

Richard Husband
10 Mallard Court
Litchfield, NH 03052
RMHusband@gmail.com

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VIA E-MAIL

Debra Howland Executive Director and Secretary
New Hampshire Public Utilities Commission
21 S. Fruit Street, Suite 10
Concord New Hampshire 03301

RE: DG 17-068
Liberty Utilities (EnergyNorth Natural Gas) Corp. d/b/a Liberty Utilities
Petition for Declaratory Ruling

Dear Ms. Howland:

I am a licensed New Hampshire, Massachusetts and Maine attorney in my 30th year of practice. I am a member of the Citizens' Climate Lobby, 350NH, the New Hampshire Sierra Club and several other organizations supporting climate change action and opposing fossil fuel use (which exacerbates climate change). I have filed pleadings and commented in a number of Public Utilities Commission ("PUC") proceedings involving one or both issues, including [DG14-380](#), [DE 16-241](#) and [DG 16-770](#), which respectively concerned PUC approval for the "NED/Kinder-Morgan" gas pipeline, the "Access Northeast" gas pipeline and the Concord Steam conversion to gas. Besides my dedication to climate change/fossil fuel activism, I have a strong, demonstrated interest in ensuring that the PUC follows applicable laws, its own rules and due process requirements in its proceedings, having been harmed as an individual and a resident of the Town of Litchfield by PUC lapses respecting the same, including failing to hold proceedings pursuant to [R.S.A. 374:22](#) and [R.S.A. 374:26](#) when mandated. I have twice litigated such issues through appeal before the New Hampshire Supreme Court, in *Husband v. Town of Hudson*, Case No. 2015-0371, and [Appeal of Richard M. Husband](#), Case No. 2015-0729 (appendix to appeal is [here](#)).

Please file this letter as a public comment in the above-referenced docket.

The (revised) petition for declaratory ruling underlying this proceeding should be dismissed for three obvious reasons:

1. PUC Staff is right: if the PUC were able to grant the relief sought in this matter, it would have to be in a proceeding to change franchise rights under R.S.A. 374:22 and R.S.A. 374:26, not under a petition for a declaratory ruling;
2. The PUC is not able to grant the requested relief as the New Hampshire Site Evaluation Committee ("SEC") has sole jurisdiction over this matter; and
3. The underlying petition does not otherwise meet PUC rule requirements

1. **If the PUC could afford the requested relief, it would have to be pursuant to R.S.A. 374:22 and R.S.A. 374:26**

The petitioner, a gas utility distributing propane-air in Keene, seeks a declaratory ruling that its Keene “gas” franchise allows it to convert to compressed natural gas (“CNG”) and liquid natural gas (“LNG”) without seeking such permission under R.S.A. 374:22 and R.S.A. 374:26. See generally [petition](#).

However, as is acknowledged in paragraph 3 of the petition, PUC Staff informed the petitioner before it even filed its request for a declaratory ruling that any PUC remedy for the relief sought **must** come from a petition filed under R.S.A. 374:22 and R.S.A. 374:26—it cannot be granted under a petition for a declaratory ruling such as the petitioner has filed.

In relevant part, R.S.A. 374:22 provides:

“374:22 Other Public Utilities. –

I. No person or business entity, including any person or business entity that qualifies as an excepted local exchange carrier, shall commence business as a public utility within this state, or shall engage in such business, or begin the construction of a plant, line, main, or other apparatus or appliance to be used therein, in any town in which it shall not already be engaged in such business, or **shall exercise any right or privilege under any franchise not theretofore actually exercised in such town, without first having obtained the permission and approval of the commission ...**”

Id. (emphasis added).

R.S.A. 374:26 further provides:

“374:26 Permission. – The commission shall grant such permission whenever it shall, after due hearing, find that such engaging in business, construction or exercise of right, privilege or franchise would be for the public good, and not otherwise; and may prescribe such terms and conditions for the exercise of the privilege granted under such permission as it shall consider for the public interest. Such permission may be granted without hearing when all interested parties are in agreement.”

Id. (emphasis added).

While admitting that it has *never* distributed CNG or LNG under its Keene franchise, see [petition, ¶ 17](#), the petitioner contends that the “right” is broadly granted by the franchise. But, even if the right were covered under the franchise, the failure to have “theretofore actually exercised” it requires permission under R.S.A. 374:22.

Moreover, the petitioner ignores the plain language of the franchise grant, which clearly limits all rights under the franchise to gas use

“for the purpose of lighting the streets, manufactories, machine shops, and all other buildings in the town of Keene, **and to construct** or purchase such buildings, works, furnaces, reservoirs, gas holders, gas pipes, and other things as may be requisite and proper **for such purpose.**”

Id. at ¶ 15 (emphasis added). Thus, unless the petition is amended to expressly limit CNG and LNG distribution solely for lighting and not for heating or other purposes, it must be found to request a change in rights and/or privileges requiring relief under R.S.A. 374:22.¹

Of course, as PUC Staff noted, the petitioner’s request must also meet the requirements of R.S.A. 374:26, compelling due notice and a hearing on the requested change in franchise rights to ensure that the change would be in the public interest—a critical distinction between the standards of the proceeding before us as filed and as it is required to be maintained, since the public interest determination does not govern a declaratory ruling. Absent complete statutory and due process compliance, any order the petitioner receives will be an absolute nullity, of no force and effect, for all time and purposes. *See, e.g., Clark v. New Hampshire Dept. of Health and Welfare*, 114 N.H. 99, 104 (1974)(NH Department of Health and Welfare regulations contrary to statutory requirements held void); *Appeal of Gallant*, 125 N.H. 832, 834 (1984)(NH Department of Employment Security regulations void for conflicting with statutory requirement); 2 Am.Jur.2d Administrative Law § 52 (2004)(“The power of an administrative agency must be exercised in accordance with and in the mode prescribed by the statute or other law bestowing such power ...”); *id.* at § 264 (“ ... An [administrative agency’s] attempt to exercise a power without compliance with statutory provisions as to the manner and circumstances of its exercise is a nullity ...”); *id.* at § 358 (“An agency’s final order in an administrative proceeding, like the final judgment of a court of law, is immune from collateral attack [1] unless the order is void because it was issued without, or in excess of, statutory power ...”); *see also* 2 Am.Jur.2d Administrative Law § 376 (1994)(“an agency’s decision must be made in accordance with statutory authority”), *id.* at § 380 (“an order entered by an administrative agency which lacks the inherent power to make or enter it is void and is open to direct or collateral attack ...”); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980)(a judgment rendered in violation of due process is void)(citing *Pennoyer v. Neff*, 95 U.S. 714, 732-733 (1878)); *Appeal of Public Service Co. of New Hampshire*, 122 N.H. 1062, 1077 (1982)(PUC imprudency finding, improperly made in financing hearing under wrong standard, violated due process and ordered expunged); 2 Am.Jur.2d Judgments § 29 (2004)(“It is not necessary to take any steps to have a void judgment reversed or vacated ... Such a judgment is open to attack or impeachment in any proceeding ... direct ... or collateral ... and at any time ...”); *see also id.* at § 31 (1994)(“... A

¹ Whether the petitioner *has* been distributing propane-air for purposes beyond the express (lighting purpose) limitation of the franchise grant is irrelevant. The petitioner cannot argue any “acquired” franchise rights exceeding the express language of the franchise grant, by the expiration of any statute of limitations, laches, or the like, as all rights are fixed by the language of the grant and not subject to time defenses. *See State v. Hutchins*, 79 N.H. 132, 139 (1919)(rights in public waters are fixed by the grant and cannot be alienated except by legislative action, despite the passage of time). The proposed change in rights has never been exercised or relied on by the petitioner, is before the PUC right now, and is subject to all objections that could be raised under applicable statutes, whether the objections had been raised previously or not.

void judgment is not entitled to the respect accorded to, and is attended by none of the consequences of, a valid adjudication. Indeed, a void judgment ... has no legal or binding force or efficacy for any purpose or at any place. It cannot affect, impair, or create rights, nor can any rights be based in it ... All proceedings founded on the void judgment are themselves regarded as invalid and ineffective for any purpose.”).

2. The SEC has exclusive jurisdiction over this matter.

In any event, the petition must be dismissed as the PUC does not have jurisdiction to decide the case.

R.S.A. 162-H:5 provides, in relevant part:

“162-H:5 Prohibitions and Restrictions. –

I. No person shall commence to construct any energy facility within the state unless it has obtained a certificate pursuant to this chapter. Such facilities shall be constructed, operated and maintained in accordance with the terms of the certificate.

Such certificates are required for sizeable changes or additions to existing facilities. Such a certificate shall not be transferred or assigned without approval of the committee.

II. Facilities certified pursuant to RSA 162-F or RSA 162-H prior to January 1, 1992, shall be subject to the provisions of those chapters; however, **sizeable changes or additions to such facilities shall be certified pursuant to this chapter ...”**

Id. (emphasis added).

While the petition is wholly bereft of any description of the “conversion” changes being proposed, changes that will allow the existing Keene system to switch from propane-air to CNG and/or LNG clearly involve “sizeable changes or additions to existing facilities” under R.S.A 162-H:5 requiring certification from the SEC. How could such a major conversion occur *without* “sizeable changes or additions” to the Keene system? The Keene system plainly concerns facilities subject to the statute, as it broadly defines covered facilities under Section VII of R.S.A. 162-H:2 as follows:

“VII. ‘Energy facility’ means:

(a) Any industrial structure that may be used substantially to extract, produce, manufacture, transport or refine sources of energy, including ancillary facilities ...”

*Id.*²

The petition’s asserted applicability of PUC rules and decisions, and legislative acts that predated the effective date of R.S.A. 162-H:5, falls flat: whatever the law may have arguably been at one time, the SEC statutes plainly govern now, and cannot be skirted. Consistent with its prior decisions, the PUC should find that the SEC has jurisdiction over the ultimate issue in the matter,

² The facility may also fall under subsection (g) of the statute: there is insufficient information in the petition to make this determination.

i.e., whether the proposed new CNG/LNG facility should be approved as being in the public interest, and that the SEC’s jurisdiction is exclusive.³ The apparent backdoor attempt to avoid the SEC here—there is no mention of any SEC filing in the petition, or reference to one on the SEC web site—should be rejected by dismissal of the petition under Puc 207.01(c) (4). This matter does not involve a simple determination of franchise rights, as the petition would have us believe, but rights in an entirely new source of energy and associated energy facility that can only be determined through proceedings before the SEC: general principles of fairness, as well as due process and state statutory notice requirements, preclude a finding of existing franchise rights in LNG/CNG when no notice of, or opportunity for objection to, CNG rights were noticed and at issue in the proceedings granting the Keene franchise rights.⁴ Thus, as there can be no right under any franchise to service customers until the facility itself receives SEC approval, this matter is, at best, premature to such approval. Absent such approval, any and all otherwise applicable franchise rights are completely speculative.

3. The petition does not meet PUC rule requirements.

The petition should also be dismissed for failing to meet several important PUC rule requirements.

Puc 207.01 provides:

“Puc 207.01 Declaratory Rulings.

(a) A person seeking a declaratory ruling on **any matter within the jurisdiction of the commission** shall request such ruling by submitting a petition pursuant to Puc 203.

(b) Such a petition **shall be verified under oath or affirmation** by an authorized representative of the petitioner with knowledge of the relevant facts.

(c) The commission **shall dismiss** a petition for declaratory ruling that:

(1) **Fails to set forth factual allegations that are definite and concrete;**

(2) **Involves a hypothetical situation or otherwise seeks advice as to how the commission would decide a future case;** or

³ From PUC decisions: if the SEC has jurisdiction over the matter, it is exclusive. See [PUC Order No. 25,822 dated October 2, 2015, p. 24 and Footnote 8](#) (refusing to consider gas pipeline siting issues, in part, because such matters “may also come before the New Hampshire Site Evaluation Committee under RSA ch. 162-H,” thereby implying like exclusive state agency jurisdiction for the SEC; [PUC Order No. 25,843 dated November 20, 2015, p. 5](#) (gas pipeline siting issues are “considerations for other agencies,” citing, *inter alia*, an SEC statute, thereby again indicating that it considers the SEC’s jurisdiction to be exclusive of PUC jurisdiction).

⁴ A matter of particular importance given the objection by so many citizens to the proposed CNG facility. See, e.g., <https://toxicsaction.org/event/mayor-lane-city-council-revisit-the-keene-gas-plant-vote/>; <http://www.echoaction.org/keene-gas-plant>; http://www.sentinel-source.com/news/local/activists-question-if-keene-s-part-of-effort-to-create/article_1356e037-cf63-5b08-ab1d-5dbcd18d8c9.html.

(3) Does not implicate the legal rights or responsibilities of the petitioner; or

(4) **Is not within the commission's jurisdiction.**

(d) Except for a petition dismissed pursuant to subsection (c), the commission shall conduct an adjudicative proceeding on a petition for declaratory ruling in accordance with Puc 203.”

Id. (emphasis added).

The petition should be dismissed because it is not “verified under oath or affirmation” as required by Puc 207.01(b): the only signature on the petition is that of its counsel which, obviously, cannot meet the verification/affirmation requirement as interpreting the rule to allow only that would make its requirement superfluous and meaningless, given that counsel for parties are otherwise required to sign all petitions under Puc 202.07. Particularly as the petition in this matter had to be revised because the applicant admittedly misstated a fact (*see* [revised petition cover letter](#)), the verification/affirmation requirement is critical.

Moreover, the petition should be dismissed for failing to “set forth factual allegations that are definite and concrete,” as required by Puc 207.01(c)(1)—minimally, because it does not describe the proposed changes to the Keene system at all, precluding a fair opportunity to challenge the petition.

Also, as noted above, the petition should be dismissed as speculative—under Puc 207.01(c)(2), as it presents a purely “hypothetical situation” until there is SEC approval. The PUC looks to declaratory judgment decisions under R.S.A. 491:22 as providing analogous decisions for the requirements of exercising its own declaratory judgment authority. *See* [PUC Order No. 24,137 dated March 14, 2003, p. 28](#). As such, the petition cannot be maintained unless it claims “a present legal or equitable right or title” at both the time of filing of the petition and the PUC’s ruling on it. *See* [R.S.A. 491:22](#); *Conway v. Water Resources Bd.*, 89 N.H. 346 (1938)(petition dismissed when petitioner waived claim of right in open court); *Carbonneau v. Hoosiers Engineering Co.*, 96 N.H. 240 (1950)(wife’s declaratory judgment petition on damages available for her living husband’s injuries could not be maintained due to the lack of a present legal right or title against which an adverse claim could be made, as her only claim would arise on her husband’s decease for wrongful death). The petition cannot be construed to claim a present claim legal right or title in any “Keene CNG franchise rights” as the petitioner will have no right to distribute CNG to anyone in Keene until such time, if any, that the SEC approves its proposed CNG facility. Nor may it be concluded that such a right may arise by the time of the PUC’s decision on the petition, as there has been no SEC filing. If the petition had been filed concurrently with an SEC filing for approval of the proposed CNG facility, we might have a different story—there would at least be a colorable right in the process of determination—but, in the absence of an SEC filing, the PUC case must be dismissed or, most charitably, stayed until there is an SEC filing and outcome.

Should the PUC not dismiss or stay this proceeding, it should be scheduled with ample opportunity for public comment—both before and after the final hearing—as this is most definitely a matter of great public interest.

Sincerely,

//s//Richard M. Husband

cc: Donald Kreis, Esquire, Office of Consumer Advocacy
Concerned citizens