

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

Docket No. DG 16-852

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

Petition for Expansion of Franchise to the Town of Hanover and City of Lebanon

**INTERVENOR, JONATHAN CHAFFEE’S, OBJECTION TO
REVISED MOTION FOR PROTECTIVE ORDER AND CONFIDENTIAL TREATMENT**

Jonathan Chaffee (“Chaffee”), an intervenor in this proceeding, by and through their undersigned counsel, Richard M. Husband, Esquire, hereby respectfully objects to the *Revised* Motion for Protective Order and Confidential Treatment (“Motion”) dated April 11, 2018 filed by the petitioner, Liberty Utilities (“Liberty”), on grounds as follows:

1. The Motion was filed in conjunction with Liberty’s filing of less redacted materials intended to meet its obligations under Public Utilities Commission (“Commission”) [Order No. 26,109 \(March 5, 2018\)](#) (“Order”), which states, in relevant part, as follows:

“We agree with Liberty that the information contained in the documents and discovery responses it seeks to protect constitute confidential and commercial information under RSA 91-A:5, IV ...

Nonetheless, Liberty’s request goes too far in seeking to protect the entirety of those documents ... We find that most of the privacy interests and competitive harm raised by Liberty could be resolved simply by redacting potential customers’ names from the documents ... Because Liberty’s request is over-inclusive, we direct Liberty to refile the documents with the appropriate redactions and a revised motion for protective treatment within 15 days of this order. Following that filing, other parties will be allowed 10 days to file objections. ...

FURTHER ORDERED, that Liberty’s motion for protective treatment is GRANTED in part and DENIED in part, and Liberty is required, within 15 days, to file the protected documents with more limited redactions and revised motion for confidential treatment consistent with this order ...”

[Order at 24-26](#). Although the Order only expressly provides “other parties” the right to object to Liberty’s new redactions, the Order presumably affords Chaffee the right as well, as the relief afforded specifically addresses Chaffee’s objection to the redactions. [Id. at 14](#).

2. While Chaffee appreciates Liberty’s recent filings, and the fact that they have fewer, more appropriate redactions, Liberty has still not complied with the Order’s redaction requirements. In his objection to Liberty’s original redacted filings, Chaffee provided four specific examples of instances where Liberty inappropriately redacted information not qualifying for such protection. See [Objection to Liberty Utilities’ Motion for Protective Order and Confidential Treatment, at 2-4](#). Liberty’s new redaction filings only resolve two of these issues.

3. One area of inappropriate redactions that Liberty’s recent filing does not correct is with respect to the four columns of blacked out information shown in the table on [Attachment WJC-8, Bates page 080, of the Testimony of William J. Clark](#). In Liberty’s original [Motion for a Protective Order and Confidential Treatment](#), Liberty objected to the disclosure of these four columns of information based on the assertion that:

“Disclosure may violate the customers’ privacy, and may cause the Company economic harm as it negotiates with these potential anchor customers.”

[Id. at 6-7](#). However, in his objection to Liberty’s redactions, Chaffee noted:

“On bates page 080, Attachment WJC-8, Liberty claims confidential treatment for ‘Table of estimated load, current fuel, and status of negotiations with potential anchor customers’ (Table), based on its ‘Customer’ and ‘LU Data’ categories. Liberty claims that ‘Disclosure may violate the customers’ privacy, and may cause the Company economic harm’. Liberty has redacted all of the usage data and identification of ‘current fuel’ for each of ten potential anchor customers. This claim fails the test of Puc 203.08(b)(3) if for no other reason than that much of the data in the Table has been previously disclosed by the potential customers. In some cases the data have been disclosed in Liberty testimony or otherwise appears in the public record. Take for example Dartmouth College. The College itself has disclosed that it uses approximately 3.8 million gallons of #6 fuel oil annually. Dartmouth College Sustainability Office². That is approximately

574,000 ADTH. James Campion, President of Valley Green Natural Gas, filed testimony before the Commission that included a heating load estimate for the college that was quite close to that figure. DG 15-155 Pre-filed Direct Testimony of James Campion.

It is known that Dartmouth Hitchcock Medical Center (DHMC) uses compressed natural gas (CNG). Mr. Campion gave a figure for DHMC's gas usage that, when converted to the same units that Liberty uses in the redacted table, comes out to approximately 144,000 ADTH. DG 15-155 Pre-filed Direct Testimony of James Campion. Liberty has redacted both DHMC's fuel type and usage, data which is already in the public record."

[Id. at 2-3.](#) While Liberty's new redactions reveal the information in two of the four previously redacted columns of information in the table, [see id. at Bates page 080R](#), Liberty still has not disclosed all that it should, claiming essentially the same grounds for redactions that it had previously asserted:

"Disclosure would violate the potential customers' privacy, and may cause the Company economic harm as it negotiates with these potential anchor customers."

[Motion at 6.](#)

4. Liberty should still reveal the "Current Fuel" and "ADTH" column information redacted in [Bates page 080R](#) of Liberty's new filings. As is noted in Chaffee's original objection to Liberty's redactions quoted in the paragraph 3 above, some of the redacted data is clearly already in the public domain, such as that discussed in relation to Dartmouth College and the Dartmouth Hitchcock Medical Center. Moreover, Liberty itself discloses more of the still redacted "Current Fuel" column information, as the attached states that two of the customers use gas and "the majority" utilize propane for fuel, *see* Exhibit "A," and it is hard to fathom what "privacy interests" Liberty's potential commercial customers would have in their current choice

of fuel,¹ or how Liberty could suffer cognizable economic harm as the result of the disclosure of information specific to only *potential* (not even existing) customers, not Liberty.

5. More illustrative of the problem than an actual concern is Liberty's continued insistence on redacting a letter of intent with Kleen Laundry marked as [Bates page 107R in Liberty's newly filed redactions](#). These redactions highlight the unreasonableness of Liberty's redactions, as the company itself introduced the entire unredacted letter into evidence in Commission Docket No. DG 15-289 *more than two years ago*. [See pp. O17-O21 of February 26, 2016 Liberty filing \(Tab 37\)](#). While Chaffee obviously has access to the unredacted letter of intent and does not need a clean copy from Liberty, there is no reason why an unredacted copy should not have been filed in this matter from the outset, and Liberty's failure to do so has impeded members of the public interested in this proceeding from the fully informed participation to which they were entitled.

6. Unfortunately, Liberty continues to misapprehend the gravity of the problem, as is shown by the thin excuses Liberty provides in its [Objection to Motion for Contempt](#). First, Liberty brushes off its failure to meet the Order's redaction requirements by deeming it an "oversight." *Id.* at 1. An "oversight" suggests unintentional wrongdoing. How could Liberty not have been aware of the redaction provisions of the Order when it had been acting on the other provisions beneficial to its purposes for weeks? How could a litigation-savvy company *overlook* its noncompliance with an order for that length of time? The answer to both questions is obvious: because Liberty thought that it could get away with it. Second, Liberty wraps its "argument" against a contempt finding in the true, but misleading observation that its delayed

¹ Would the choice not be obvious or easily discernible to visitors of the businesses who really wanted to know? If the customers claim a privacy interest, where is the confidentiality agreement Liberty signed to obtain it?

redaction filing “has not prejudiced any *party*.” [Objection to Motion for Contempt](#), p. 1 (emphasis added). As the Consumer Advocate noted in his objection to Liberty’s motion for confidential treatment filed in Commission Docket No. DG 17-198 (the Granite Bridge Project case), the public has a clear “right to know” what its government is doing in these proceedings. [See id. at 8](#); see also *generally* [RSA 91-A](#). Liberty may not like it, and it may not be as a “party,” but the public—some of whom Liberty wants to subsidize their investments—has a seat, with the absolute right to review all that should be disclosed in filings. *See generally* [RSA 91-A](#). This is not just for the benefit of the individual, but the Commission, as well, and the good of the entire public.

7. Citizen access to such proceedings for the purpose of public comment is crucial to the right outcome. Public comment periods are not provided as mere window dressing to lend the illusion of public input in agency decision-making; they are not just for “venting.” Public comments serve a vital function in the process. Their inclusion “encourages public participation in the administrative process and educates the agency, thereby helping to ensure informed agency decisionmaking.” *Chocolate Mfrs. Ass’n of United States v. Block*, 755 F.2d 1098, 1103 (4th Cir. 1985)(citing *Spartan Radiocasting Co. v. FCC*, 619 F.2d 314, 321 (4th Cir.1980); *BASF Wyandotte Corp. v. Costle*, 598 F.2d 637, 642 (1st Cir.1979), cert. denied, 444 U.S. 1096, 100 S.Ct. 1063, 62 L.Ed.2d 784 (1980)). They “allow the agency to benefit from the experience and input of the parties who file comments ...” *National Tour Brokers Ass’n v. United States*, 591 F.2d 896, 902 (D.C.Cir.1978). Thus, they “ensure that the broadest base of information [will] be provided to the agency by those most interested and perhaps best informed on the subject ...” *Phillips Petroleum Co.*, 22 F.3d 619, 620 (1994)(citing *Shell Oil Co. v. Fed. Energy Admin.*, 574

F.2d 512, 516 (Temp.Emer.Ct.App.1978)). Public comments deprived of underlying information, however, are obviously far less helpful to the process.

8. As Liberty did not disclose all that should have been disclosed in its initial filings, and still has not met this obligation by its new filings, the entire public has been prejudiced and continues to be prejudiced by Liberty's contempt of the Order. This case received considerable public attention, scrutiny and opposition, and the unlawful concealment of the subject information for the entire statutory time frame for filing motions for rehearing, *see* [RSA 540:3](#), minimally deprived citizens of their legal "right to know" at a critical juncture in these proceedings, and may even have chilled further challenge to the Order, calling its integrity into question. The wrong here should not be so easily shrugged off.

WHEREFORE, for the reasons expressed, Chaffee respectfully requests that the Commission:

- A. Deny the Motion; and
- B. Schedule a hearing on the matter and Liberty's noncompliance with and contempt of the Order; and
- C. Grant such other and further relief is reasonable, lawful, just and otherwise appropriate.

Respectfully submitted,

Dated: April 19, 2018

//s//Richard M. Husband, Esquire
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CERTIFICATE OF SERVICE

I hereby certify that I have on April 19, 2018, served an e-mail copy of this objection on Liberty, the Consumer Advocate each person identified on the Commission's service list for this docket, by delivering it to the e-mail address identified on the Commission's service list for the docket.

//s//Richard M. Husband
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