

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DG 15-362

**LIBERTY UTILITIES (ENERGYNORTH NATURAL GAS) CORP.
d/b/a LIBERTY UTILITIES**

Petition for Franchise Approval in Pelham and Windham

Order Approving Settlement Agreement and Franchise Petition

ORDER NO. 25,987

February 8, 2017

APPEARANCES: Michael J. Sheehan, Esq., for Liberty Utilities (EnergyNorth Natural Gas) Corp. d/b/a Liberty Utilities; Mr. Jeffrey Gowan, Town of Pelham Planning Director, *pro se*; D. Maurice Kreis, Esq., the Consumer Advocate, on behalf of residential ratepayers; and Alexander F. Speidel, Esq., for the Staff of the New Hampshire Public Utilities Commission.

In this order, the Commission approves a franchise petition by Liberty to permit their provision of natural gas service in the towns of Pelham and Windham, and under the terms of a settlement agreement.

I. PROCEDURAL HISTORY

Liberty Utilities (EnergyNorth Natural Gas) Corp. d/b/a Liberty Utilities (“Liberty”) provides natural gas service to customers in various southern and central New Hampshire communities. Liberty does not provide natural gas service to customers in either Pelham or Windham at the present time. On August 31, 2015, Liberty filed a petition for approval of an expansion of its franchise to the towns of Pelham and Windham pursuant to RSA 374:22 and RSA 374:26. Liberty included the written testimony of Liberty personnel William Clark, Richard McDonald, and Steven Mullen in support of its petition. *See* Exh. 1.

On September 10, the Office of the Consumer Advocate (“OCA”) filed a letter notifying the Commission that it would participate on behalf of residential customers consistent with

RSA 363:28. The Town of Pelham filed a petition to intervene, on October 23, which was granted at the prehearing conference held on October 28, and later re-confirmed by Order No. 25,864 (February 4, 2016).

Following discovery by and discussions with Staff and OCA, Liberty filed the supplemental testimony of William Clark on April 15, 2016. *See* Exh. 2. Subsequently, on April 22, Stephen Frink, Assistant Director of the Commission's Gas and Water Division, filed testimony in opposition to Liberty's petition. *See* Exh. 3.

On August 15, 2016, Liberty filed a Settlement Agreement, signed by Staff, the OCA, and later, through a filing made on August 25, the Town of Pelham (*see* Exh. 5). The Settlement Agreement presented conditions under which the parties ("Settling Parties") would find Commission approval of Liberty's franchise petition supportable. *See* Exh. 4. The final hearing was scheduled for October 25, 2016. On October 17, the United Steelworkers of America Local 12012 ("Steelworkers") filed a petition to intervene.

The hearing was held on October 25. The Commission declined to rule on the intervention request of the Steelworkers, because the Steelworkers did not attend the hearing. *See* Transcript of October 25, 2016 Hearing (Tr.) at 6. Liberty filed a motion for confidential treatment of certain discovery responses, which was assented to by Staff on the day of the hearing.¹

The petition and subsequent docket filings, other than any information for which confidential treatment is requested of or granted by the Commission, are posted to the Commission's website at <http://www.puc.nh.gov/Regulatory/Docketbk/2015/15-362.html>.

¹ Liberty indicated that the OCA assented to the motion as well within its written filing, but some uncertainty exists regarding the continued existence of OCA's assent in light of the OCA's oral statements at hearing, which will be discussed further below.

II. THE FRANCHISE PETITION AND SETTLEMENT AGREEMENT

In its franchise petition, Liberty proposed to serve natural gas customers in Pelham and Windham under the existing terms and conditions of its tariff (with the exception of that portion of the tariff applicable to Liberty's Keene Division). Exh. 1 at 1. Liberty proposed to bring natural gas distribution service to the majority of the commercial corridor along State Routes 38 and 111, to municipal buildings and schools, and to approximately 2,500 residential customers through a multi-phase process. Exh. 1 at 1-2. Liberty discussed its interest in providing service to these two towns being stimulated by discussions with Pelham and Windham town officials. *Id.* at 2. Liberty described its anticipated physical-plant needs arising from its proposal, including: a main to be built under Beaver Creek in Pelham (to be subject to an RSA 371:17 license proceeding); an interconnection with the Tennessee Gas Pipeline ("TGP") Concord Lateral that serves existing Liberty customers in the Nashua-Manchester corridor; and distribution system infrastructure that would be built and maintained by Liberty's existing contractors subject to all existing federal and state safety/operations standards. *Id.*

The Settlement Agreement, as entered into by Liberty, Staff, the OCA, and the Town of Pelham recommends that the Commission grant Liberty the franchise rights to serve Pelham and Windham (Exh. 4 at 2 (Settlement Agreement provision II.A)) and delineates a number of conditions upon which that recommendation is based. Those conditions include:

1. Liberty would provide service to customers located in the Phase 1 build-out in Windham (as defined and discussed further below) under Liberty's standard distribution rates. *Id.*
2. Liberty would provide service to customers in Pelham under Liberty's Managed Expansion Plan (MEP) rates, as approved by Order No. 25,933 (August 4, 2016). *Id.*

3. Construction of either project would not commence unless the sum of the revenue from committed commercial and industrial (“C&I”) load for the first six years, plus the revenue from committed residential load for the first eight years, is at least 25 percent of the cost of construction, excluding overheads, for the project. *Id.*

4. Liberty would recover the costs incurred to construct a take station off of the TGP Concord Lateral in Pelham through its distribution rates as part of a rate case. These costs would be amortized over 10 years, including a pre-tax return, based on the Commission-approved capital structure and cost of capital for Liberty. *Id.* at 2-3.

5. As a “risk-sharing” provision Liberty would reduce its revenue deficiency in any rate case filed within five years of the in-service date of Phase 1 of the Pelham build-out as follows (as demonstrated in Appendix B of the Settlement Agreement): *Id.* at 3.

a. In the first rate case any revenue deficiency between the anticipated average annual revenue from Pelham customers over the three years following implementation of permanent rates, and the average annual revenue requirement over the same period of the Pelham construction costs and amortization of the Pelham TGP take station, would be reduced by one half. If a second rate case is filed within the five year period, the amount of the reduction to the revenue deficiency would be the full difference between the anticipated Pelham revenue requirement and projected revenues. *Id.*

b. For purposes of the risk-sharing provision, costs would include actual direct capital costs to date, the Pelham take station amortization expense, and projected direct capital costs for system reinforcement and customer growth to serve Pelham. *Id.*

c. For purposes of the risk-sharing provision, anticipated revenue would include committed revenue plus Estimated Annual Margin as defined in Liberty's main extension provision in its tariff. *Id.*

d. The risk-sharing provision would terminate if average annual revenue exceeds average annual revenue requirement. *Id.*

e. Liberty would file annual updated Pelham and Windham Discounted Cash Flow ("DCF") analyses in January of each year following the first full year of commencement of service until the projects achieve a positive annual return, but for no less than three years, and for no more than five years (as demonstrated in Appendix C of the Settlement Agreement). These annual reports would include the following:

i. A comparison of the original and updated DCF analyses;

ii. A comparison of the original annual projected residential and C&I customer conversions and gross profit margins, by fuel type, with the actual annual conversions and gross profit margin; and

iii. A Current Heating Fuel Value table comparing the annual average residential heating rate calculated using the Liberty bill impact schedule in its winter cost of gas filing and the cost of alternative fuels in effect at that time as reported by the New Hampshire Office of Energy and Planning. *Id.* at 4.

III. POSITIONS OF THE PARTIES AND STAFF REGARDING THE FRANCHISE PETITION AND SETTLEMENT AGREEMENT

A. Liberty

In its initial franchise petition filing, Liberty stated that it possessed the managerial, technical, and financial ability to provide gas service to Pelham and Windham, as evidenced by Liberty's current operational ability to serve approximately 90,000 other gas customers within

New Hampshire. Exh. 1 at 2-3. Liberty pointed to its existing customer service, sales and marketing, gas procurement, energy efficiency, regulatory, and finance operations as enabling Liberty to support service to customers from the proposed franchise territory. *Id.* Liberty also stated that the expansion of Liberty's franchise to Pelham and Windham would be in the public good (under the relevant statutory standards of RSA 374:22 and 374:26). Liberty argued that award of the requested franchise would: bring low-cost natural gas to two more municipalities within the State; enable businesses and individual homeowners to install higher-efficiency heating equipment; facilitate economic development in Pelham and Windham; and offer Liberty's physical plant potential reliability benefits from eventual interconnection of the new Pelham-Windham system to Liberty's existing Hudson, Londonderry, and Derry systems. *Id.* at 4.

Messrs. Clark, MacDonald, and Mullen of Liberty expanded on these themes within their supporting testimony. In particular, Mr. MacDonald provided details regarding the ability of Liberty's existing operational personnel and contractors to adequately support the construction and operational duties expected by Liberty to arise in connection with the franchise expansion. Exh. 1 at Bates Pages 19-25. Mr. Clark also delineated what would constitute "Phase 1" of the Liberty expansion program in each town, and the financial planning criteria applied by Liberty for the development of its expansion effort (Exh. 1 at Bates Pages 2-18). Mr. Clark provided financial and planning details related to a Service Line Agreement ("SLA") entered into with a Windham developer's project, which would, in Liberty's estimation, enhance the economic prospects for "Phase 1" of its franchise expansion considerably. Exh. 2.

At the hearing, Messrs. Clark and Mullen testified in support of the Settlement Agreement and Liberty's franchise petition generally. In particular, Mr. Clark provided updates

regarding customer commitments. Mr. Clark noted that the Town of Pelham and “two large anchor customers” had signed SLAs. Tr. at 17. According to Mr. Clark, this would further enhance the economic prospects of the Pelham expansion because the signed customer commitments represented 73 percent of the construction cost of the Phase 1 build-out, well above the 25 percent test required by provision II.C of the Settlement Agreement. Tr. at 17-18. Mr. Clark further noted that for Windham, the estimated construction cost for the first year of build-out was \$1,236,610, and that Liberty had signed SLAs with a Windham developer that totaled \$1,756,800. Tr. at 18.

Messrs. Clark and Mullen explained how the “risk-sharing” and revenue-requirement terms of the Settlement Agreement would work in practice. They also explained several of the schedules provided with Liberty’s petition materials, the Settlement Agreement, and pre-filed testimony. Tr. at 14-20; 41-48; 51-57. Mr. Clark testified that Liberty plans to make expansion decisions in its service territories using a computer data module, the Strategic Intelligence Management System, provided by ICF International. Tr. at 42-46. Mr. Clark opined that Staff’s approach of having a DCF analysis provided to the Commission as part of its review of major expansion projects of more than \$1 million in capital costs was the correct one. Tr. at 34. In summation, Liberty requested that the Commission grant Liberty the right to serve Pelham and Windham in their entirety. Tr. at 65.

B. OCA

The OCA signed the Settlement Agreement. The OCA opined that Commission approval of the Settlement Agreement, and Liberty’s related franchise petition for Pelham and Windham, would be in the public interest. Tr. at 59-61.

C. Pelham

The Town of Pelham also signed the Settlement Agreement. The Town's Planning Director, Mr. Jeff Gowan, testified that Pelham is a growing community with approximately 13,000 residents, with around 100 homes being built per year. Tr. at 58. Mr. Gowan noted frustration among Pelham's residents and municipal leadership that there is no natural gas service available even though the TGP Concord Lateral passes through Pelham. Tr. at 58-59. Mr. Gowan also expressed the importance of broader energy availability to Pelham's economic development plans. He testified that the Pelham Board of Selectmen voted unanimously to support the Settlement Agreement. Tr. at 59.

D. Staff

Mr. Frink originally recommended that the Commission deny Liberty's petition. Exh. 3. Staff's opposition centered around Liberty's failure to include signed SLAs and a DCF analysis with its petition to justify Liberty's revenue projections and the economic viability of the proposed expansion Exh. 3 at 1-4. Mr. Frink stated that these approaches were necessary to avoid a cross-subsidization of Pelham and Windham customers by existing ratepayers on the Liberty system, and to properly manage what could be a very significant financial risk. Exh. 3 at 4-18. Mr. Frink also challenged Liberty's decision not to include the estimated \$1.25 million cost of a city gate/take station on the TGP Concord Lateral in its financial projections as unreasonable. Exh. 3 at 3-4; 8-12.

Staff signed the Settlement Agreement and Mr. Frink testified in favor of the settlement at hearing. Mr. Frink testified that, with the terms of the Settlement Agreement and related developments reported on by Liberty, Staff's concerns had been satisfied. On that basis, Mr. Frink opined that granting the franchise area of Pelham and Windham would be in the public

interest. Tr. at 22-23. Mr. Frink also testified in support of the Settlement Agreement's requirements related to annual reporting (for updates to the Liberty DCF analysis for each town). Mr. Frink further recommended that the Commission require the schedules presented in Appendix C of the Settlement Agreement to be updated in the future to provide new information soon to be available to Liberty as a result of its planned use of the Strategic Intelligence Management System computer module. Tr. at 24-30.

IV. MOTION FOR CONFIDENTIAL TREATMENT

As referenced above, on October 25, 2016, Liberty filed a motion for protective order and confidential treatment. (Liberty's motion referenced Staff's concurrence, and that of the OCA. However, for the purposes of this Order, in light of certain statements made by the OCA at the hearing, OCA's concurrence is found to have been constructively withdrawn from Liberty's motion. *See* Tr. at 60-61). Liberty asked the Commission to protect certain information that Liberty produced to Staff in discovery. Liberty contended that the specific discovery-response schedules for which it sought confidential treatment included confidential, commercially sensitive information regarding the identity of potential Liberty anchor customers, and specific and commercially sensitive data regarding certain potential customers' fuel usage. Furthermore, Liberty contended that certain elements of this information implicated commercially-sensitive pricing information provided to it by TGP in connection with the Pelham take station planning effort. Liberty stated that its potential customers, TGP, and by implication, Liberty, have a privacy interest in the information as it constitutes "confidential, commercial, or financial information" within the meaning of RSA 91-A:5, and that disclosure of this information would violate the privacy interests of these entities.

V. COMMISSION ANALYSIS

A. Franchise Petition and Settlement Agreement

We encourage parties to settle issues through negotiation and compromise because it is an opportunity for creative problem solving, allows the parties to reach a result in line with their expectations, and is often a better alternative to litigation. *Concord Steam Corporation*, Order No. 25,966 (November 10, 2016); *citing Liberty Utilities (EnergyNorth Natural Gas) Corp. d/b/a Liberty Utilities*, Order No. 25,797 (June 26, 2015), and *Granite State Electric Co.*, Order No. 23,966 at 10 (May 8, 2002); *see* RSA 541-A:31, V(a) (“informal disposition may be made of any contested case...by stipulation [or] agreed settlement.”) Nonetheless, we must independently determine that the result comports with “applicable standards.” Order No. 25,797 at 11 (*citing EnergyNorth Natural Gas, Inc. d/b/a National Grid NH*, Order No. 24,972 at 48 (May 29, 2009) (“we must scrutinize settlement agreements thoroughly regardless of whether a party appears at hearing to raise objections”)). We conduct this analysis through a transparent process to ensure that a just and reasonable result has been reached. *Id.*; *see* N.H. Code Admin. Rules Puc 203.20(b) (the Commission shall approve settlements that are “just and reasonable and serve the public interest”).

The “applicable standards” governing the proposed settlement in this franchise petition case are those of RSA 374:22, I and 374:26. The first of these statutory provisions provides that:

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

RSA 374:22, I. Further, pursuant to RSA 374:26:

The Commission shall grant such permission whenever it shall, after due hearing, find that such engaging in business, construction, or exercise of right, privilege, or franchise would be for the public good, and not otherwise; and may prescribe such terms and conditions for the exercise of the privilege granted under such permission as it shall consider for the public interest.

Exercise of franchise rights by Liberty in Pelham and Windham must be for the public good, and the conditions pertaining thereto must be considered to be in the public interest. In examining whether a franchise petition is in the public good, we consider whether the franchise applicant has the financial, managerial, and operational resources to successfully and safely serve customers in the intended territory; whether the financial projections used to economically justify the franchise petition are reasonable and in conformance with accepted financial, accounting, and business standards; in the case of existing New Hampshire public utilities, whether the franchise expansion would pose an unacceptable risk of cross-subsidization or other financial risk to existing utility ratepayers; and in general, whether the franchise petition's approval would offer benefits to the public. *See Lakes Region Water Co., Inc.*, Order No. 25,964 at 3-4 (November 10, 2016) (citing *Lower Bartlett Water Precinct*, 85 NH PUC 635, 641 (2000)); *see also Northern Utilities, Inc.*, Order No. 25,700 (August 1, 2014); *Hampstead Area Water Company*, Order No. 25,672 (May 30, 2014); *Verizon New England, Inc.*, Order No. 24,823 (February 25, 2008); *EnergyNorth Natural Gas, Inc.*, 85 NH PUC 71, 71-72 (2000).

In engaging in this analysis, we are informed by settled precedent against cross-subsidization. For instance:

Not infrequently, utilities, in their desire to please the public, make extensions which do not pay and cannot be made to pay because there is not business enough in the territory served. Such extensions are not in the public interest because they must be carried by increasing the rates upon other consumers. Before utilities make extensions into new territory they should be reasonably certain that the new business to be obtained thereby can be made to pay, at least within a reasonable time.

C. Julian Tuthill Et Al. v. Plaistow Electric Light & Power Company, 8 N.H.P.S.C. 509, 510 (1922). Also, we have long endorsed the approach that the DCF methodology is the appropriate framework in which to evaluate the financial viability of large system expansion projects. *See Northern Utilities, Inc.*, Order No. 22,297, 81 N.H.P.U.C. 662, 664 (1996). With these principles in mind, we find the Settlement Agreement in the public interest, and the expansion of Liberty's franchise into Pelham and Windham as for the public good.

We are satisfied that the reformation of the proposed terms of Liberty's franchise expansion effectuated by the Settlement Agreement adequately address the initial concerns of Staff presented in the written testimony of Mr. Frink. The reformation also offers benefits to Liberty's existing ratepayers. In particular, the annual reporting and "risk-shifting" requirements of the Settlement Agreement serve as a check against over-expenditure of capital investment funds, which could lead to cross-subsidization of expansion projects in Pelham and Windham by existing Liberty ratepayers. We also concur with Staff, that Liberty should, and order that Liberty will provide annual updates of the "Appendix C" schedules presented with the Settlement Agreement, as informed by Liberty's Strategic Intelligence Management System data outputs furnished by ICF International. We also find the DCF analysis methodologies presented in the Settlement Agreement, and assented to by the Settling Parties, to be reasonable and appropriate.

We find that Liberty possesses the financial, managerial, and operational resources to successfully serve customers in Pelham and Windham, as demonstrated by its ongoing operations in other parts of New Hampshire. However, this is a finding specific to this petition, and is dependent upon the current position of Liberty. It does not authorize future franchise expansions. Furthermore, this finding is embedded within the ongoing safety- and operations-

related inspection and enforcement authority of the Commission, and all other responsible local, state, and federal agencies, and does not override such authority.

Having found the results comport with existing standards, we approve the terms of the Settlement Agreement, and also grant Liberty the franchise area of the Towns of Pelham and Windham, in their entirety.

B. Motion for Confidential Treatment

The New Hampshire Supreme Court and the Commission apply a three-step balancing test to determine whether a document, or the information contained within it, falls within the scope of RSA 91-A:5, IV. *Lambert v. Belknap County Convention*, 157 N.H. 375, 382-83 (2008); *Aquarion Water Company of New Hampshire, Inc.*, Order No. 25,863 at 2 (February 1, 2016) (citation omitted). Under the balancing test, the Commission first inquires whether the information involves a privacy interest and then asks if there is a public interest in disclosure. Order No. 25,863 at 2. Finally, the Commission balances those competing interests and decides whether disclosure is appropriate. *Id.* When the information involves a privacy interest, disclosure should inform the public of the conduct and activities of its government; if the information does not serve that purpose, disclosure is not warranted. *Id.*

The Commission routinely protects information related to commercial customers' fuel pricing and usage profile information, and pricing information related to pipeline contracting. *See, e.g., Northern Utilities, Inc.*, Order No. 25,700 (August 1, 2014) and *Northern Utilities, Inc.*, Order No. 25,330 (February 6, 2012) (protecting pricing and fuel-usage data of commercial gas-utility customers); *see also Liberty Utilities (EnergyNorth Natural Gas) Corp. d/b/a Liberty Utilities*, Order No. 25,861 (January 22, 2016) (protecting TGP-related pricing information filed by Liberty with the Commission). The Commission has also found that commercial customers'

identities, in the context of their dealings with a gas utility, may be protected if their privacy interests warrant it, for instance, when disclosure would harm those customers' competitive positions. *See EnergyNorth Natural Gas, Inc. d/b/a National Grid NH*, Order No. 25,208 at 5-7 (March 23, 2011).

We agree with Liberty that the information contained within the subject discovery responses constitutes confidential, commercial information under RSA 91-A:5, IV. While the public may have some interest in the information (e.g., to aid in its understanding of the Commission's analysis in this proceeding), we find that the public's interest is outweighed by Liberty's, TGP's, and its potential customers' privacy interests, and that disclosure of this information could result in commercial harm. In the case of the identities of potential customers, disclosure could harm the competitive position of Liberty insofar as competing energy suppliers could attempt to "poach" these potentially valuable anchor, and non-anchor customers. Accordingly, we will grant the motion for protective treatment.

Consistent with past practice, the protective treatment provisions of this Order are subject to the ongoing authority of the Commission, on its own motion or on the motion of Staff, any party, or other member of the public, to reconsider this protective order in light of RSA 91-A, should circumstances so warrant.

Based upon the foregoing, it is hereby

ORDERED, that the proposed franchise expansion for the towns of Pelham and Windham by Liberty Utilities (EnergyNorth Natural Gas) Corp. d/b/a Liberty Utilities, and the Settlement Agreement, are APPROVED subject to the terms and conditions delineated therein and the terms of this Order, including all reporting requirements and annual updates of

“Appendix C” schedules of the Settlement Agreement, as informed by the data outputs of Liberty’s Strategic Intelligence Management System; and it is

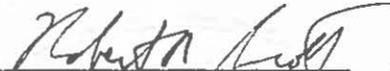
FURTHER ORDERED, that the Company update its Gas Tariff appropriately to reflect this expansion of its franchise; and it is

FURTHER ORDERED, that Liberty’s motion for protective treatment is GRANTED.

By order of the Public Utilities Commission of New Hampshire this eighth day of February, 2017.



Martin P. Honigberg
Chairman

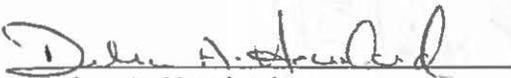


Robert R. Scott
Commissioner



Kathryn M. Bailey
Commissioner

Attested by:



Debra A. Howland
Executive Director

SERVICE LIST - EMAIL ADDRESSES- DOCKET RELATED

Pursuant to N.H. Admin Rule Puc 203.11 (a) (1): Serve an electronic copy on each person identified on the service list.

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