset purchase agreement of Concord Steam.

Liberty, which is a party to this proceeding, is in support of the Petition and establishing the \$1 million dollar fund. Prior to the Commission issuing Order Nos. 25,966 and 25,965, Liberty stated that “[i]f the Commission approves Concord Steam’s request to discontinue service in Docket No. DG16-769 and the Asset Purchase Agreement in Docket No. DG 16-770,

then Concord Steam will cease operation as of May 31, 2017, leaving customers with no source of energy or heating.” Correspondence from Liberty to Debra A. Howland (October 21, 2016). Liberty further stated “to help alleviate the unanticipated financial consequences for customers as they convert to a new fuel, Liberty agreed to provide a source of funding for those customers, with that funding administered by a third party.” *Id.*

The instant Petition provides a DCF analysis which combines Liberty’s \$1.9 million payment with the proposed \$1 million payment to create the transition fund to assist Concord Steam customers. Ex. 1. The proposal includes the \$1 million fund as a regulatory asset, wherein the rates of return set forth in the discounted cash flow analysis are just and reasonable.¹

II. Utility Customers Are Entitled To Financial Assistance To Defray Conversion Costs

RSA 374:28 authorizes the Commission to allow the discontinuance of a public utility when the public good no longer requires further continuance of such service. It is axiomatic that when the Commission grants a utility franchise, it creates not just a right to operate, but an obligation to serve. *Claremont Gas Corporation*, Order No. 21,309 (August 5, 1994), 79 NH PUC 426, 430-431 (1994) (citing *Wolff Packing Co. v. Court of Industrial Relations*, 262 U.S. 522 (1927)).

In *Claremont Gas Corporation*, Order No. 21,309 (August 5, 1994), 79 NH PUC 426, 430-431 (1994) (“CGC”), the Commission went to great lengths to safeguard the customers of the abandoning gas utility. Significantly, the abandonment was allowed “only after customers have been converted to either bottled propane service or another alternative fuel source or have declined conversion.” *Id.* at 428. Further, the abandonment order required the utility to provide a mechanism whereby customers would have a no-cost conversion option. *Id.* at 431. The

¹ Additionally, since filing the Petition, the co-petitioners have secured the Capital Regional Development Council to manage the distribution of the \$1 million fund.

Commission noted that the mechanism was a “fair balance between the rights of customers and the obligation of a utility which is voluntarily abandoning its franchise because it is no longer financially viable.” *Id.*

Upon review of the cases involving public utility abandonment, it appears that this is not a common occurrence in New Hampshire or elsewhere. Nevertheless, when this unfortunate circumstance does occur, customer protection (of the proposed abandoned public utility) is of paramount importance. *See e.g. Borough of Duncannon v. Pennsylvania Public Utility Com’n*, 713 A.2d 737, 740 (Pa. 1998); *In the Matter of the Joint Petition of the City Of Hamilton, Ohio and Duke Energy Ohio, Inc. to Transfer Facilities to the City of Hamilton, Ohio*, 2013 WL 1628417 (Ohio P.U.C.) (“The Commission has reviewed the Application and is satisfied that the transfer of the equipment to Hamilton will not impair the quality of service presently provided or result in interrupted or unsatisfactory service to Duke’s customers.”).

In *Borough*, the Pennsylvania state court declared that the “Commission has the authority to grant, deny, or even condition an abandonment request.” *Borough*, 713 A.2d at 740. The court made clear that “[a]nything less would improperly limit the Commission’s ability to protect utility customers and expose the public to the whims of a utility seeking to cease utility service for purely financial reasons.” *Id.* Accordingly, the court affirmed the Commission’s requirement that the utility pay \$3,000 to each of the four affected customers to “defray the costs of a new water source.” *Id.* at 741. The court also affirmed the Commission’s requirement that the utility pay \$15,000 to a recreation association customer to likewise defray its cost of conversion. *Id.* The court reasoned that the “nature of utility service extends beyond mere profit and loss A utility cannot expect to provide service only when that service is financially advantageous.” *Id.*

The request in this matter for a transition fund is consistent with the precedent of this Commission and other jurisdictions to provide mechanisms for customers to conveniently convert to an alternate fuel source. The proposed transition fund in this case achieves a fair balance between the rights of customers and the obligation of a utility which is voluntarily abandoning its franchise because it is no longer financially viable.

III. The Updated DCF Analysis Demonstrates That The \$1 Million Transition Fund Further Ensures An Orderly Transition Of Concord Steam Customers To Liberty Gas

With respect to the Commission's approval of the asset purchase agreement, it observed that under RSA 374:30, "[a]ny public utility may transfer or lease its franchise, works or system, or any part of such franchise, works or system, exercised or located in this state ... when the commission shall find that it will be for the public good" PUC Order No. 25965 at 9. The Commission held:

[w]e have reviewed the petition and the subject Asset Purchase Agreement, the Settlement Agreement, and the other evidence presented in this proceeding, and we find the proposed transaction between Concord Steam and Liberty to be in the public interest. Liberty's DCF analysis indicates that an orderly transition of Concord Steam customers to Liberty gas service during the 2017 construction season offers significant financial benefits to Liberty, and by extension, Liberty customers.

Id. at 10 (emphasis added). An orderly transition of Concord Steam customers to Liberty gas service must also include a means to defray the cost of conversion. Indeed, the Commission stated that it would take up the Liberty Utilities-funded means of supporting Concord institutions' and business' conversion costs in the Docket No. 16-827. PUC Order No. 25,966 at 17.

In opposition to the transition fund, Stephen Frink, staff member of the Commission, stated that Liberty has "no affiliation with Concord Steam, to support the conversion costs of

Concord Steam Customers due to Concord Steam terminating service.” Testimony of Stephen P. Frink at 16 (January 20, 2017). Mr. Frink’s testimony is misplaced.

Liberty paid \$1.9 million to Concord Steam, which includes Concord Steam’s tangible assets “comprised of certain real property easements held by Concord Steam around the premises of its current customers.” PUC Order No. 25,965 at 3. The Commission observed that these “easements would enable Liberty to manage the technical aspects of the conversion of those customers to Liberty’s natural gas service in advance of Concord Steam’s approved termination of service date of May 31, 2017.” *Id.* at 3-4. Liberty also acquired the right to “Concord Steam customer information, including billing information, for customers that give written consent for such transfer pursuant to the terms of a written consent form.” *Id.* at 4. The Asset Purchase Agreement also “requires Concord Steam to abandon its physical plant, including underground steam piping and boiler equipment, by May 31, 2017.” *Id.*

The Commission authorized this purchase because “Liberty’s DCF analysis indicates that an orderly transition of Concord Steam customers to Liberty gas service during the 2017 construction season offers significant financial benefits to Liberty, and by extension, Liberty customers.” PUC Order No. 25,965 at 10. Liberty’s \$1.9 million purchase of Concord Steam’s tangible assets, which requires Concord Steam’s closure by May 31, 2017, creates a sufficient nexus and affiliation with Concord Steam to provide the \$1 million fund to ensure an equitable transition of Concord Steam customers from Concord Steam to Liberty.

The updated DCF analysis demonstrates that the \$1 million fund further ensures an orderly transition of Concord Steam customers to Liberty. Ex. 1. Similar to the DCF used in Docket No. DG 16-770, the updated DCF demonstrates that the additional \$1 million payment, treated as a regulatory asset, will have, at most, a negligible impact on Liberty rates, and will

substantially benefit existing Concord Steam customers which require financial assistance to conveniently transfer from Concord Steam to Liberty.

IV. PUC Staff Is Judicially Estopped From Asserting That The Proposed \$1 Million Transition Fund Is A Completely Separate Transaction From Docket Nos. DG 16-769 and 16-770

Mr. Frink further states in his pre-filed testimony that there is no basis for “updating the [DCF] analysis” that combines Liberty’s \$1.9 million payment with the proposed \$1 million payment. Testimony of Stephen P. Frink at 4 (January 20, 2017). Mr. Frink asserts that the proposed \$1 million transition fund is an “entirely separate transaction.” *Id.* However, contrary to Mr. Frink’s position, this Commission stated in its Orders issued in Docket Nos. DG 16-769 and DG 16-770 that it would address the transition fund in this docket. Moreover, the Commission’s Orders did not foreclose the co-petitioners’ request to combine Liberty’s \$1.9 million payment with the proposed \$1 million payment. In fact, in Docket Number DG 16-769, Mr. Frink stated the co-petitioners’ proposal could make this request after the Commission ordered the closure of Concord Steam. *See* Docket No. DG 16-769, Transcript at 79, Lines 11-22 (October 5, 2016) (“I think that’s a proposal that can be made after-the-fact, and something can be established, if that’s what – if that’s appropriate.”).

The doctrine of judicial estoppel protects “the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment.” *Kelleher v. Marvin Lumber & Cedar Co.*, 152 N.H. 813, 848 (2006) (quotation omitted). While the circumstances under which judicial estoppel may be invoked vary, three factors typically inform the doctrine’s application: (1) whether the party’s later position is clearly inconsistent with the party’s earlier position; (2) whether the earlier position was accepted by the

court; and (3) whether the party seeking to assert a later inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. *Id.*

In Docket No. DG 16-770, Mr. Frink notified the Commission that the co-petitioners' request for Liberty to provide a transition fund could be addressed "after-the-fact." Mr. Frink did not state or otherwise imply that the co-petitioners' proposal would be considered an entirely separate transaction and could not be combined or analyzed with Liberty's \$1.9 million payment. If that was Mr. Frink's previous position, then it was incumbent upon him to provide such clarification, which did not occur.

Next, it is apparent that Mr. Frink succeeded in persuading the Commission to accept his earlier position, wherein the Commission expressly ordered that it will "address the co-petitioners' petition in the Docket No. 16-827." PUC Order No. 25,965 at 17. Given that the Commission made this Order, it is apparent that Mr. Frink was successful in asserting his earlier position.

The co-petitioners are being placed at an unfair disadvantage to the extent that Commission staff is now reversing its earlier position that the issues in this docket could be raised "after-the-fact." To the extent that the co-petitioners were advised that there was no means to update Liberty's DCF as proposed in those earlier dockets, it could have argued that the proposed settlement agreements and Orders in those dockets did not sufficiently address whether the Concord Steam customers were sufficiently protected and could conveniently convert to an alternative energy source. Therefore, it is clear that Mr. Frink is estopped and cannot now assert, at least in a conclusory fashion, that the requested transition fund here is an "entirely separate transaction."

V. The Proposed Transition Fund Is Consistent With RSA 378:10

Mr. Frink also asserts that the co-petitioners' proposed transition fund and associated DCF is discriminatory under RSA 378:10. Testimony of Stephen P. Frink at 14-15 (January 20, 2017). Mr. Frink maintains that the DCF exclusion of Liberty's residential low income customers from the cost of financing the proposed transition fund is discriminatory. *Id.* at 14, Lines 15-16. Mr. Frink also asserts that the transition fund only benefits Concord and, therefore, is an unreasonable preference. *Id.* at 15, Lines 19-22. Mr. Frink's analysis is in error.

RSA 378:10 provides:

No public utility shall make or give any undue or unreasonable preference or advantage to any person or corporation, or to any locality, or to any particular description of service in any respect whatever or subject any particular person or corporation or locality, or any particular description of service, to any undue or unreasonable prejudice or disadvantage in any respect whatever.

Notwithstanding Mr. Frink's claim of discrimination, the co-petitioners' proposal directly corresponds with the Commission's reasoning which approved Liberty's asset purchase agreement of Concord Steam and past precedence of this Commission. The Commission's approval was based, in part, on the determination by Commission staff that Liberty's \$1.9 million payment "will have, at most, minimal impact on Liberty rates, and will substantially benefit existing Concord Steam customers" PUC Order No. 25,965 at 10. It follows that combining the proposed transition fund with the approved asset purchase agreement will likewise do no harm to Liberty or Concord Steam ratepayers, and, in fact, will offer significant benefits to both. *See id.* There should be no dispute that the co-petitioners' proposed transition fund and accompanying DCF analysis provides *greater protection* for the "orderly transition of Concord Steam customers to Liberty gas service during the 2017 construction season [and] offers significant financial

benefits to Liberty, and by extension, Liberty customers.” *Id.* Moreover, in the words of this Commission, “this outcome also mitigates the significant risks posed by a disorderly conversion of Concord Steam customers to Liberty gas service” *Id.*

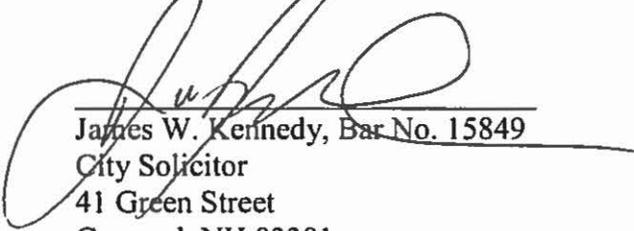
In sum, this proposal does not run afoul of RSA 378:10. There is no unreasonable preference or an unreasonable prejudice. Instead, the co-petitioners’ proposed transition fund is consistent with the Commission’s Orders in Docket Numbers DG 16-769 and DG 16-770 and with the fundamental principle of protecting customers of an abandoned public utility.

WHEREFORE, the City of Concord and Senator Dan Feltes respectfully request that this Honorable Commission approve the co-petitioners’ proposed transition fund.

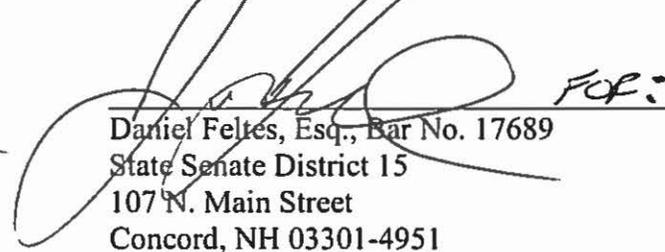
Respectfully submitted,

CITY OF CONCORD
BY ITS ATTORNEY

SENATOR DAN FELTES
ON BEHALF OF SELF



James W. Kennedy, Bar No. 15849
City Solicitor
41 Green Street
Concord, NH 03301
(603) 225-8505
jkennedy@concordnh.gov

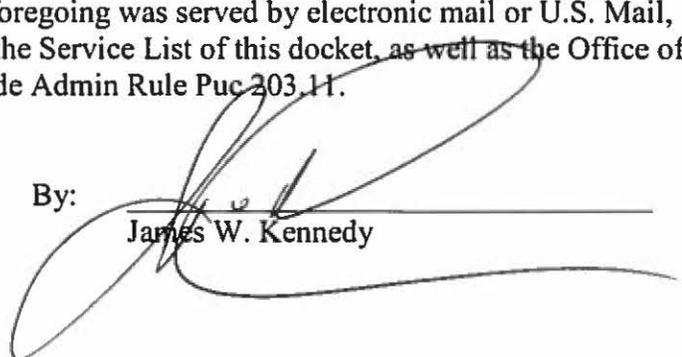


Daniel Feltes, Esq., Bar No. 17689
State Senate District 15
107 N. Main Street
Concord, NH 03301-4951
(603) 271-3067
Dan.Feltes@leg.state.nh.us

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by electronic mail or U.S. Mail, postage prepaid, to those parties listed on the Service List of this docket, as well as the Office of Consumer Advocate, pursuant to N.H. Code Admin Rule Puc 203.11.

January 30, 2017

By: 
James W. Kennedy