

State of New Hampshire
Supreme Court

No. 19-__

Appeal of Terry Clark
(Public Utilities Commission)

Motion for Summary Affirmance

Liberty Utilities (EnergyNorth Natural Gas) Corp. (“Liberty”), through counsel, respectfully moves this Court pursuant to Supreme Court Rule 25(2) for summary affirmance because the Public Utilities Commission (“Commission”) applied its expertise and understanding of the unique facts and specialized law to conclude that Liberty’s longstanding franchise right to serve “gas” in Keene included the right to serve “natural gas,” and thus Liberty need not seek new franchise approval to serve natural gas. Mr. Clark provides no basis for this Court to find there “was no evidence from which the PUC could conclude as it did.”

In support of this motion, Liberty represents as follows:

1. Through several predecessor companies, Liberty has been providing gas distribution service in the City of Keene since shortly after the Legislature granted the franchise in 1860:

The said corporation is authorized to purchase and hold all such real estate and personal property as may be necessary and proper to enable

them to carry on the manufacture, *distribution and sale of sale of gas*, for the purpose of lighting the streets, manufactories, machine shops, and all other buildings in the town of Keene.

Laws 1860, ch. 2451; Appendix at 352 (emphasis added).¹

2. The Company has distributed different forms of gas over the ensuing 150 years, beginning with gas manufactured from coal, then butane, then a butane-air mixture, and currently a mixture of propane and air. Appendix at 353 - 357 (various documents recounting the history of gas distribution in Keene). Although butane and propane are often byproducts from the production of natural gas, Liberty had not previously distributed natural gas in Keene.
3. For reasons of safety, reliability, and cost, Liberty is investing in new infrastructure in order to convert existing Keene customers from propane-air to natural gas and to acquire new natural gas customers in Keene. Appendix at 339 - 340.
4. In the spring of 2017, Commission Staff suggested that Liberty needs franchise approval from the Commission to switch from propane air to natural gas in Keene because the switch would be a “change in the character of service.” Appendix at 340, 342. Such a franchise request would be governed by RSA 374:22 and RSA 374:26. *See Liberty Utilities (EnergyNorth Natural Gas) Corp.*, Order No. 26,109 at 15 (Mar. 5, 2018) (“In examining whether a franchise petition is in the public good, we consider whether the franchise applicant has the financial, managerial, and technical expertise to successfully and safely serve customers in the intended territory”).

¹ The legislation also authorized the company to “construct and purchase such buildings, works, furnaces, reservoirs, gas holders, gas pipes, and other things that may be requisite and proper for such purposes,” and to “lay and maintain gas pipes.” *Id.*

5. Liberty disagreed with Staff's suggestion because a "change in the character of service" is not a standard that has ever triggered the need for a new franchise filing, and, even if it were the standard, a switch from propane-air to natural gas is not such a change. Liberty believed its existing franchise to serve "gas" in Keene already included the right to serve natural gas. Liberty thus filed the petition for declaratory ruling that gives rise to this appeal. Appendix at 339. The petition asked the Commission to "declare that Liberty need not seek permission under RSA 374:22 and 374:26 to distribute natural gas in Keene." Appendix at 351; *see* N.H. Admin. Rules, Puc 207 (authorizing requests for "declaratory rulings").

6. Liberty's petition presented the factual and legal history of the various fuel changes in Keene and elsewhere with Liberty, Liberty's predecessors, and with other New Hampshire gas utilities. The petition described how these fuel changes were made without franchise approvals from the Commission, citing Commission references that acknowledged and tacitly approved these fuel changes without franchise proceedings. The petition also argued that a "change in the character of service" is not a recognized basis to require new franchise approval. The petition ultimately demonstrated that the requested declaratory ruling is factually and legally appropriate and reasonable.

Appendix at 341 – 350.

7. The Commission accepted Liberty's arguments and granted the relief sought:

Having reviewed the Company's petition and the arguments and information presented, we conclude that under RSA Chapter 374, Liberty has the authority, pursuant to RSA 374:22, to supply CNG [compressed natural gas] and LNG [liquefied natural gas] service in Keene *under its current franchise*.

Liberty Utilities (EnergyNorth Natural Gas) Corp., Order No. 26,065 at 3 (Oct. 20, 2017)

(emphasis added) (Appendix at 43). The Commission later denied Mr. Clark's motion for rehearing:

In particular, this is a declaratory ruling proceeding in which we decided that no further statutory approvals were required under RSA 374:22 and RSA 374:26 *because Liberty already has the franchise authority to provide natural gas service in its Keene Division.*

Liberty Utilities (EnergyNorth Natural Gas) Corp., Order No. 26,294 at 9 (Sept. 25, 2019) (emphasis added) (Appendix at 25).

8. Mr. Clark's appeal seems to raise three issues, only one of which focuses on the Commission's decision. Mr. Clark seeks to appeal the Commission's ruling that "Liberty already has the franchise authority to provide natural gas service in its Keene Division," relying on the "change in the character of service" argument. Appeal at 9-12. The Commission rejected that argument:

We find the Company's arguments that CNG and LNG constitute gas of the same character as the propane-air mixture currently supplied to Liberty-Keene customers to be persuasive. This interpretation of gas service is consistent with prior Commission decisions allowing natural gas utilities to supplement natural gas supply with propane without requiring additional franchise approval under RSA 374:22 and RSA 374:26.

Order No. 26,065 at 3; Appendix at 43.

9. This Court applies a deferential standard of reviewing Commission orders:

A party seeking to set aside an order of the PUC has the burden of demonstrating that the order is contrary to law or, by a clear preponderance of the evidence, that the order is unjust or unreasonable. Findings of fact by the PUC are presumed prima facie lawful and reasonable. The appealing party may overcome this presumption only by showing that there was no evidence from which the PUC could conclude as it did.

We deferentially review PUC orders such as the one at issue. “When we are reviewing agency orders which seek to balance competing economic interests, or which anticipate such an administrative resolution, our responsibility is not to supplant the PUC’s balance of interests with one more nearly to our liking.” “The statutory presumption, and the corresponding obligation of judicial deference are the more acute when we recognize that discretionary choices of policy necessarily affect such decisions, and that the legislature has entrusted such policy to the informed judgment of the [PUC] and not to the preference of reviewing courts.” While we give the PUC’s policy choices considerable deference, we do not defer to its statutory interpretation; we review the PUC’s statutory interpretation *de novo*.

In re Pennichuck Water Works, 160 N.H. 18, 26 (2010) (citations omitted).

10. Mr. Clark failed to demonstrate how there was “no evidence from which the PUC could conclude as it did.” Mr. Clark simply disagrees with the Commission’s orders. Acceptance of Mr. Clark’s appeal of this issue is not warranted.
11. The Commission did not decide the other two issues Mr. Clark now seeks to appeal because of its ruling that Liberty need not seek franchise approval. The court has no basis to accept and decide issues that were not reached or resolved by the Commission.
12. Mr. Clark seeks appeal Liberty’s alleged inability to succeed in a franchise proceeding brought under RSA 374:22 and RSA 374:26. Appeal at 5, 9, 26-29. Since the Commission found that such a franchise filing was not legally required, Liberty never had to present, and the Commission never considered, a franchise case. There is nothing to appeal.
13. Mr. Clark also seeks to argue that the Commission’s orders are inconsistent with the state’s energy policy as stated in RSA 378:37. Appeal at 4-5, and 22-26. Again, the issue Liberty in this matter – and the issue the Commission decided – did not require a review of energy policy. The Commission merely declared what was already the case,

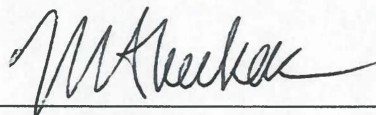
that Liberty has the right to distribute natural gas. The Commission did not address a claim for new rights. Therefore, the Commission correctly declined to engage in the policy argument Mr. Clark raised.

WHEREFORE, Liberty Utilities (EnergyNorth Natural Gas) Corp. respectfully asks that this Court:

- A. Grant this motion for summary affirmance pursuant to Supreme Court Rule 25(2); and
- B. Grant such other relief as is just and reasonable.


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

Date: November 13, 2019

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Certificate of Service

I hereby certify that on November 13, 2009, a copy of this motion has been provided to the counsel for the parties in NH PUC Docket No. DG 17-068 via electronic mail and either hand delivery (Mr. Kreis and Ms. Fabrizio) or by first class mail (Mr. Husband).

By: 
Michael J. Sheehan