THE STATE OF NEW HAMPSHIRE
SUPREME COURT

NO. _____

LIBERTY UTILITIES (ENERGYNORTH NATURAL GAS) CORP.
d/b/a LIBERTY UTILITIES
PUBLIC UTILITIES COMMISSION CASE DG-14-380

APPEAL OF RICHARD M. HUSBAND BY PETITION
PURSUANT TO R.S.A. 541:6 AND SUPREME COURT RULE 10

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SUPREME COURT RULE 10(b) DOCUMENTS

Pursuant to Supreme Court Rule 10(b), copies of the following documents are contained in the appendix ("App.") accompanying this petition:

1. Public Utilities Commission ("PUC") Order No. 25,822 dated October 2, 2015, the decision on the merits, App. at 1
2. PUC Order No. 25,843 dated November 20, 2015, the order denying the petitioner's motion for a rehearing, App. at 33
3. PUC Order No. 25,767 dated March 6, 2015, App. at 39
4. PUC website undated document titled "Information on Liberty's Agreement with Tennessee Pipeline for Firm Transportation," App. at 45
5. Petitioner's Motion for Rehearing Under R.S.A. 541, App. at 46
6. Objection to Richard M. Husband's Motion for Rehearing filed by Liberty Utilities (EnergyNorth Natural Gas) Corp. d/b/a Liberty Utilities ("EnergyNorth"), App. at 93
7. The petitioner's public comments, App. at 101
8. Sampling of other public comments at issue, App. at 121
9. Transcript excerpt from (day 2) hearing on the merits, App. at 151
10. Transcript excerpt from (day 3) hearing on the merits, App. at 154

QUESTIONS PRESENTED FOR REVIEW

1. The PUC approved a settlement agreement and 20-year contract for capacity on the proposed Northeast Energy Direct ("NED") natural gas pipeline project ("NED Pipeline"), finding approval to be "consistent with the public interest," and any negative impacts of the pipeline project to be irrelevant to that determination. Did the PUC err in applying an incorrect and unduly narrow standard to its "public interest" determination on the merits, resulting in the unlawful exclusion of public comments submitted by the petitioner, and by or on behalf of over 100,000 other New Hampshire citizens, concerning the negative effects of the NED Pipeline on, among other things, water wells and aquifers, wildlife, environmentally sensitive land areas, property values and rights, the general economy, public health and safety, and the rural character of the region—as well as evidence which may have been submitted on these matters?

2. Did the PUC also err in determining that it lacked jurisdiction to consider the negatives of the NED Pipeline, as that was a matter for "other agencies," given that the PUC's consideration involved a standard and not jurisdiction, there is no federal preemption, and the PUC offered as the only possible superseding state law R.S.A. 162-H:10-b, which (a) only became effective July 20, 2015, *after* commencement of the PUC proceeding on December 31, 2014, (b) may be read harmoniously with the PUC "public interest" standard, and (c) could not be applied to substantively affect that outcome-determinative standard as such application would violate the constitutional proscription against the retrospective application of laws affecting substantive rights? *See In re Goldman*, 151 N.H. 770 (2005).

3. Did the PUC's rulings, which readily allowed for consideration of the alleged benefits of the NED Pipeline to the petitioning utility and its customers while refusing to consider its negative impacts on the remaining vast majority of all other state energy users, violate the equal protection guarantees of our state and federal constitutions by providing disparate treatment to persons similarly situated, *i.e.*, different classes of New Hampshire energy users?

4. Did the PUC err in denying the petitioner's motion for rehearing on the preceding issues by ruling that the petitioner lacked standing, when R.S.A. Chapter 541-A and Puc 203.18 must be read to have granted the petitioner legally protected interests and rights in having his public comments considered, with standing to assert those interests and rights when violated, and the petitioner otherwise alleged cognizable standing injuries?

5. Did the PUC err in denying the petitioner's motion for rehearing based on new evidence establishing a nexus between the PUC's approval, FERC certification of the NED Pipeline project, and therefore the relevance of its negatives to the PUC's "public interest" determination on the merits, when the evidence offered was a post-approval news article containing a post-approval admission by a NED Pipeline representative that the PUC's approval was part of a "'significant step' in bringing the project to fruition ..."?

PROVISIONS OF CONSTITUTION, STATUTES AND RULES INVOLVED IN CASE

Constitutional Provisions

United States Constitution

New Hampshire State Constitution

Statutes

Federal Statutes

New Hampshire Statutes

Rules

STATEMENT OF THE CASE

A. Procedural Background

This is an administrative appeal pursuant to R.S.A. 541:6 of decisions of the PUC, whereby the petitioner contends that the PUC applied an incorrect and unduly narrow standard in reaching its public interest determination on the merits, unlawfully ignored public comments and ignored or excluded other evidence relevant to the determination, violated the equal protection guarantees of our state and federal constitutions by providing disparate treatment to persons similarly situated (different classes of New Hampshire energy users), wrongly concluded that the petitioner lacked standing to contest these rulings, and improperly denied a rehearing on new evidence (as well as other) grounds.

The procedural history is as follows.

On December 31, 2014, EngergyNorth filed a "Petition for Approval of a 20-year Firm Transportation Agreement" ("Agreement") with Tennessee Gas Pipeline Company, LLC ("Tennessee Gas").[1] *See* App. at 1-2, 70 (copy of petition). The Agreement is for firm capacity on the proposed NED Pipeline, and Energy North's petition expressly requested "a determination that the Company's decision to enter into the agreement is prudent and consistent with the **public interest**." *Id.* at 70, 73 (Prayer A)(emphasis added). By Order of Notice of the proceeding dated January 21, 2015, App. at 76, the PUC recited the Petition's request for "a determination that the Company's decision to enter into the Agreement is prudent and consistent with the **public interest**," and specifically made this determination a condition of approval. *Id.* at 77-78 (emphasis added).

Following a prehearing conference held just six weeks after commencement of the matter, on February 13, 2015—before the petitioner, and likely the vast majority of New Hampshire citizens, was even aware of the "rocket docket" proceeding—the PUC issued Order No. 25,767 dated March 6, 2015, *see* App. at 39-44 (copy of order), which concluded, with respect to a petition to intervene filed by Pipe Line Awareness Network for the Northeast, Inc. ("PLAN"):

> "Only [PLAN's] EnergyNorth-customer members possess 'rights, duties, privileges, immunities or other substantial interests [that] may be affected by the proceeding,' RSA 541-A:32, I(b). It will be EnergyNorth customers who will bear the costs of the Precedent Agreement if the Commission approves it. PLAN's landowner members possess no such direct interest or cost responsibility; their interests, while important, are not pertinent to the Commission's determinations in this proceeding .... To ensure an orderly and focused proceeding, we limit PLAN's participation to the interest of its EnergyNorthcustomer members in the prudence, justness and reasonableness of the Precedent Agreement and its associated costs, to EnergyNorth and its customers."

Id. at 42.

[1] Tennessee Gas is a subsidiary of Kinder Morgan. *See* App. at 84 (identified in App. at 62).

On June 26, 2015, the PUC Staff ("Staff") filed a Stipulation and proposed Settlement Agreement ("Settlement") between EnergyNorth and Staff modifying the Agreement. App. at 3, 11. Pursuant to Puc 203.20(b):

> "The commission shall approve a disposition of any contested case by stipulation, settlement, consent order or default, if it determines that the result is just and reasonable and serves the public interest."

Id., App. at 167 (text of rule); *see also Concord Steam Corp.*, 94 N.H. P.U.C. 233 (May 22, 2009)(affirming standard of Puc 203.20(b) for settlements).

At some point unknown to the petitioner (but during the course of the proceeding), the PUC published an undated document titled "DE 14-380, Information on Liberty's Agreement with Tennessee Gas Pipeline for Firm Transportation" on the home page of its web site. *See* App. at 45 (copy of document). This document acknowledged that "issues related to siting and construction [of the NED Pipeline] are **important**," but deemed them "**not relevant** to the Commission's determinations," "not issues over which the Commission has jurisdiction," and the proceeding "not a review of the Northeast Direct project," before concluding:

> "**Only those comments related to the terms of the Precedent Agreement or its impact on Liberty rates and service will be considered in this proceeding**. Because the Commission has no jurisdiction to decide issues relating to the approval of the Northeast Direct project, members of the public who wish to comment generally on the Northeast Direct project are asked to direct their comments to the other appropriate regulatory agencies."

Id. (emphasis added). As opposed to a proper "public interest" determination, this document leads to an improper pin-hole focus which excluded consideration of even non-pipeline, but nonetheless "public interest," concerns: "The determination will depend on analysis of Liberty's projected service requirements and an economic review." *Id.* Together with the PUC's March 6, 2015 order, this document effectively provides a procedural/evidentiary ruling which precluded the correct "public interest" determination, by excluding consideration of *all* relevant matters, including any consideration

of the negative impacts of the NED Pipeline project because of their perceived "irrelevance" to the proceeding and the PUC's alleged lack of jurisdiction to factor them in its decision-making.

Nonetheless, individually and through their lawful representatives, over 100,000 New Hampshire citizens, including the petitioner, voiced their opposition to approval of the Agreement and Settlement, over concerns about negative impacts of the NED Pipeline, through numerous public comments submitted to the PUC. App. at 49-53, 101-150, 153. The petitioner's comments were detailed and lengthy. *Id.* at 101-120. All of the public comments are available at the online PUC docket for the proceeding. *See* http://www.puc.nh.gov/ ("Virtual File Room" link on left, to 2014 Docketbook, Case # DG 14-380). While a handful of public comments voiced approval for the Agreement and Settlement, and NED Pipeline, the overwhelming majority of comments were negative, with almost all citing substantial reasons why the NED Pipeline project was not in the public interest. App. at 49-53, 101-150, 153. Excerpts of these comments are discussed in the motion for rehearing the petitioner subsequently filed in the proceeding, *see* App. at 49-55; the complete written comments underlying these excerpts, as well as the transcribed oral comments, and all four written comments, submitted by the petitioner during the proceeding are included in the accompanying Appendix, at pages 99-150.

Following three days of hearings on the merits held on July 21, 22 and August 6, 2015, the PUC issued Order No. 25,822 dated October 2, 2015, *see* App. at 1-32 (copy of order), which approved the Settlement and Agreement (as modified by the Settlement), finding such approval "consistent with the **public interest**." *Id.* at 1, 31 (emphasis added). While the PUC's subsequent order denying the petitioner's motion for a rehearing acknowledged that the public comments identified "numerous potential negative impacts of siting the NED Pipeline in southern New Hampshire ... negative effects on, among other things, water wells and aquifers, wildlife, environmentally sensitive land areas, property values, the general economy, public

health and safety, and the rural character of the region," *see id* at. 36-37, 101-150, you would not know it from reviewing the decision on the merits. Rather, these clearly "public interest" concerns were only vaguely referenced, unidentified and without discussion, within a bundle of amorphously acknowledged NED Pipeline concerns:

> "Before the hearing, the Commission received many written comments from the public, with the overwhelming majority advocating against the approval, construction, and siting of the NED Pipeline. Many if not all of the opposing comments were tendered by residents or representatives of the communities along the route of the NED Pipeline ...
>
> ... The Commission opened the hearing by receiving additional comments from the public. Those comments were consistent with the focus, content, and tenor of the written comments. Comments at hearing were primarily directed at the advisability of the NED Pipeline and not the terms of the Precedent Agreement or the interests of EnergyNorth's customers. After the hearing, the Commission continued to receive written comments opposing approval of the Precedent Agreement for reasons related to the impact of the NED Pipeline on the communities and citizens along the proposed pipeline route. Some of the post-hearing comments requested that the Commission reopen the hearing to receive additional evidence on the impact of the NED Pipeline on individuals who are not EnergyNorth's customers, or on interests that are not EnergyNorth customer interests."

App. at 23-24. The PUC's decision on the merits dismissed the public comments concerning the negative impacts of the NED Pipeline out-of-hand, stating that only FERC could consider such matters:

> "...The important issues raised in the public comments, including the impact of the NED Pipeline on the communities through which the pipeline will run, are **solely within the province of FERC**."

Id. at 24 (emphasis added). However, this statement ended with a footnote, which added: "The siting of the NED Pipeline *may* also come before the New Hampshire Site Evaluation Committee under RSA ch. 162-H." *Id.* at Footnote 8 (emphasis added).

On November 2, 2015, the petitioner filed a motion for rehearing, *see* App. at 46-92 (copy of motion) with the PUC pursuant to R.S.A. 541:3, which provides that "any party" or

"person directly affected" by its rulings "may apply for a rehearing in respect to any matter determined in the action or proceeding, or covered or included in the order" within thirty days of the (final) order. *Id.*, App. at 163 (text of statute). The motion claimed that the petitioner, as a submitter of public comments, had standing under R.S.A. Chapter 541-A and Puc 203.18, and otherwise asserted that he was a "person directly affected" by the PUC's rulings under R.S.A. 541:3 because, *inter alia*:

a) His legally protected interests and rights in having his comments considered had been violated;

b) The petitioner is an impacted citizen of the town of Litchfield, a community on the NED Pipeline route, wherein the pipeline is planned to run near the petitioner's property, through wetlands, the town's drinking water aquifer, numerous wildlife and other environmentally sensitive areas, and the property of approximately 67 landowners, negatively affecting all others, including the petitioner, by the general diminution of property values associated with the "fear factor" and other concerns associated with a nearby pipeline;

c) The petitioner is an impacted property owner, negatively affected by the general devaluation of property values associated with the "fear factor" and other concerns associated with a nearby high-pressure gas pipeline, and at risk of further harm given that the blasting associated with running the pipeline through the aquifer wherein the pond on which the movant lives may negatively impact the water table of the pond;

d) The petitioner is an impacted nature lover; and

e) The petitioner was an interested, involved person in the PUC proceeding who had not only submitted comments, but followed it for months, once petitioned to intervene (withdrawn), and attended all or substantial parts of all three days of the final hearing on the merits in the proceeding.

App. at 66-67.

As grounds for a rehearing, the petitioner argued that the PUC had erred and abused its discretion by applying an incorrect and unduly narrow standard in reaching its "public interest" determination which unlawfully ignored negative NED Pipeline public comments and excluded evidence of the negatives relevant to the determination, that the PUC was not preempted from applying the correct standard,[2] and that it rulings violated the equal protection guarantees of our state and federal constitutions by providing disparate treatment to persons similarly situated (different classes of New Hampshire energy users). *See generally* App. at 46-92 (motion for rehearing, with exhibits). As new evidence—but not the only grounds—supporting a rehearing, the motion cited an October 6, 2015 newspaper statement of a NED pipeline representative made immediately after the PUC's October 2, 2015 decision on the merits, admitting the decision (together with similar Massachusetts decisions) was a "'significant step' in bringing the project to fruition ..." *Id.* at App. 62-63, 84-85. The motion argued that, if the nexus between the PUC's approval and the negatives of the NED Pipeline was not already known to the PUC at the time of its decision, the article proved it. *Id.* at 62-63.

The only objection to the petitioner's motion for a rehearing was filed by EnergyNorth, which argued that the petitioner lacked standing to be heard on the motion as he was not a party to the PUC proceeding, not an EnergyNorth customer, and cannot be a customer because

[2] The petitioner did not understand the PUC to be making a *state* "preemption" argument at the time, but reserved "the right to challenge other reasoning," as the PUC's rationale was unclear. *See* App. at 67 Footnote 7.

EnergyNorth does not provide service to the area in Litchfield where the petitioner lives. App. at 94, 98. Moreover, EnergyNorth contended that the petitioner had failed to demonstrate grounds for a rehearing under R.S.A. 541:3, any new evidence that could not have been presented before, or that the PUC had overlooked or mistakenly conceived evidence before it. *Id.* at 94. EnergyNorth also asserted that the PUC had not ignored the negative NED Pipeline comments, but acknowledged them in determining them to be outside the scope of the PUC proceeding, which EnergyNorth claimed was not within the statutory authority of the PUC, but the authority of the Federal Energy Regulatory Commission ("FERC") and "possibly" the New Hampshire Site Evaluation Committee. *Id.* at 95-96.

The PUC sided with EnergyNorth.

By Order No. 25,843 dated November 30, 2015, the PUC denied the petitioner's motion for a rehearing. App. at 33-38. The PUC's order held that the petitioner lacked standing to move for a rehearing as a "person directly affected" by its rulings under R.S.A. 541:3. *See* App. at 34. While discussing some of the petitioner's arguments for standing, the order completely overlooked the assertion that R.S.A. 541-A and Puc 203.18 provided standing, and dismissed all other bases for standing by finding that the petitioner was not "directly affected by the Order" as the PUC considered the proceeding to only concern the rights of EnergyNorth customers. *Id.* at 34-35. Continuing with a substantive consideration of the petitioner's motion for rehearing, the order did not dispute the motion's analysis as to why the negatives of the NED Pipeline were relevant to the proceeding, but "flip-flopped" on its decision on the merits assertion that the negatives were "solely within the province of FERC" and *maybe* R.S.A. Chapter 162-H. *Id.* at 24 (including Footnote 8). Now, the PUC seemed to contend just the opposite, stating "This is not, as Mr. Husband alleges, a matter of federal preemption or a matter of discretion, but a matter

of our statutory role and the roles of other agencies," before citing R.S.A. 162-H:10-b as "requiring New Hampshire Site Evaluation Committee to 'establish criteria or standards governing the siting of high pressure gas pipelines in order to ensure that the potential benefits of such systems are appropriately considered and unreasonable adverse effects avoided.'" *Id.* at 37-38.[3] As for the petitioner's new evidence argument, the order held:

> "Although the article was published after the Order was issued, the article refers to pre-existing facts and analysis and does not contain any information that was not or could not have been produced at hearing."

Id. at 37-38.

This appeal followed.

B. The NED Pipeline and its Nexus With the PUC Proceeding

The NED Pipeline, one of several potential pipelines in the works, is planned to traverse roughly 70 miles of Southern New Hampshire. App. at 2, 7. "Portions of the route are new 'greenfield' rights-of-way, and portions run through existing electric transmission rights-of-way." *Id.* "'Greenfield' rights-of-way" refer to undeveloped, agricultural areas, including working farms, state forests, historic areas, wetlands, aquifers and other environmentally sensitive areas. *See generally* App. at 101-150 (public comments discussing impacted areas). New Hampshire will largely serve as a conduit for this transmission line from New York to Massachusetts. App. at 4, Footnote 1 ("it will transport natural gas from Wright, New York, to the market center location serving New England Markets, in Dracut, Massachusetts."). The Agreement and Settlement will provide this state's gas customers with only up to 115,000 dekatherms per day of firm capacity on the NED Pipeline. *Id.* at 4. This is not even 10% of the

[3] In yet another apparent "flip-flop," despite just disclaiming any issue of preemption, the order additionally cited 15 U.S.C. § 717f(c)(1)(A), which requires the issuance of certificate of public convenience and necessity by FERC before gas pipelines may be constructed, in support of its assertion that only other agencies could consider the NED Pipeline's negatives. App. at 37. Whatever the PUC's final position on preemption: there is no preemption, as discussed below.

pipeline's roughly 1.3 billion cubic feet per day capacity.[4] Of that small amount, only a little more than half actually represents new gas.[5]

The NED Pipeline project is still under review by FERC, with no certificate of public convenience and necessity issued to approve the project and trigger federal preemption. *See* App. at 2 ("To take effect, the Federal Energy Regulatory Commission (FERC) must approve the NED Pipeline. FERC's review is ongoing."); 15 U.S.C. § 717f (federal purview over matters involving gas pipeline construction does not arise until a certificate of public convenience and necessity issues), App. at 160-162 (text of statute).

The Agreement between EnergyNorth and Tennessee Gas is the *only* contract for New Hampshire gas customers on the NED Pipeline. App. at 111, 129. As such, its PUC approval was/is critical to the pipeline project. As noted in the *Union Leader* article attached to the petitioner's motion for rehearing as new evidence establishing a nexus between the PUC's approval of the Agreement, approval of the NED Pipeline by FERC, and therefore the relevance of the pipeline's negatives to the PUC's "public interest" determination:

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[4] It is not believed that this small percentage of capacity is substantively disputed by the PUC or any of the parties to the PUC proceeding. The petitioner raised it in his motion for rehearing. App. at 48. Neither EnergyNorth nor the PUC disputed it in their responses. *See generally* App. at 33-38, 93-100. In any event, it is a matter of public record and common knowledge to interested persons, was raised in the public comments, including the petitioner's, *see, e.g.*, App. at 111, 103-104, and, but for the PUC's rulings complained of herein, could have been further established to any degree reasonably required in this proceeding by records of a kind deemed acceptable for consideration by the PUC. For example, Exhibit "56" admitted as evidence in the PUC proceeding was an online news article, ***see*** App. at 62 (including Footnote 6), 87-88, and Exhibit "57" admitted as evidence in the proceeding was a printout of page 1 of a website. App. at 62 (including Footnote 6), 90-92. The July 17, 2015 Daily Hampshire Gazette online news article, available at the URL http://www.gazettenet.com/news/specialcoverage/goinggreen/17797749-95/tennessee-gas-pipeline-reduces-capacity-sought-for-northeast-energy-direct-project, informs that the NED pipeline has a capacity of 1.3 billion cubic feet per day capacity. 115,000 dekatherms is easily calculated to equal roughly 9% of 1.3 billion. See http://www.kylesconverter.com/energy,-work,-and-heat/cubic-feet-of-natural-gas-to-dekatherms-(ec) (1.3 billion cubic feet equals 1.3 million dekatherms; 115,000 is only 8.8% of 1.3 million.).

[5] "Of the total 115,000 Dth per day of capacity contracted for in the Precedent Agreement, 50,000 Dth per day is replacement of existing TGP capacity and 65,000 Dth per day is new or incremental capacity." *See* App. at 4. 65,000 is roughly 57% of 115,000.

> "Long-term contracts like the one approved for [EnergyNorth] are necessary to demonstrate the need for the pipeline in proceedings before the Federal Energy Regulatory Commission. Approval of the contract doesn't necessarily guarantee success with FERC, but **failure to approve the contract would have been a major blow to the project.**"

App. at 84-85 (emphasis added); see also id. at 62-63 (motion's discussion of article). No wonder, then, that Kinder Morgan hailed the PUC approval as a big step toward FERC approval. App. at 85.

C. The "Public Interest" Standard

The PUC approvals of the Agreement and Settlement were requested, noticed and claimed to have been decided under the "public interest" standard. EnergyNorth sought approval under a petition requesting "a determination that the Company's decision to enter into the [A]greement is prudent and consistent with the **public interest**." App. at 70 (emphasis added). The PUC's Order of Notice for the proceeding recited the petition's request for "a determination that the Company's decision to enter into the Agreement is prudent and consistent with the **public interest**," and specifically made this determination a condition of approval. *Id.* at 77-78 (emphasis added). The PUC's decision on the merits makes a determination that approval of the subject settlement and precedent agreements is in the "**public interest**." *Id.* at 1, 31 (emphasis added). This was a requisite finding for approval of the Settlement. *See* Puc 203.20(b), App. at 167 ("The commission shall approve a disposition of any contested case by stipulation, settlement, consent order or default, if it determines that the result is just and reasonable and serves the public interest."); *Concord Steam Corp.*, 94 N.H. P.U.C. 233 (May 22, 2009) (affirming standard of Puc 203.20(b) for settlements).

The PUC must act in the public interest. *See, e.g., Waste Control Systems, Inc. v. State*, 114 N.H. 21, 24 (1974); *Boston & Maine R.R. v. State*, 102 N.H. 9, 10 (1959) ; *Harry K.*

Shepard, Inc. v. State, 115 N.H. 184, 185 (1975); *Browning-Ferris Industries of New Hampshire, Inc. v. State*, 115 N.H. 190, 191 (1975).

The term "public interest" is analogous to the term "public good" and should be broadly construed "not only to include the needs of particular persons directly affected . . . but also . . . the needs of the public at large ..." *Waste Control Systems, Inc. v. State*, *supra*, 114 N.H. at 21)(citing *Boston & Maine R.R. v. State*, *supra*, 102 N.H. at 10); *see also Black's Law Dictionary* (6th Ed., West Publishing Co., St. Paul, MN)(1990), p. 1229 ("Public interest" defined as "Something in which the public, the community at large, has some pecuniary interest, or some interest by which their legal rights are affected. ..."). The "public at large" means the public "as a whole; in general" or "the whole of a state, district or body rather than one division or part of it ..." *Webster's New Universal Unabridged Dictionary*, p. 808 (defining "at large").

It is well-established that the PUC has broad discretion when it comes to making "public interest" determinations. *See, e.g., Waste Control Systems, Inc., supra*, 102 N.H. at 24.

But, with this broad discretion comes a corresponding obligation to cast its net as widely as possible to properly consider the matter. The PUC is well aware that it has this obligation, not just the obligation to make sure that rates are "just and reasonable" for one class of utility customers:

> "[W]e have general supervisory authority over utilities operating in this state, requiring us to assure that the rates are just and reasonable **and** imposing on us **the obligation to assure citizens of this state that the transactions as in issue here are in the *public interest*.**"

Merrimack County Telephone Company, 87 NH PUC 278, 281 (2002)(emphasis added); *see also Hampton Water Works, Inc.*, 87 NH PUC 104, 108 (2002).

The PUC confirmed the exercise of this discretion, to the broadest extent of its authority, in its decision on the merits at issue:

> "We construe the public interest within the context of our overall authority including, in this case, the interests of EnergyNorth's existing and future customers."

App. at 25.

In exercising this discretion, the PUC does not have the authority to ignore mandated legislative procedures and rights pertaining to the determination—including those pertaining to public comments, discussed below—and it is an abuse of its discretion constituting legal error to apply a more limited standard for determining the "good of the public," not just "the benefit to the contending parties," than is required under the law:

> "The good of the public and not the benefit to the contending parties being the issue (Grafton &c. Co. v. State, 77 N.H. 539, 542), the desire or consent of the latter is not the test. The public, as well as the parties, is entitled to a finding of the public good on a hearing without error of law ..."

The Parker Young Company and Fox & Putnam v. State, 83 N.H. 551, 560 (1929); *see also In re Pinetree Power, Inc.*, 152 N.H. 92, 97 (2005)("the 'public interest' of PSNH's customers encompasses more than simply rates ..."); *Appeal of Conservation Law Foundation of New England, Inc.*, 127 N.H. 606 (N.H. 1986)("...the express statutory concern for the public good comprises more than the terms and conditions of the financing ...").

D. Public Comments

1. The Importance of Public Comments

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. Observations made on the importance of such comments in rulemaking are equally applicable here. 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)).

Consequently, a state agency may not ignore a statutory or constitutional mandate to consider public comments, even if the agency is not persuaded by the comments. *Mahoney v. Shinpoch*, 732 P.2d 510, 516, 107 Wn.2d 679 (Wash. 1987); *see also Environmental Protection Information Center v California Dept of Forestry and Fire Protection*, 44 Cal.4th 459, 487, 80 Cal.Rptr.3d 28, 50, 187 P.3d 888, 906 (Cal. 2008)(if it is established that a state agency's failure to consider public comments has frustrated the purpose of the public comment requirements of the process, the error is prejudicial); *California Native Plant Society v. City of Santa Cruz*, 177 Cal.App.4th 957, 987, ___ Cal.Rptr.3d ___ (Cal.Ct.App. 6th Dist. 2009)("[T]he omission of required information constitutes a failure to proceed in the manner required by law where it precludes informed decision-making by the agency or informed participation by the public.")(citing *Sierra Club v. State Bd. of Forestry*, 7 Cal.4th 1215, 1236, 32 Cal.Rptr.2d 19, 876 P.2d 505 (Cal. 1994)).

2. The Legally Protected Interests and Rights in the Comments at Issue

The only statutory references to "public comments" in PUC proceedings are found in R.S.A. Chapter 541-A, the "Administrative Procedure Act."

R.S.A. 541-A:11 mandates public comments for rulemaking proceedings, with the statute making it clear that all interested persons "**shall**" be afforded "reasonable opportunity" for input, including by public comment:

> " I. (a) **Each agency** shall hold at least one public hearing on all proposed rules filed pursuant to RSA 541-A:3 and **shall afford** all interested persons **reasonable opportunity** to testify and to submit data, views, or arguments ...
> III. **To provide reasonable opportunity for public comment**, the agency may continue a public hearing past the scheduled time or to another date, or may extend the deadline for submission of written comment. "

Id.; App. at 163-164 (text of statute)(emphasis added). The word "shall" in this statute serves as a command. *Appeal of Concord Natural Gas Corp.*, 121 N.H. 685, 691 (1981)("Absent an indication of legislative intent to the contrary, the word 'shall' acts as a command.").

R.S.A. 541-A:12, I requires that such comments be "fully consider[ed].":

> " I. **After fully considering public comment** and any committee comments or comments by the office of the legislative services received pursuant to RSA 541-A:11, and any other relevant information, a quorum of the members of the agency or the agency official having rulemaking authority shall establish the text of the final proposed rule ..."

Id.; App. at 165 (text of statute)(emphasis added).

While "rule" is not specifically defined under R.S.A. Chapter 541-A to include rulings such as the PUC rulings at issue, it is not defined to exclude rulings, either. *See generally* R.S.A. 541-A:1, XV (definition of "Rule"), App. at ___ (text of statute). Thus, especially as the PUC's decision on the merits will be no less impactful—likely far more—to New Hampshire citizens than most rules promulgated by the PUC under the statute, and no one is more qualified to

comment on matters affecting the general "public interest" than the general public, the voice assured public comments under the statute should be interpreted to apply to PUC proceedings such as the one *sub judice*.

The PUC's own comment rule compels this interpretation.

Similar to R.S.A. 541-A:11 and 12, Puc 203.18 guarantees full consideration of public comments, by expressly providing that interested persons **shall** have the opportunity to "state their position":

> "Puc 203.18 Public Comment. Persons who do not have intervenor status in a proceeding but having interest in the subject matter **shall be provided with an opportunity** at a hearing or prehearing conference **to state their position**."

Id.; App. at 167 (text of rule)(emphasis added).

This rule was adopted under R.S.A. Chapter 541-A. *See* R.S.A. 541:3; Puc 205.01; Puc 205.02(b); App. at 163 (text of statute), 167 (text of rules). It must be concluded that the rule, specifically concerning public comments, therefore adopted the R.S.A. Chapter 541-A comment consideration requirements. Indeed, how could the PUC adopt a lesser standard than is required under the promulgating statute, or such an interpretation otherwise be afforded when the rule mandates essentially the same standard?

"An agency, like a trial court, must ... comply with the governing statute, in both letter and spirit." *Appeal of Morin*, 140 N.H. 515, 519 (1995). The PUC must follow its own rules. *Attitash Mt. Service Co. v. Schuck*, 135 N.H. 427, 429 (1992)(law well-settled that administrative agencies must follow their own rules and regulations); *In re Union Telephone Co.*, 160 N.H. 309, 317 (2010)("[T]he PUC may not act contrary to the plain meaning of [its own] Rule 431.01."). While the PUC is afforded deference in the interpretation of its own rules, the interpretation must be "consistent with the language of the regulation and with the purpose which the regulation was

intended to serve." *Appeal of Morin, supra,* 140 N.H. at 518 (quoting *Appeal of Alley*, 137 N.H. 40, 42 (1993)(quotation omitted)).

"An agency, like a trial court, must follow fair procedures and provide due process ..." *Appeal of Morin*, 140 N.H. at 518 (citing *Appeal of Lathrop*, 122 N.H. 262, 265 (1982)); *Appeal of Public Service Co. of New Hampshire*, 122 H.H. 1062 (due process clauses of federal and state constitutions apply to administrative proceedings, including PUC proceedings). "Its discretion must be exercised 'in a manner to subserve and not to impede or defeat the ends of substantial justice.'" *Morin*, 140 N.H. at 518 (quoting *Sturman v. Socha*, 191 Conn. 1, 463 A.2d 527, 531 (1983)(quotation omitted)). "One element of this requirement is the opportunity to present one's case--to attempt to meet one's burden of proof--in a fair manner before an impartial fact-finder." *Id.* (citing *Appeal of Lathrop, supra,* 122 N.H. at 265). The right to provide "fully consider[ed]" input under R.S.A. Chapter 541-A, the right to "state [one's] position" under Puc 203.18, the right "to present one's case--to attempt to meet one's burden of proof--in a fair manner before an impartial fact-finder" recognized under *Morin,* embody the "opportunity to be heard" demanded by due process. *See* U.S. Const., Amends. V, XIV, Section 1 at App. at 158; N.H. Const., Pt. I, Arts. 15, 35 at App. at 159; *Hagar v. Reclamation Dist.*, 111 U.S. 701, 708 (1884); *Society for Protection of N.H. Forests v. Site Evaluation Comm.*, 115 N.H. 163, 168 (1975)("Where issues of fact are presented for resolution by an administrative agency due process requires a meaningful opportunity to be heard.").

This fundamental right, to be heard, is meaningless, in letter and spirit, if the input or position (comment) can just be ignored. As it would be absurd to conclude that the legislature intended such an illogical, idle result--particularly in view of the significant rights and strong policies involved—such a reading of R.S.A. Chapter 540-A, and Puc 203.18 adopted thereunder,

may not be countenanced. *See State v. Woodman*, 114 N.H. 497, 500 (1974)(legislature should not be presumed to do "an idle and meaningless act," nor one which would lead to an absurd result); *Ruel v. New Hampshire Real Estate Appraiser Board*, 163 N.H. 34, 39 (2011)(Supreme Court will not presume the legislature intended an illogical, wasteful result); *McDonald v. Town of Effingham Zoning Bd. of Adjustment*, 152 N.H. 171, 175 (2005)(statutes should not be interpreted to lead to absurd, illogical results); *In re C.T.*, 160 N.H. 214, 221 (2010)(whenever possible, every word of a statute should be given effect).

E. The PUC Erred in Applying an Incorrect and Unduly Narrow Standard to its "Public Interest" Determination on the Merits

The PUC's final decision purports to make a proper "public interest" determination, but it plainly does not. Minimally, such a determination would require that the PUC have actually listened to the public on the matter, especially given that the issues involved do not involve areas within the PUC's particular expertise. *Cf. Legislative Utility Consumers' Council v. Public Service Co.*, 119 N.H. 332, 339 (1979)(PUC to be given "broad discretion" in areas considered within its expertise). Indeed, many of those submitting public comments in the PUC proceeding, by virtue of their familiarity with the impacted properties as landowners, town citizens, municipal and state representatives, and experience with environmental, conservation and water management issues as conservation members, selectmen and other officials, have far more expertise than the PUC in the matters discussed in the comments—particularly as concerns issues affecting their own districts and towns.

The PUC applied an unduly narrow view of the "public interest," limiting its consideration to *any* of the purported benefits afforded one utility and its customers by a contract on the NED Pipeline, while rejecting consideration of *any* of the negative impacts the pipeline project would have on the public at large--despite *acknowledging* such concerns to be

"important" in all of its rulings at issue. *See* App. at 24, 35, 42, 45. This constituted an abuse of discretion, and legal error:

> "The [PUC], like a trial judge, has broad discretion over the conduct of its proceedings, including its hearings ... But that discretion is not unlimited. The board may not abuse its discretion ... abuse of discretion by the board constitutes legal error ... "

Appeal of Morin, supra, at 518 (1995)(citations omitted). The PUC should have followed its own rule (Puc 203.18), the will of the legislature and basic principles of fairness and allowed ***both*** sides to fully "state their position."

The PUC holds the obligations of a trial judge and may not unfairly pick and choose among comments and evidence equally materially and relevant to the ultimate issue to guide the result it wants. *See Appeal of Public Service*, 122 N.H. 1062, 1074 (1982)("[to] be paid as a judge, one must act like a judge"). This is not even about the merits; it is about just being *heard* when others are heard, and not just being shown the door.

The issue before this Court was decided nearly 30 years ago. The Administrative Procedure Act of R.S.A. Chapter 541-A is based on the 1981 version of the Model State Administrative Procedure Act. *See* notes preceding statutes in R.S.A. Chapter 541-A. Washington has also adopted a version of this act. *Id.* In *Mahoney v. Shinpoch, supra*, 732 P.2d 510, the Washington Supreme Court considered the requirement under its act that an agency "fully consider" public comments—the same requirement found in R.S.A. 541-A:12, I. App. at 165. The *Mahoney* Court held:

> "Full consideration of public comment prior to agency action is both a statutory and constitutional imperative. See RCW 34.04.025(5); Ocosta, 38 Wash.App. at 791, 689 P.2d 1382; Barry & Barry, Inc. v. Department of Motor Vehicles, 81 Wash.2d 155, 500 P.2d 540 (1972). The opportunity for public comment is essential to agency rulemaking, not because public comment is invariably helpful in discerning legislative intent but because the agency's authority to act is premised on the functioning of such procedural safeguards. See Barry & Barry, at 159, 500 P.2d 540. The APA contains no harmless

> error provision permitting an agency not to consider public comment even when the public comment proves unpersuasive; rulemaking conducted without substantial compliance with APA requirements is per se invalid. See RCW 34.04.025(5)."

Mahoney v. Shinpoch, 732 P.2d at 517.

For the reasons previously discussed, the same principles apply to public comments submitted in agency proceedings such as the matter at issue: there is no "harmless error" in the exclusion of such comments, particularly when they concern a determination as important as the "public interest," especially when the bar for the agency's consideration of *anything* is so low.

The PUC has minimum threshold requirements for the consideration of matters. It does not follow technical rules of evidence: only that which is "irrelevant, immaterial or unduly repetitious" is barred. *See* R.S.A. 541-A:33, II, App. at 165; Puc 203.23, App. at 167. Proof need only be by a "preponderance "of the evidence, *see* Puc 203.25, App. at 167—not a high obstacle. *See In re Shelby R.*, 148 N.H. 237, 241 (2002)("relatively low" standard).

There is no legal or rational basis for the PUC to hold public comments to a higher standard for consideration than evidence.

Thus, if public comments offered on a "public interest" determination are relevant and material, the PUC may not lawfully ignore them.[6]

There is no question that the negatives of the NED pipeline are relevant and material to the determination in this case. Clearly, they are material: the loss of or injury to drinking water aquifers, wetlands, farmlands, historic areas, conservation and other environmentally sensitive

[6] If relevant and material, such comments are clearly not within the first two categories of the only three categories of inadmissible PUC evidence: that which is "irrelevant, immaterial or unduly repetitious." R.S.A. 541-A:33, II, App. at 165; Puc 203.23, App. at 167. The third category, that which is "unduly repetitious," should not apply to public comments—particularly in a proceeding of such great public interest as this matter, wherein repetition is a virtual certainty given the number of likely comments, but all are entitled to an equal voice. Indeed, if anything, repetitive "public interest" comments in such a case should be given added consideration, as establishing a clear "public at large" sentiment on the issue.

areas; safety concerns, damage to the state's tourism and related economies, personal hardships, *etc.* are significant public interest concerns. Again, the PUC *recognized* these concerns to be "important" in all of its rulings. *See* App. at 24, 35, 42, 45.

Something is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *State v. Hayward*, 166 N.H. 575, 580 (2014)(quoting New Hampshire Rules of Evidence Rule 401).

Thus, the negatives of the NED pipeline were relevant to the PUC proceeding if they had "any tendency" to make it "more probable or less probable" that approval of the Agreement and Settlement would be for the public good: the ultimate fact "of consequence to the determination of the action." *See State v. Hayward, supra*, 166 N.H. at 580. As the negatives made it "less probable" that approval would be for the public good, they were plainly relevant. *Id.* Let us start with the obvious: there will be no gas under the Agreement without the pipeline; of course there is a nexus between PUC approval and the negatives. The fact that FERC must ultimately approve the NED pipeline provides no disconnect, but only strengthens the nexus: PUC approval makes it "more probable" than not that there will be FERC approval. The public certainly expressed this as common knowledge at the time of the PUC proceeding, as evidenced by the public comments, *see generally* App. at 101-150, and thus it was a nexus appropriate for the equivalent of judicial notice in the proceeding. *See* R.S.A. 541-A:33, V(a); App. at 165.

In his motion for rehearing, the petitioner contended that the news article discussed herein was new evidence on this issue. App. at 62-63. The PUC's response was more admission than argument:

> "[The petitioner] further argues that a new piece of information justifies rehearing. That information is an article published by the New Hampshire Union

> Leader, titled 'PUC Backs Liberty-Kinder Morgan Pipeline Deal.' Motion Exh. D. Although the article was published after the Order was issued, **the article refers to pre-existing facts and analysis and does not contain any information that was not or could not have been produced at hearing.**"

Id. at 38 (emphasis added).

In identifying the facts in the article as "pre-existing" and no "information that was not or could not have been produced at hearing," the PUC acknowledges that it was aware at the time of its decision on the merits of these facts discussed in the article:

> a)"Long-term contracts like the one approved for [EnergyNorth] are necessary to demonstrate the need for the pipeline in proceedings before the Federal Energy Regulatory Commission."
> b) "failure to approve the Agreement would have been a major blow to the project"; and
> c) PUC approval constituted part of a "'significant step' in bringing the [NED} project to fruition"

App. at 84-85. This is not surprising, as it is the PUC's business to know the business of utilities. Moreover, if it did not otherwise know, State Representative James W. McConnell flat-out told the PUC in his July 16, 2015 public comment letter: "The new proposed Liberty Utilities contract remains the only contract that Kinder Morgan has available to try to justify approval to New Hampshire regulators." App. at 129. By public comment letter dated July 28, 2015, the petitioner told the PUC, as well. App. at 111 ("Liberty Utilities is the only New Hampshire customer signed on to the NED pipeline"). Certainly, it would be a lot easier for FERC to justify approving 70 miles of pipeline fallout in New Hampshire if there was at least one New Hampshire customer—and awfully hard to justify approval without one.

The petitioner still avers that the news article constitutes new evidence on the issue: the statements made therein plainly could not have been produced at the time of hearing, as they were made after the final order. But, in acknowledging facts establishing a nexus between its approval of the Agreement and Settlement and approval of the NED Pipeline project, and

therefore the relevance of the pipeline's negatives to the PUC's "public interest" determination, the PUC admits the standard for rehearing:

> "... a party states good reason for such relief and demonstrates that a decision is unlawful or unreasonable. See Rural Telephone Companies, Order No. 25,291 (Nov. 21, 2011) at 9. **Good reason may be shown by identifying specific matters that were "overlooked or mistakenly conceived" by the deciding tribunal**, see Dumais v. State, 118 N.H. 309, 311 (1978) ..."

Freedom Logistics, LLC, d/b/a Freedom Energy Logistics, PUC Order No. 25,788 (DE 14-305, June 5, 2015) at 3-4.

This case is a "poster child" for the importance of public comments in informed decision-making, and the harm in their omission. At stake are the interests and rights of more than 100,000 New Hampshire citizens and the very character and quality of our state, respecting matters in which the PUC has no expertise; indeed, often no real knowledge at all. The public tried to inform the PUC on these matters. The PUC should have listened, but refused, and the public was deprived of critical input in the final decision, and the right decision, accordingly.[7]

F. The PUC Erred in Determining that it Lacked Jurisdiction to Consider the Negative Impacts of the NED Pipeline

First and foremost, we are not concerned with an issue of jurisdiction, but one solely of application of the proper standard. In disputing the PUC's obligation to consider the NED Pipeline project negatives—contending such consideration to be solely or "possibly" for "other agencies," *see* App. at 24, 37-38, 45, 96—the PUC and EnergyNorth essentially argue that a "public interest" determination was not really required. This contention is unsustainable, failing under the clear law to the contrary discussed above, EnergyNorth's request for the determination

[7] The PUC and EnergyNorth contend that the PUC considered the public comments, but just determined them to be beyond its jurisdiction ("purview," "scope of the proceeding," etc.) *See* App. at 36-37, 96. However one chooses to pronounce "potato," the PUC plainly did not *substantively* consider the comments, as it deemed them not only outside of its jurisdiction, but "irrelevant." App. at 45 ("While the issues related to siting and construction are important, they are not relevant to the Commission's determinations ..."). The fallacy in the jurisdictional argument is discussed in the next section.

in its petition underlying the proceeding, App. at 70, 73, the PUC Order of Notice framing the proceeding, App. at 76, and the decision on the merits. App. at 77-78. Unless the PUC was completely devoid of jurisdiction to consider the matter—which no one contends—it was required to make a "public interest" determination, and under the correct standard considering all factors pertinent to the best interests of New Hampshire as a whole, including the negatives of the pipeline.

The PUC cites 15 U.S.C. §717f in support of its "flip-flopping" position on preemption. discussed previously. *See also* App. at 160-162 (text of 15 U.S.C. §717f). Should the PUC's position be determined to ultimately rest on the side of preemption, it is irrational that it considered the purported "benefits" of the NED pipeline. *See, e.g.*, App. at 156-157 (36:17-37:24). There is no logic in the PUC being precluded from entering an area to discuss the negatives, but not the positives. In any event, any preemption argument overlooks or misapprehends the law:

> "This argument rests on two provisions of the Act. The first provision requires natural gas companies engaged in the interstate or international transportation or sale of natural gas to obtain a certificate of public convenience and necessity from FERC before "undertak[ing] the construction or extension of any facilities." 15 U.S.C. § 717f(c)(1)(A). The second confers eminent domain power on natural gas companies that have been issued a certificate of public convenience and necessity by FERC ..."

Midwestern Gas Transmission Co. v. Baker, 2006 WL 461042, *9 (Tenn.Ct.App. 2006) (emphasis added).

Thus, there is no issue of federal preemption here, as any preemption would only occur after FERC certification (approval) of the NED Pipeline project. *See* 15 U.S.C. § 717f; *Midwestern Gas Transmission Co. v. Baker, supra*, 2006 WL 461042 at *9; *Loqa*, 79 F.Supp.2d 49 (D.R.I. 2000)(preemption raised after certification). The project is only in the FERC

reviewing stage, *see* App. at 24–far from any certification, so the statute is inapplicable. *Id.* Besides, many "public interest" comments here, including the petitioner's, pertained to environmental, public drinking water, conservation, public safety and other concerns not within the exclusive purview of 15 U.S.C. § 717f , even if it were applicable. Because the PUC fails to elucidate any clear preemption rationale—even contradicting itself on the issue—federal preemption fails as any underpinning of the PUC's rulings. *See State v. Exxon Mobil Corp.*, 2013-0591, 2013-0668 (N.H., October 2, 2015)(proponent of obstacle preemption bears a heavy burden); R.S.A. 541-A:35 (PUC must provide "an adequate basis upon which to review its decision.").[8]

Nor do the stands by EnergyNorth and the PUC on "other" state agencies find any footing.

In support of its position on this issue, EnergyNorth contends only that "possibly the New Hampshire Site Evaluation Committee ... would have authority to address [the pipeline project negatives], not the Commission." App. at 96. With similar lack of conviction, the PUC's decision on the merits asserts only (in a footnote) that "The siting of the NED Pipeline may also come before the New Hampshire Site Evaluation Committee under RSA ch. 162-H." App. at 24, Footnote 8. The only substantive identification of any possible clash with the New Hampshire Site Evaluation Committee ("SEC")'s jurisdiction under R.S.A. Chapter 162-H comes in the

[8] Perhaps the PUC's concern is that the federal eminent domain complaints of some of the public comments come too close to the federal authorization of such takings under 15 U.S.C. § 717f(h). *See* App. at 162. But, again, such authorization is only triggered by FERC approval of the pipeline and preemption, which has not happened. As long as there is no federal preemption, a fair argument may be made that the PUC, an agency of this state obligated to act in the public interest, owes a good faith duty to its citizens to do its best to prevent federal eminent domain from ever becoming an issues—especially as our state constitution guarantees New Hampshire citizens protection from such takings. *See* App. at 159 (N.H. Const., Pt. I, Article 12-a, providing that "No part of a person's property shall be taken by eminent domain and transferred, directly or indirectly, to another person if the taking is for the purpose of private development or other private use of the property.").

PUC's order denying the petitioner's motion for rehearing, wherein the PUC cites R.S.A. 162-H:10-b as "requiring New Hampshire Site Evaluation Committee to 'establish criteria or standards governing the siting of high pressure gas pipelines in order to ensure that the potential benefits of such systems are appropriately considered and unreasonable adverse effects avoided.'" *Id.* at 37-38.

R.S.A. Chapter 162-H, and specifically R.S.A. 162-H:10-b, do not relieve the PUC of its obligation to consider the pipeline negatives, for obvious reasons.

To begin with, R.S.A. 162-H presents no conflict in agency authority. Indeed, at the time of the PUC's rulings, R.S.A. 162-H:1 expressly required the SEC to make "public interest" determinations in approving energy projects under the same "public at large" standard required of the PUC, *i.e.*, the SEC must take into account the environmental and other public concerns expressed in the public comments submitted here:

> "**162-H:1 Declaration of Purpose.** – The legislature recognizes that the selection of **sites for energy facilities may have significant impacts on and benefits to the following: the welfare of the population, private property, the location and growth of industry, the overall economic growth of the state, the environment of the state, historic sites, aesthetics, air and water quality, the use of natural resources, and public health and safety**. Accordingly, the legislature finds that **it is in the public interest to maintain a balance among those potential significant impacts and benefits in decisions** about the siting, construction, and operation of energy facilities in New Hampshire; that undue delay in the construction of new energy facilities be avoided; that **full and timely consideration of environmental consequences be provided** ..."

Id. (emphasis added); App. at 166-167 (text of statute); App. at 101-150 (petitioner's, and sampling of other, public comments). In fact, if applicable, R.S.A. 162-H:10-b, II specifically required that rules adopted under its provisions address the following:

> "(a) Impacts to natural, scenic, recreational, visual, and cultural resources.
> (b) Health and safety impacts, including but not limited to, proximity to high pressure gas pipelines that could be mitigated by appropriate setbacks from any high pressure gas pipeline.

(c) Project-related sound and vibration impact assessment prepared in accordance with professional standards by an expert in the field.

(d) Impacts to the environment, air and water quality, plants, animals, and natural communities.

(e) Site fire protection plan requirements.

(f) Best practical measures to ensure quality construction that minimizes safety issues.

(g) Best practical measures to avoid, minimize, or mitigate adverse effects.

(h) Criteria to maintain property owners' ability to use and enjoy their property."

Id., App. at 166-167 (text of statute).

There is nothing in R.S.A. Chapter 162-H to suggest either that the legislature considers such significant public concerns to be of less legislative concern and irrelevant in other state agency "public interest" determinations, or that the statute precludes the PUC from considering such matters under the long-established standard for its "public interest" determinations. Plainly, the legislature did not believe (and thus intend) that R.S.A. Chapter 162-H provided the SEC with any specific purview over the gas pipeline matters discussed in R.S.A. 162-H:10-b prior to its effective date, if ever, or it would not have enacted the provision.

Whenever possible, New Hampshire statutes must be interpreted harmoniously. *In re Juvenile 2004-789-A*, 153 N.H. 332, 334 (2006); *Nashua School Dist. v. State*, 140 N.H. 457, 458 (1995). "Harmony" requires uniformity in agency standards, *i.e.,* and particularly that different state agencies apply the same standard on a matter as important as the "public interest" to the same concerns. There is no harmony, or logic, in the PUC applying a lesser standard to the same broad concern: the *public* interest.

Moreover, R.S.A. 162-H:10-b cannot be found applicable to the PUC proceeding. The proceeding was commenced on December 31, 2014, App. at 1-2, but R.S.A. 162-H:10-b did not become effective until July 20, 2015. *See id.* As such, the statute's application to a proceeding commenced prior to its enactment, with the result of significantly substantively altering the

outcome-determinative standard to be applied in deciding the merits, would affect substantive rights, and thus would be precluded by the New Hampshire state constitution. *See In re Goldman*, 151 N.H. 770 (2005); N.H. Const., Pt. I, Art. 23, App. at 159 (text of Article 23). In fact—not that a contrary intent would be permissible—the legislature makes its intent clear under R.S.A. Chapter 162-H that state agencies should only be subject to its provisions in effect at the time of an agency filing. *See* R.S.A. 162-H:5, V.

G. The PUC's Rulings Violate Equal Protection Guarantees

The PUC's rationale in rejecting any consideration of the NED Pipeline negatives is particularly perplexing given that it had no problem considering its purported benefits. *See* App. at 156-157.

State disparate treatment of persons similarly situated, without a legitimate state interest, violates the equal protection guarantee of our state and federal constitutions. *See* U.S. Const., Amend XIV, Section 1 at App. at 158; N.H. Const., Pt. I, Arts. 2, 12, Pt. I, Art. 5, App. at 158, 160; *Verizon New England, Inc. v. City of Rochester*, 151 N.H. 263, 270-271 (2004). Why was EnergyNorth allowed to support its "public interest" argument for approval of its NED Pipeline contract by consideration of the purported benefits of the pipeline, *see* App. at 156-157, while opponents of approval were denied any consideration of the negatives under the PUC's rulings? Are we all not New Hampshire energy users, with some getting gas through EnergyNorth and the remainder elsewhere? Indeed, *non*-EnergyNorth gas customers comprise the vast majority of New Hampshire's population: with over 1.3 million New Hampshire citizens as of the 2010 census, and under 90,000 Liberty Utilities gas customers, the latter amounts to **less than 7% of New Hampshire's energy users**. App. at 64, 82. Absent a legitimate, compelling state reason not shown here, why should 93% of a total population of similarly situated citizens (energy users)

be burdened to benefit less than 7%? *See Ellison v. Cass*, 127 S.E.2d 206, 208, 241 S.C. 96 (S.C. 1962)("It is, however, implicit in both the State and Federal Constitutions that legislation may not be discriminatory; that it must give equal protection to all; and that special legislation granting special benefits to private individuals, as contrasted with the public at large, is not permissible.").

The Order essentially decided that the interests of less than 90,000 Liberty Utilities customers completely muted the voices of all other New Hampshire citizens—including over 100,000 citizens represented by the NH Municipal Pipeline Coalition alone—with valid reasons why approval of the Settlement and Agreement was not in the public interest. Somehow, those voices should have counted. This result is unsustainable.

H. The PUC Erred in Determining that the Petitioner Lacked Standing

There are at least two bases for standing here.

First, the petitioner has standing to assert his protected legal interests and rights under R.S.A. Chapter 541-A and Puc 203.18, including the fundamental "right to be heard" on his public comments. EnergyNorth and the PUC ignored this claim of legally protected rights and interests under the statute and rule in responding to the petitioner's motion for rehearing. *See* App. at 34-35, 94-95. But, it was plainly made in the petitioner's motion. App. at 59-61, 66-67.

Chapter 541-A and Puc 203.18 apply to "interested" persons. The petitioner surely meets the standard.

"Whether a person's interest in the challenged administrative action is sufficient to confer standing is a factual determination to be undertaken on a case by case basis." *Golf Course Investors of NH, LLC v. Town of Jaffrey*, 161 N.H. 675, 680 (2011)(citing *Goldstein v. Town of Bedford*, 154 N.H. 393, 395-96 (2006). The extent of agency participation is an important factor in considering such interest. *Id.* at 680; *Weeks Restaurant Corp. v. City of Dover*, 119 N.H. 541,

544-45 (1979); *Thomas v. Town of Hooksett*, 153 N.H. 717, 721 (2006); *Johnson v. Town of Wolfeboro Planning Bd.*, 157 N.H. 94, 99-100 (2008). Proximity may be considered. *Id.* The extent of the impact weighs, as well. *Id.*

The petitioner participated extensively in the PUC proceeding at issue, as an interested person, which is alleged in his motion for rehearing. App. at 66-67. The petitioner submitted nearly 20 pages of relevant, material, detailed and clearly well-considered public comments in the proceeding, both orally during the public comment period of the hearing and in written submissions. *See* App. at 101-120. He followed the proceeding for months, even once petitioning to intervene, App. at 67 (to secure the right of protest; a petition withdrawn once the right was secured, *see* App. at 93-94). *See al*so copies of petition to intervene, and withdrawal, available at the URL for the online PUC docket for the proceeding, http://www.puc.nh.gov/ ("Virtual File Room" link on left, to 2014 Docketbook, Case # DG 14-380). He attended all or substantial parts of all three days of the final hearing on the merits in the matter. App. at 67. His attendance on the first day was limited only because he was outside protesting the proceeding. App. at 101-102. Additionally, the time spent on his nearly 50-page (counting exhibits), well-researched and well-reasoned, motion for rehearing, *see* App. at 46-92, has to be given considerable weight as to his involvement in the proceeding (proceedings are not final until such motions are resolved).

The petitioner's extensive participation in the PUC proceeding, alone, confers standing. Could a higher degree of participation be required without holding an "interested person" to virtually the same standing level required of an actual party to proceedings? Not without impermissibly merging the distinction between "interested persons," as used in R.S.A. 541-A:11, I(a), *see* App. at 163, and "parties," as used in R.S.A. Chapter 541-A:33, I, *see* App. at

165, for the terms would become superfluous and redundant. *See State v. Zubhuza,* 166 N.H. 125 (presumption that the legislature did not enact superfluous or redundant words. In any event, it is clear under Puc 203.18 that interested persons submitting public comments must be held to a lower standing threshold than parties (including intervenors). The rule begins: "Public Comment. Persons who do not have intervenor status in a proceeding but having interest in the subject matter ..." *Id.*; App. at 167.

But the petitioner has also established sufficient proximity. The petitioner's interest in the PUC proceeding is more than his general concerns as a citizen of the State of New Hampshire: **he is a resident of the Town of Litchfield, an impacted municipality in the path of the pipeline, and an owner of property not far from the pipeline's path.** *See* App. at 66. These facts are not disputed. *See id.* at 121-123 (Litchfield among affected towns); *see also* App. at 34 (PUC not disputing the petitioner's allegation that "the NED Pipeline is planned to run through his town, near his property"), 94 (EnergyNorth acknowledging that Litchfield is where the petitioner resides). The NED Pipeline will not only run through Litchfield wetlands, numerous wildlife and other environmentally sensitive areas, but also through the town's drinking water aquifer, the same aquifer wherein the pond abutting the petitioner's property is located, and the property of approximately 67 landowners—which will negatively affect all others, including the petitioner, by the general diminution of property values associated with the "fear factor" and other concerns associated with a nearby pipeline. App. at 66. These facts are not disputed. *See* App. at 34 (PUC acknowledging, and not disputing allegations), 94-95 (EnergyNorth not disputing allegations in discussion of petitioner's standing). Sufficient "proximity" for standing does not require that the NED Pipeline run through the petitioner's

property. "[C]lose proximity," is enough. *Weeks Restaurant Corp. v. City of Dover*, *supra*, 119 N.H. 541. The petitioner is plainly close enough.

The impact is extensive. Again, the pipeline will run its gas through the petitioner's drinking water aquifer. App. at 66. Associated blasting may not only damage the aquifer (and contaminate the water), but consequently lower the water level of the pond abutting the petitioner's property. *See Id.*; *see also id.* 122 ("blasting may damage wells, aquifers and buildings ..."). This would, plainly, affect the petitioner's use and enjoyment of his property and littoral property rights. *See, e.g., Sundell v. Town of New London*, 119 N.H. at 844 (1979) (littoral property owner rights "include but are not necessarily limited to the right to use and occupy the waters adjacent to their shore for a variety of recreational purposes ..."). These are significant concerns. So, also, is the established property-devaluing "fear factor" arising from the public's perception of health and safety hazards associated with such projects, a relevant concern whether or not the fear is proven to have a reasonable scientific basis. *See, e.g., Florida Power & Light Co. v. Jennings*, 518 So.2d 895 (Fla. 1987)(discussing "fear factor" associated with high voltage transmission lines). Again, while the pipeline will not run through the petitioner's property, it will be in close proximity, and will run through 67 other town properties, all of which demonstrates negative, "fear factor" impact to the petitioner's property. The actual or future suffering of such a direct economic interest in the value of one's home constitutes "injury in fact" sufficient to confer standing under R.S.A. 541:3. *In re Londonderry Neighborhood Coalition*, 145 N.H. 201, 203 (2000). For the same reasons, it should provide a sufficient interest under R.S.A. Chapter 541-A and Puc 203.18 to confer standing. While the petitioner's status as an impacted nature lover, *see* App. at 66, may or may not be enough, by itself, to provide standing, it is certainly a cognizable interest affording a supportive factor. *See*,

e.g., *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153-154, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970).

In considering standing, every supporting factor should be considered. *See Golf Course Investors of NH, LLC v. Town of Jaffrey*, 161 N.H. 675, 680 ("...the trier of fact may consider factors ...").

Persons granted a statutory right may invoke its provisions to act upon the right. 73 Am. Jur. 2d Statutes § 308. It would be an impermissibly absurd, illogical interpretation of R.S.A. Chapter 541-A to read the public comment rights granted thereunder to be without the means of enforcing the right if the PUC improperly ignored or rejected relevant comments out-of-hand, as this would render the statute meaningless. *See State v. Woodman*, 114 N.H. at 500; *Ruel v. New Hampshire Real Estate Appraiser Board*, 163 N.H. at 39; *McDonald v. Town of Effingham Zoning Bd. of Adjustment*, 152 N.H. at 175.

For similar reasons, the petitioner has standing to challenge the PUC's rulings, as a "person directly affected" by those rulings, under R.S.A. 541:3. He plainly has alleged cognizable injuries, not only in the violation or his legally protected interests and rights in having his public comments properly considered, but also due to the physical, economic and aesthetic impacts on him as a property owner and citizen of a town in the NED Pipeline's path. These are not just generalized claims of harm affecting the public as a whole. *Cf. Appeal of New Hampshire Right to Life*, 166 N.H. 308, 324 (2014).[9] The petitioner alleges that **he** submitted public comments in an administrative proceeding that **he** participated extensively in, **his** public comments were ignored, **his** drinking water is in the path of the pipeline, **his** property rights and economic and aesthetic interests will be negatively affected by the PUC's rulings. App. at 66-67. Particularly in light of the

[9] At most, the petitioner alleges that he suffered an injury shared with 100,000+ others: those citizens whose public comments were also ignored. But this was not a harm to the general populace.

significant rights and interests, and strong policies involved, in requiring the consideration of public comments—in affording the "right to be heard"-- this is more than enough for standing. *See* 2 Am. Jur. 2d Administrative Law § 408 (regarding standing under the federal Administrative Procedure Act: "Standing is not limited to those who have been "significantly" affected by agency action, allowing a court to consider only whether an injury exists and not the weight or significance of the alleged injury ... The injury-in-fact test thus serves to distinguish those persons with a direct stake in the outcome of the litigation, even though small, from those with a mere interest in the problem; an 'identifiable trifle' suffices.")(footnotes omitted)("identifiable trifle" language cited from *United States v. Students Challenging*, 412 U.S. 669, Note 14, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973)).

Again, the PUC itself acknowledged the petitioner's interests to be "important"; they were improperly rejected for other reasons—*i.e.*, allegedly lacking a sufficient nexus to the PUC's determination and/or for being outside the scope of the proceeding. ***See*** **App. at 35 ("While we recognize that his interests in the siting of the NED Pipeline are important, they are not directly affected by our approval ..."); *see also See* App. at 24, 42, 45.**

However, if the Court is still not convinced that the petitioner has standing under current principles of New Hampshire jurisprudence, given the rights of more than 100,000 New Hampshire citizens involved, the importance of the issues presented by the appeal, the fact that no one but the petitioner is in a position to raise them (they were not raised in any other motion for rehearing filed in the PUC proceeding), and the likelihood that the PUC will engage in the complained-of-conduct again with respect to others who may be unable to avail themselves of relief, the petitioner urges the Court to consider an appropriate exception to, or extension of, existing law to allow for consideration of this appeal.

I. The PUC Should have Granted a Rehearing Based on New Evidence

If the PUC is willing to concede that it was aware of the nexus between its approval of the Agreement and Settlement and FERC certification of the NED Pipeline project, and therefore the relevance of the pipeline's negatives to the PUC's "public interest" determination, at the time of its rulings complained of, the petitioner will withdraw his claim that the news article at App. 84-85 is new evidence on the issue.

But, until such time, the news article is new, important evidence which is contrary to the rulings on a disputed, outcome-determinative issue, providing grounds for a rehearing. *See Consumers New Hampshire Water Co., Inc.*, 80 NH PUC 666 (1995), cited in *Verizon New Hampshire Petition to Approve Carrier to Carrier Performance Guidelines*, Order No. 23, 976 (May 24, 2002). As noted above, the PUC's position that the article presents only "pre-existing facts and analysis" and no "information that was not or could not have been produced at hearing," App. at 38, clearly fails with respect to the Kinder Morgan admission in the article, as it was plainly not made until after the hearing on the merits. Moreover, principles of estoppel should preclude such arguments as to any statements in the article to begin with, as the PUC's rulings rejected the submission and consideration of facts and information offered for the purpose the article is offered, such that it would be patently unfair to allow such a defense.

JURISDICTIONAL BASIS FOR APPEAL

The jurisdictional basis for this appeal is R.S.A. 541:6.

REASONS FOR ACCEPTING THE APPEAL

The Court should exercise its discretion to accept this appeal, for several reasons.

First, it is clear that acceptance of the appeal will not only protect the petitioner, but more than 100,000 New Hampshire citizens from "substantial and irreparable injury." Sup. Ct. R. 10(1)(h).

Second, while decided by the Washington Supreme Court in *Mahoney*, *see* discussion, *supra*, at 18, 23-24, this case presents significant issues of first impression in New Hampshire, and "present[s] the opportunity to decide, modify or clarify an issue of general importance in the administration of justice." Sup. Ct. R. 10(1)(h).

Finally, it is clear that "a substantial basis exists for a difference of opinion" on one or more of the questions presented." N.H. Sup. Ct. R. 10(1)(h). Both the PUC and EnergyNorth, have shown considerable conflict in their jurisdictional positions, and their "public interest" and standing analyses are not supported by the law discussed herein. Sup. Ct. R. 10(1)(h).

CONCLUSION

WHEREFORE, for the reasons expressed, the petitioner respectfully requests that this Honorable Court:

A. Vacate or reverse the PUC rulings complained of and order that the matter be rescheduled for a new hearing on the merits, after further proceedings which (i) allow consideration of the negatives of the NED pipeline and the submission of public comments and evidence on the matter and the "public interest" determination, and (ii) apply the proper "public interest" standard;

B. Order the PUC, in its decision resulting from the new hearing on the merits, to sufficiently discuss the rationale of its ultimate findings and conclusions concerning (i) the nexus between the PUC approval sought and FERC approval of the NED Pipeline, and (ii) matters submitted and fully considered or not considered respecting the NED Pipeline and the "public interest" determination, such that the general public has "an adequate basis

upon which to review its decision." *Petition of Support Enforcement Officers*, 147 N.H. 1, 9 (2002); R.S.A. 541-A:35, App. at 166; and

C. Grant such other and further relief as is just, reasonable, lawful and otherwise appropriate.

STATEMENT OF PRESERVATION OF ISSUES

Pursuant to Supreme Court Rule 10(1)(i), the petitioner hereby states that "[e]very issue specifically raised has been presented to the administrative agency and has been properly preserved for appellate review by a contemporaneous objection or, where appropriate, by a properly filed pleading."

CERTIFICATE OF COMPLIANCE

The petitioner hereby certifies that copies of the foregoing petition and accompanying appendix have, on this 21st day of December, 2015, been either hand delivered or sent by first class mail, postage prepaid, to the parties of record, and the Attorney General of the State of New Hampshire.

Richard M. Husband

Respectfully submitted,

The petitioner,

Richard M. Husband,

Dated: December 21, 2015

By:

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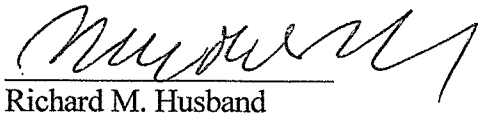
CERTIFICATE OF SERVICE

I, Richard M. Husband, Esquire, hereby certify that on the 21st day of December, 2015, I served copies of the foregoing and accompanying appendix on all of the counsel and parties of record identified on page 1 of this petition, and on the Attorney General of the State of New Hampshire, either by depositing the same in the United States mails, first class, postage prepaid, or by hand delivery.



Richard M. Husband