

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

2016 TERM

No. 2016-0002

APPEAL OF PIPE LINE AWARENESS NETWORK FOR THE NORTHEAST, INC.

MOTION FOR SUMMARY DISPOSITION

NOW COMES Liberty Utilities (EnergyNorth Natural Gas) Corp. d/b/a Liberty Utilities (“Liberty Utilities” or the “Company”), by its attorneys, Rath, Young and Pignatelli, P.C., and respectfully moves this Honorable Court to dismiss the Appeal Petition (the “Petition”) filed by Pipe Line Awareness Network for the Northeast, Inc. (“PLAN”) regarding the New Hampshire Public Utilities Commission’s (the “Commission”) Order 25,845 denying PLAN’s motion for rehearing (the “Rehearing Order”). The Court should summarily dispose of the Petition for two reasons: (1) PLAN did not move for rehearing on one of the issues it raises and thus the issue has not been properly preserved for appellate review, and; (2) the Rehearing Order is supported by ample evidence in the record and reflects the Commission’s policy judgments on long-term gas procurement, all of which require deference by the Court. As a result, there is no substantial question of law presented and the Commission’s decision is neither unjust nor unreasonable. 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 166 and 173. The Company sought a determination from the Commission that its decision to enter into the Precedent Agreement was prudent and consistent with the public interest.

Appendix at 2.

2. Shortly after Liberty Utilities filed the Precedent Agreement with the Commission, the Commission issued an Order of Notice providing public notice of the following issues to be considered in the docket:

EnergyNorth's filing raises, inter alia, issues related to RSA 374:1 and 374:2 (public utilities to provide reasonably safe and adequate service at 'just and reasonable rates'); RSA 374:4 (Commission's duty to keep informed of the manner in which all public utilities in the state provide for safe and adequate service); RSA 374:7 (Commission's authority to investigate and ascertain the methods employed by public utilities to 'order all reasonable and just improvements and extensions in service or methods' to supply gas); and 378:7 (rates collected by a public utility for services rendered must be just and reasonable). These issues include whether EnergyNorth reasonably investigated and analyzed its long term supply requirements and the alternatives for satisfying those requirements, and whether EnergyNorth's entry into the Precedent Agreement with TGP for additional pipeline capacity is prudent, reasonable and otherwise consistent with the public interest.

Id. at 3.

3. PLAN petitioned to intervene in the proceeding, *see* Supplemental Appendix at 1-10, and in its intervention petition, stated that:

Liberty's financial analysis will be determinative in any assessment of 'best cost' and ultimately will be a significant factor in the development of rates charged to PLAN

members as customers of Liberty; therefore, the Commission's determination as to the reasonableness and prudence of the Precedent Agreement will have a *de facto* impact on the rights and interests of PLAN's members. Accordingly PLAN and its ratepayer members are directly and substantially affected by this proceeding and should be permitted to intervene in the Commission's review of Liberty's assertion that the Precedent Agreement presents the 'best cost' capacity option and is consistent with the public interest.

Supplemental Appendix at 6 (emphasis in the original). The Commission granted PLAN's petition to intervene stating that it was "...limit[ing] PLAN's participation to the interests of its EnergyNorth-customer members in the prudence, justness, and reasonableness of the Precedent Agreement and its associated costs, to EnergyNorth and its customers. " *Id.* at 14.

PLAN did not Preserve for Appeal Question 1 in the Petition Which Claims the Commission did not Have the Authority to Conduct a Prudence Review of the Precedent Agreement "at this time."

4. PLAN now seeks to appeal the Commission's decision approving the Precedent Agreement arguing that the "case presents questions regarding whether the PUC has statutory authority *at this time* to approve the prudence and other ratemaking implications of the Precedent Agreement." Petition at 8 (emphasis added). However, PLAN never raised on rehearing whether the Commission had the authority to determine prudence even though it was well aware that the very nature of the Commission's review was to determine the prudence of the contract. *Supra.*

5. When the Commission approved the Precedent Agreement in Order 25,822 (October 2, 2015), *the very first sentence* of the legal analysis in the order stated that this was a prudence review: "Our statutory review of the Precedent Agreement is limited to consideration of EnergyNorth's prudence in entering into the Precedent Agreement, and the reasonableness of the terms of the agreement." Appendix at 166. If PLAN thought the Commission had no legal authority to conduct a prudence review of the Precedent Agreement, it should have moved to

dismiss the case at its onset, instead of waiting to raise the issue for the first time when it appealed the Rehearing Order to the Court.

6. This is all the more confounding when one considers that PLAN's motion for rehearing did argue that the prudence review that the Commission conducted was not adequate. For example, PLAN argued that the Commission's review was not thorough enough based on alleged "fundamental deficiencies" in the Company's filing:

Given the fundamental deficiencies in the filing, the Commission erred in approving the Precedent Agreement and Settlement Agreement as a matter of law and in pre-approving the prudence and reasonableness of the contract... This case wholly failed to comply with the level of review required as part of any prudence determination. In contrast to the comprehensive review undertaken in DG 07-101, referenced in the Order as a precedent for the Commission's pre-approval of the long-term contract in this case), this case was woefully inadequate as set forth in Section II.a above. It failed to reasonably evaluate multiple alternatives, including LNG as a resource, and instead relied upon, among other things, undocumented assurances of future growth and future activities, e.g., expansion into Keene and the Southwest New Hampshire communities, future activities assumed to reduce excess gas capacity, and the closure of the propane facilities. The Commission's determination of prudence (an intentionally high legal standard), should be based upon known facts and a complete record, but as it stands it is not supported in this case as a matter of law given the inadequacies of the Company's filing and reliance upon future activities.

Appendix at 178-79. Yet PLAN's rehearing motion never raised the issue of whether the Commission could lawfully undertake the analysis in the first instance.

7. The purpose of the requirement for rehearing is to give the administrative agency a chance to correct any mistake it may have made. *Appeal of Hardy*, 154 N.H. 805, 811 (2007) ("administrative agencies should have a chance to correct their own alleged mistakes before time is spent appealing from them."). PLAN never gave the Commission that opportunity, and as a result, the Court should refuse to accept PLAN's first question presented for review.

8. Apparently concerned about this deficiency when making its preservation statement required by Supreme Court Rule 10(1)(i), PLAN argues that “[t]o the extent the Court finds that any issue was not explicitly raised, PLAN submits that either: (1) any remaining issues raised in this petition were implicitly raised in the motion for rehearing...(omitting citations); or (2) good cause exists to allow PLAN to specify additional grounds for appeal, *see* RSA 541:4.” Petition at 19-20.

9. There is nothing in PLAN’s motion for rehearing that implies that PLAN questioned the Commission’s underlying authority to conduct a prudence review. The Commission was clear from the day it opened the case in January 2015 and throughout the proceeding that it was reviewing the prudence of the Precedent Agreement. Any effort by PLAN to argue that it implicitly questioned this authority should not be convincing. PLAN also claims there is “good cause” for the Court to hear any issue not specifically raised, but offers no explanation for the basis of this good cause argument. The Court should reject PLAN’s after-the-fact attempt to broaden the case, particularly where there was explicit notice at the beginning of the case of the Commission’s intention to conduct a prudence review of the Precedent Agreement, and PLAN’s explicit acknowledgment of the nature of the review in its petition to intervene.

The Court Should Summarily Affirm the Case on the Remaining Issues Because They Do not Raise a Substantial Question of Law and the Commission’s Decision is Neither Unjust nor Unreasonable.

10. Pursuant to Supreme Court Rule 25, the Court should summarily affirm the Order because the Petition presents no substantial question of law, and because the case includes an opinion from the Commission that identifies and discusses the issues, and reaches the correct result. *See* Sup. Ct. R. 25(1). Further, PLAN’s Petition does not raise an issue in

which there is a substantial basis for a difference in opinion, a circumstance in which there would be irreparable injury, or a case which presents the opportunity to decide, modify or clarify an issue of general importance in the administration of justice. *See* Sup. Ct. R. 10(1)(h).

11. The issues raised by PLAN - that the Commission was persuaded by the testimony of some witnesses and not others, that it concluded that LNG was not a viable alternative long term supply to serve the Company's customers, and that the Precedent Agreement was the best option to meet customer needs - do not present substantial questions of law but rather seek to have the Court supplant its judgment for the Commission's in making important decisions about long term gas supply. In addition, each of the Commission's rulings challenged by PLAN is based on ample evidence in the record, and thus there is nothing unreasonable or unjust about the Commission's decision.

12. In reviewing an order from the Commission, the Court presumes that the Commission's findings of fact are prima facie lawful and reasonable. *Appeal of Northern New England Telephone Operations, LLC*, 165 N.H. 267, 270 (2013). PLAN acknowledges that "[t]he presumption of reasonableness afforded agency decisions by RSA 541:13 'will be overcome by a showing that *no* evidence was presented in the record to sustain the order.'" Petition at 14 (emphasis added). This Court has held that where the Commission is balancing competing economic interests, the Court will not supplant the Commission's balance of interests "with one more nearly to our liking," particularly given that the legislature "has entrusted such policy to the informed judgment of the PUC and not to the preference of reviewing courts." *Appeal of Northern New England Telephone Operations, LLC*, 165 N.H. at 270-71. Accordingly, this Court "give[s] the PUC's policy choices considerable deference." *Id.* at 271.

13. PLAN argues in question 2(a) in the Petition that the Commission's reliance on testimony by the Company as opposed to other witnesses was unreasonable and warrants reversal of the Rehearing Order. In support of this argument, PLAN relies heavily on the fact that a witness for the Commission Staff filed testimony early in the case in which she was critical of certain aspects of the Precedent Agreement. PLAN neglects to mention that the Staff witness, upon review of additional information provided by the Company during the pendency of the docket and as a result of modifications to the Precedent Agreement through a Stipulation and Settlement Agreement between the Staff and the Company, testified at length at the final hearing on the merits in favor of the Precedent Agreement. The Staff witness explained the basis for her position at the hearing, and why she concluded that the Precedent Agreement (as modified by the Stipulation and Settlement Agreement) was in the public interest, in the best interest of customers, and prudent for the Company to undertake. *See* Appendix at 28-32. The Commission was legally entitled to weigh that testimony, along with the Company's, against that of other witnesses, find it credible, and reach the conclusion that the Precedent Agreement was prudent and reasonable.

14. PLAN's arguments do not overcome the presumption of reasonableness accorded to the Rehearing Order, particularly given the extensive evidence relied on by the Commission in reaching its determination that the Precedent Agreement was prudent and reasonable. The Commission pointed out in its Rehearing Order the basis for its decision that the amount of capacity being procured was appropriate:

We disagree with PLAN that the record does not support our finding that EnergyNorth should procure pipeline capacity to support future demand growth....Planning for future load growth is always a central component of utility planning and a demand forecast is the foundation for a utility least cost integrated resource plan. Order at 25-26. We found EnergyNorth's estimates of increased demand credible and consistent with the last filed

2013 LCIRP. Order at 25-27. There is ample support in the record for our findings on future demand growth. *See, e.g.*, Exhibit 8 at 26, lines 2-6 and fn. 33 (accelerated reverse migration has occurred for several years now and is likely to continue based on volatile natural gas pricing arising from constrained pipeline capacity in New England); Tr. Day 1 at 52, lines 18-22 (since the filing of the Company's rebuttal, two or three additional capacity customers have returned to firm sales service and assigned capacity, with approximately at 200 Dth requirement on design day; the Company still has 14,000 Dth of design day capacity-exempt load that could migrate back to sales service and capacity assignment); *id.* at 54, lines 2-9 (the Company is in discussion with Concord Steam customers who may become sales and capacity-assigned customers.)(omitting footnote). We acknowledge that EnergyNorth's growth projections may not end up being perfect, but they are far from speculative.

Appendix at 219-20. The Commission also explained the basis for its conclusion that the alternatives to the NED Pipeline were more expensive:

PLAN's objection to the Concord Lateral estimates is not a new argument. Tr. Day 3 at 83, line 9 to 84, line 18. We found those estimates to be sufficiently reliable as a cost comparison to other supply alternatives. Order at 28. The cost estimates for upgrades to the Concord Lateral were prepared by TGP, the owner and operator of the Concord Lateral. Tr. Day 1 at 210, line 8 to 211, line 13, and at 212, lines 18-22 (Company witness testifies about initial and updated cost estimates for the Concord Lateral upgrade); Tr. Day 2 at 83, line 23 to 84, line 16 (Company witness testifies that the updated cost estimate for Concord Lateral upgrade exceeds the costs of the NED project 'all the way back to Marcellus'). The fact that PLAN disagrees with our conclusion does not render the evidence on the issue insufficient.

Id. at 218.

15. While PLAN still may not like the fact that the Commission found this evidence credible, that does not make the Commission's decision unjust or unreasonable. Effectively, PLAN asks the Court to replace its judgment for the Commission's on this very evidence, which the Court should decline to do. *Appeal of Northern New England Telephone Operations, LLC*, 165 N.H. at 270-71.

16. PLAN similarly argues that the Commission was wrong in its judgment that LNG was not a viable long term solution to the Company's need for capacity and thus did not need to be evaluated by the Company. PLAN claims, for example, that the Commission

committed legal error by concluding “without record support” that “the LNG global market is unstable and may compromise the reliability of EnergyNorth’s service to customers at least cost, particularly on design day or during a design season...” Petition at 15.

17. PLAN’s contention that there was no support in the record for this finding is incorrect. When PLAN raised this issue in its rehearing motion, the Commission pointed PLAN to the record on this issue that supported its decision:

Although PLAN disputes our findings that LNG supply is unstable, both as to supply and pricing due to global demand, we found the evidence presented on the issue credible. Order at 29; *see also* Tr. Day 1 at 62, lines 16-21 (LNG is a global commodity that sells to the highest bidder); *id.* at 61, line 16 to 63, line 1, and at 88, lines 7-17 (offshore LNG supplies available at Dracut are declining, lack of LNG ‘liquidity’ causes price spikes).

In addition, the Commission was not obliged to consider LNG as an alternative to pipeline capacity, and we disagree with PLAN and the OCA that our analysis was deficient or incorrect. Even if we had required consideration of LNG, the Company provided a sufficient explanation to support a finding that expansion of its existing LNG peaking capacity or the development of new LNG peaking capacity within its franchise is not an available option to meet its long-term design day needs. *See, e.g.*, Tr. Day 2 at 62, line 1, to 63, line 9 (EnergyNorth did not consider expansion of its existing LNG peaking capacity because of federal requirements for ‘vapor dispersion of LNG facilities and thermal radiation zones’ and the densely populated locations of the facilities); *id.* at 64, line 6; to 66, line 12 (EnergyNorth unaware of locations within its franchise to site a new LNG facility to meet long-term design day demand comparable to the Precedent Agreement capacity); *see also* Order at 8 and 29.

Appendix at 216-17. The Rehearing Order could not be more explicit about the record evidence supporting the claim and how the Commission weighed this evidence in making its determination as to why LNG is not a viable option for long term supply. As a result, PLAN’s claim that the Commission’s ruling was unsupported is not convincing, and does not meet the legal standard for acceptance of an appeal. Rather, it highlights why this case is so appropriate for summary affirmance.

18. In its last effort to attempt to convince the Court to replace its judgment for the Commission's, PLAN asserts that the "Commission mistakenly determined that the 'capacity cost associated with replacing the existing 50,000 Dth per day at Dracut is outweighed by the benefits associated with the capacity contracted for in the Precedent Agreement.'" Petition at 17. In essence, PLAN argues that the Commission weighed the evidence incorrectly. Based on *Appeal of Northern New England Telephone Operations, LLC*, 165 N.H. at 270, the Court should not accept this issue for review.

19. Both Commission Order 25,822 and the Rehearing Order clearly articulate the basis for the Commission's determination that purchase of capacity via the Precedent Agreement was a better option for customers than the existing capacity contract that required purchase of capacity at Dracut, Massachusetts. The Commission explained not only the basis in the record for its decision, but which evidence it found persuasive in reaching its conclusion:

...we found the testimony supporting the price volatility at Dracut credible. Order at 27-28; *see, e.g.*, Tr. Day 1 at 66, lines 4-10 (NED avoids Dracut, described as 'one of the highest price points in North America' for purchasing gas); Tr. Day 3 at 79, line 4 to 80, line 5 (PLAN witness agreed with EnergyNorth's witness's concerns about price spikes at Dracut, stating 'his point is certainly well taken that there's been a great deal of price volatility in New England the last several winters'); *id.* at 82, lines 10-13 (PLAN's witness testified the 'issue with supply at Dracut, in particular, and New England more generally, is largely an issue of price').

As PLAN noted in its motion, we also based our conclusions on other benefits of replacing the Dracut supply: (1) avoidance of supply constraints at Dracut, (2) increased reliability, (3) opportunity for a new lateral off West Nashua delivery point, and (4) avoidance of costly upgrades to the Concord Lateral. (omitting citations). Based on the evidence presented, the alternate supply provided by the Precedent Agreement appears to be a less expensive source of supply when compared to alternatives. Hearing Tr. Day 1 at 57, lines 2-7, and 177, lines 10-14 (115,000 on NED, ensures long-term reliability of supply at least cost); Tr. Day 2 at 83, line 23, to 84, line 16 (NED project less expensive than alternatives even without costs of Concord Lateral expansion.) Therefore, we reject PLAN's argument that we erred in our findings about the replacement of the existing Dracut capacity.

Appendix at 214. As the Commission explained, it approved the Precedent Agreement instead of continued purchases of capacity at Dracut based on a many reasons, such as price and the need for reliable gas supply. This is exactly the type of policy determination that the legislature has delegated to the Commission. *Appeal of Northern New England Telephone Operations, LLC*, 165 N.H. at 271. The fact that PLAN disagrees with the Commission’s findings does not make the Commission orders unjust or unreasonable, and does not create any substantial issue of law that warrants the Court’s consideration.

20. Finally, PLAN argues that the Court should accept its Petition because it “is the first one to test aspects of the manner in which the NED pipeline – and its attendant impact on the public interest – are addressed by the PUC.” Petition at 18. Simply put, PLAN argues that this case warrants review by this Court because of the nature of the underlying project (the NED Pipeline), not because of any substantial legal issue that is important to resolve. As explained *supra*, all of the issues raised by PLAN in its Petition have already been well established by this Court: that issues not raised on rehearing cannot be the subject matter of an appeal, *Appeal of Hardy*, 154 N.H. 805, 811 (2007); *see also, Appeal of Walsh*, 156 N.H. 347, 352 (2007); that decisions of administrative agencies will not be reversed where there is record support for the agency’s decision, *Appeal of Regenesis*, 156 N.H. 445, 451-54 (2007), citing *Appeal of Basani*, 149 N.H. 259, 261-62 (2003), and that the Court will not replace the agency’s judgment, when weighing the evidence of record, with its own. *Appeal of Northern New England Telephone Operations, LLC*, 165 N.H. at 270, citing *Appeal of Pennichuck Water Works*, 160 N.H. 18, 26 (2010). For the reasons stated above, Liberty Utilities requests that the Court summarily affirm the Rehearing Order.

WHEREFORE, Liberty Utilities respectfully requests that this Honorable Court:

- A. Summarily affirm Commission Order 25,845, and;
- B. Grant such other relief as it deems appropriate.

Respectfully submitted,

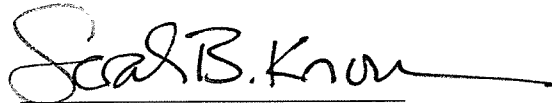
LIBERTY UTILITIES (ENERGYNORTH
NATURAL GAS) CORP. D/B/A LIBERTY
UTILITIES

By Its Attorneys,

RATH, YOUNG AND PIGNATELLI, P.C.

January 22, 2016

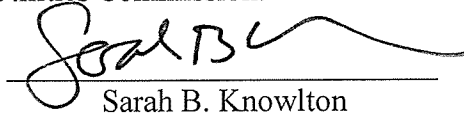
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Certification of Compliance

I hereby certify that on this 22nd 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, Attorneys Gates, Kanoff and Hossain, the Attorney General of the State of New Hampshire and the New Hampshire Public Utilities Commission.



Sarah B. Knowlton