

**THE STATE OF NEW HAMPSHIRE**

**SUPREME COURT**

**2015 TERM**

**No. 2015-0729**

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

**MOTION FOR SUMMARY DISPOSITION**

NOW COMES Liberty Utilities (EnergyNorth Natural Gas) Corp. d/b/a Liberty Utilities, by its attorneys, Rath, Young and Pignatelli, P.C., and respectfully moves this Honorable Court to dismiss the Appeal Petition (the “Petition”) filed by Richard M. Husband (“Mr. Husband”). The Court should dismiss the Petition because Mr. Husband has no standing to appeal. Mr. Husband was not a party to the proceeding at the New Hampshire Public Utilities Commission (the “Commission”) from which he appeals and he has not suffered any injury in fact as a result of the Commission’s order. In support of this Motion, Liberty Utilities states as follows:

1. This case arises out of the Commission’s approval of a contract (the “Precedent Agreement”) between Liberty Utilities and Tennessee Gas Pipeline Company, LLC (“Tennessee”) in which Liberty Utilities will purchase capacity (the right to transport natural gas) on Tennessee’s gas pipeline from Wright, New York to Liberty Utilities’ gas distribution system near Nashua, New Hampshire (the “NED Pipeline”). The costs under the Precedent Agreement will be borne by Liberty Utilities’ customers, but not until the construction of the NED Pipeline is approved by the Federal Energy Regulatory Commission, Liberty Utilities

begins taking service from the NED Pipeline and the Commission approves a request by Liberty Utilities to include those costs in its rates. Appendix to Petition (the “Appendix”) at 24, 31, 41. The Company sought Commission pre-approval of the Precedent Agreement given the magnitude and length of the investment, which extends for twenty years. *Id.* at 70.

2. Mr. Husband, who resides in Litchfield, New Hampshire, is not a customer of the Company, and does not reside in a part of Litchfield to which the Company provides gas distribution service. *Id.* at 98. As a result, Mr. Husband will not be paying for the costs of the Precedent Agreement once they are included in the Company’s rates in the future.

3. Mr. Husband petitioned to intervene in the Commission case involving the Precedent Agreement only days before the final merits hearing, stating his interest in the proceeding as follows:

for the limited purpose of (1) objecting to any rescheduling of the July 22/23, 2015 hearing in this matter to July 21/22, 2015, as requested by a motion filed on July 15, 2015, (2) moving for reconsideration of any Commission order granting such rescheduling, and (3) otherwise contesting, through appeal, any unlawful or improper procedures undertaken by the Commission with respect to the scheduling of any proceedings in this matter, including the final hearing on the merits.

Supplemental Appendix at 1. Mr. Husband objected to the rescheduling of the hearings because he had previously obtained a permit from the City of Concord to protest “the subject matter of this proceeding, a natural gas transmission pipeline” in front of the Commission for the scheduled hearing days. *Id.* at 2. On July 21, 2015, Mr. Husband withdrew his petition to intervene stating that “[s]ince the Petition was filed, the PUC, of its own initiative and by commendable efforts, procured a new protest permit that allows for a protest on the date(s) of the rescheduled hearing at issue.” *Id.* at 10. The hearings in the case proceeded as scheduled, and at the July 21, 2015 hearing, Mr. Husband appeared and made public comments, stating that his

concern was that the NED Pipeline was “something that’s going to devastate our landscape, it’s going to carve up our towns, it poses safety risks, it takes private property from individuals, and correspondingly ruins their lives.” Appendix at 103. Mr. Husband also submitted four separate written comments to the Commission, all expressing his opinion that the NED pipeline should not be constructed. *Id.* at 105-120.

4. On October 2, 2015, the Commission issued Order 25,822 approving the Precedent Agreement subject to certain terms and conditions in a Stipulation and Settlement Agreement between the Commission’s Staff and Liberty Utilities. Appendix 24-32. In its Order, the Commission held that:

We do not undertake any review of the merits or the siting of the NED Pipeline. The Precedent Agreement is not effective unless the NED Pipeline is approved, constructed and providing service.

At this time, the NED Pipeline is still under review by FERC. 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. Consequently, we do not consider those siting issues in our review of the Precedent Agreement.

*Id.* at 24.

5. On November 2, 2015, Mr. Husband filed a motion for rehearing stating that he was:

...being directly affected by this proceeding: as an impacted citizen of the town of Litchfield, a community on the NED pipeline route, wherein the pipeline is planned to run near the movant’s property, through wetlands, the town’s drinking water aquifer, numerous wildlife and other environmentally sensitive areas, and the property of approximately 67 landowners – and will negatively affect all others, including the movant, by the general diminution of property values associated with the ‘fear factor’ and other concerns associated with a nearby pipeline (with many Litchfield citizens, including the movant, suffering further harm if the blasting associated with running the pipeline through the aquifer wherein the pond on which the movant lives negatively impacts the water table of the pond – more than a reasonable possibility with such blasting); as an impacted nature lover and resident of the State of New Hampshire, numerous times more negatively affected by the pipeline; as one who submitted public comments in this proceeding, which were improperly ignored, and is claiming standing and a legally protected interest and rights under R.S.A. Chapter 541-A and Puc 203.18, and a violation

of those rights, accordingly; as an interested person who has followed this proceeding for months, once petitioned to intervene (withdrawn), and attended all or a substantial parts of all three days of the final hearing on the merit in this matter.

*Id.* at 66. The Commission, in Order 25,843 (November 20, 2015), denied Mr. Husband's motion for rehearing on the basis that he lacked standing: "While we recognize that his [Mr. Husband's] interests in the siting of the NED Pipeline are important, they are not directly affected by our approval of EnergyNorth's contract for capacity with TGP. Accordingly, we deny Mr. Husband's motion for rehearing for lack of standing." *Id.* at 35.

6. On December 21, 2015 Mr. Husband filed the Petition alleging that he 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," Petition at 33, that his "**extensive participation in the PUC proceeding, alone, confers standing,**" *id.* at 34 (emphasis in the original), and the fact that "**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.**" *Id.* at 35 (emphasis in the original).

7. To have standing to appeal a decision of an administrative agency, the appellant must demonstrate that his rights "may be directly affected by the decision, *see* RSA 541:3 and :6, or in other words, that he has suffered or will suffer an injury in fact." *Appeal of Richards*, 134 N.H. 148, 154 (1991), cert denied, 502 U.S. 899 (omitting citations). An injury in fact occurs when the appellant has suffered a direct economic injury. *Id.* at 156. Direct economic injury exists where utility customers must pay increased rates as a result of a rate decision. *Id.* There is no direct economic injury as a result of increased utility rates that would be imposed during a future rate proceeding. *Appeal of Campaign for Ratepayers Rights*, 142 N.H. 629, 632 (1998)(holding that ratepayer group had no standing to appeal Commission approval of special

contracts because approval did not result in any immediate rate change); *see also Appeal of Stonyfield Farm, Inc.*, 159 N.H. 227, 231-2 (2009)(utility customers did not have standing to appeal Public Utilities Commission decision holding that Commission lacked authority to determine whether the installation of certain scrubber technology on power plant was in public interest because the case did not concern an appeal of a rate plan; any potential injury to the appellants would occur in the future in a subsequent rate proceeding).

8. In Order 25,822 (October 2, 2015), the Commission found that the Company's "proposed acquisition of the capacity contracted for in the Precedent Agreement is prudent and reasonable." Appendix at 31. The Order did not make any change in the Company's rates though the Commission acknowledged that "the decision of whether to approve the proposed arrangement between EnergyNorth and TGP is an important one involving a long-term commitment of substantial ratepayer dollars." *Id.* Thus, to the extent that the Order results in any alleged "injury in fact" or "direct economic injury," it can be only to customers of the utility. Mr. Husband is not and cannot be affected by the Order because he is not a customer of the Company.

9. Further, as the Commission observed in Order 25,822, the "Precedent Agreement is not effective unless the NED Pipeline is approved, constructed and providing service." *Id.* at 24. Importantly, approval to construct the pipeline will come from the Federal Energy Regulatory Commission, not the Commission order which Mr. Husband now appeals. As a result, the injuries that Mr. Husband alleges (relating to environmental damage from construction and operation of the pipeline) do not result from Commission Order 25,822 because the Commission has no role in approving the construction of the pipeline. Moreover, even if there were an environmental injury allegedly caused by the Commission's order (which there was not),

the injury claimed by Mr. Husband is not a direct injury to him, but rather in the nature of an injury that would affect the public in general, since Mr. Husband has conceded that the NED Pipeline “will not run through the petitioner’s property.” Petition at 36. Based on this well established law, Mr. Husband does not have standing to appeal the Commission’s determination.

10. Mr. Husband also argues that he has standing because he has a “fundamental ‘right to be heard’ on his public comments,” *id.* at 33, and because he participated “extensively” at the Commission proceeding. *Id.* at 34. Mr. Husband cites to Puc 203.08, which provides that “[p]ersons 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,” as support for his position. The fact that he filed comments with the Commission in the Precedent Agreement docket based on this rule does not convert him to someone who has suffered an “injury in fact” if those comments are not endorsed by the Commission.

11. The Court has already ruled on essentially this same issue in *Appeal of New Hampshire Right to Life*, 166 N.H. 308 (2014). In that case, the Court considered whether an organization that had filed a written complaint with the Board of Pharmacy alleging misconduct by a licensee, based on a state law provision allowing such a complaint, had a right of intervention in the licensure proceeding. The Court held that the “mere filing of a written complaint does not, as NHRTL urges, grant it a right to intervene in the investigatory or licensing processes of the Board.” *Id.* at 313. The Court also concluded that RSA 541-A:32:

...does not grant a person intervenor status merely because he or she files a complaint or letter expressing concerns as to some action of decision an administrative agency has under consideration. Rather, a person seeking to intervention must petition to intervene. Specifically, the APA requires a person seeking intervenor status to submit a petition that *specifically asserts that its rights and interests* may be affected by the proceeding. RSA 541-A:32,I(b). Here, NHRTL did not seek to intervene in the licensing proceeding, as it did nothing more than write letters opposing renewal by the Board of PPNE’s licenses. Thus, it did not attain the status of intervenor.

*Id.* (emphasis in the original).

12. In this case, Mr. Husband did file a petition to intervene, but chose to withdraw it. Thus, by his own election, he was not an intervenor. Mr. Husband cannot now maintain that because he chose to participate in the Commission proceeding through public comments that his participation rises to the level of being a “party” that is accorded standing to appeal under RSA 541:3. Moreover, he is not “an aggrieved person” under the Commission’s order, for the reasons cited *supra*. Mr. Husband is alleging nothing more than a “mere interest in a problem,” which is not cognizable for purposes of standing. *Appeal of Richards*, 134 N.H. 148, 156 citing *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972).

13. For the reasons stated above, Liberty Utilities requests that the Court summarily dismiss the Petition.

WHEREFORE, Liberty Utilities respectfully requests that this Honorable Court:

- A. Deny Mr. Husband’s Appeal Petition based on Mr. Husband’s lack of standing, and;
- B. Grant such other relief as it deems appropriate.

Respectfully submitted,

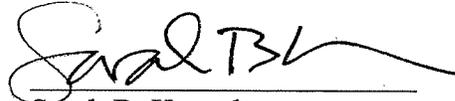
LIBERTY UTILITIES (ENERGYNORTH  
NATURAL GAS) CORP. D/B/A LIBERTY  
UTILITIES

By Its Attorneys,

RATH, YOUNG AND PIGNATELLI, P.C.

January 8, 2016

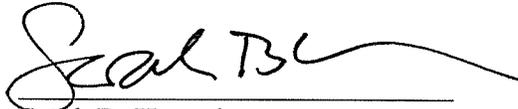
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Certification of Compliance

I hereby certify that on this 8th day of January, 2016, I have forwarded a copy of the foregoing Motion for Summary Disposition by first class mail, postage prepaid, to the parties of record, Mr. Husband, the Attorney General of the State of New Hampshire and the New Hampshire Public Utilities Commission.



Sarah B. Knowlton