

BEFORE THE NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION

Re. Liberty Utilities (EnergyNorth Natural Gas) Corp.

Docket No. DG 16-852

**OBJECTION TO LIBERTY UTILITIES' MOTION FOR PROTECTIVE ORDER AND  
CONFIDENTIAL TREATMENT**

NOW COME Ariel Arwen and Jonathan Chaffee, intervenors with full party status in the above-captioned proceeding, and object to the Motion for Protective Order and Confidential Treatment (Motion) filed by Liberty Utilities ("Liberty" or "Company"). In support of this objection we make the following statements:

**A. Introduction**

Liberty has failed to meet the requirement in Puc 203.08(b)(3) for a detailed explanation of the basis for confidential treatment. Moreover, in at least several instances, its assertions of harm that would result in disclosure demonstrably fail to meet the burden of proof for qualifying for any exemption from disclosure, as provided by RSA 91A:5, IV. Much of the data that they claim as non-public, proprietary or commercially sensitive is in the public record, and in fact some of it appears in Liberty's testimony in this docket and in a docket previously before the Commission. Some information for which Liberty claims confidentiality, ostensibly to protect a potential customer, has been previously disclosed to the public by the very same potential customer. Some information is being withheld by Liberty simply because it was provided by a third party contractor based on an unsubstantiated claim that disclosure would cause financial harm. There is also the alarming claim that disclosure of data relating to a "fatal flaw" analysis "may publicize the Company's planned infrastructure".

**B. Failure to meet requirements of Puc 203.08(b)(3) and RSA 91A:5, IV**

Liberty fails to meet the requirement in Puc 203.08(b)(3) for a detailed explanation of the basis for confidential treatment. That requirement is obviously designed to further the Commission's need to follow the instructions of the New Hampshire Supreme Court to interpret applicable provisions of RSA 91A, the Right to Know Law, "with a view to providing the utmost information in order to best effectuate the statutory and constitutional objective of facilitating access to all public documents." *Professional Firefighters of New Hampshire v. New Hampshire Local Government Center*, 163 N.H. 613, 614 (2012). "The burden of proving whether information is confidential rests with the party seeking to avoid disclosure." *Id.* Self-serving "because we said so" claims of competitive harm do not meet this burden – particularly, when the question is whether the information in question qualifies for the RSA 91A:5, IV disclosure exemption for "confidential, commercial or financial information." See *Union Leader Corp. v. New Hampshire Housing Finance Authority*, 142 N.H. 540, 55253 (1997) ("An expansive construction of these terms must be avoided, since to do otherwise would allow[ ] the

exemption to swallow the rule and is inconsistent with the purposes and objectives of [RSA chapter 91-A.]”(citations omitted).

The “Specific Claims of Confidentiality” in Liberty’s Motion fail because

- (a) They do not provide evidence in support of a “detailed statement of the harm that would result from disclosure”; and
- (b) We have provided evidence in Section C of this Objection that at least some of the information Liberty is seeking to protect is already in the public record.

### **C. Examples of Liberty’s claims lacking merit**

On Bates page 067, Attachment WJC-8, the Company claims confidential treatment for “ICF created table showing prospect count and annual expected load in Hanover and Lebanon”, based on its “Third Party” category. Liberty claims that “Disclosure of ICF work product could cause financial harm as it is proprietary, non-public, and commercially sensitive”. The table appears to contain the number of potential residential and commercial customers in Hanover, Lebanon and West Lebanon. For each category there appear to be usage metrics and annual load.

The number of potential customers is not non-public. The number of residential units in Hanover and Lebanon are matters of public record. NH Employment Security<sup>1</sup>. In fact, that information appears in Appendices III-1 and III-2 of Liberty’s filing in this docket. The number of commercial properties is also a matter of public record. Liberty may believe that computing the sum of the numbers qualifies as a protected work product but surely that trivializes the concept. The information is neither proprietary nor non-public nor commercially sensitive. Likewise it is unreasonable to conclude that disclosure of Liberty’s estimate of the cumulative heat load for housing units in Lebanon and Hanover would harm the Company. The fact that Liberty may have used proprietary software to compute total loads does not make the results proprietary, non-public or commercially sensitive.

On bates page 080, Attachment WJC-8, Liberty claims confidential treatment for “Table of estimated load, current fuel, and status of negotiations with potential anchor customers” (Table), based on its “Customer” and “LU Data” categories. Liberty claims that “Disclosure may violate the customers’ privacy, and may cause the Company economic harm”. Liberty has redacted all of the usage data and identification of “current fuel” for each of ten potential anchor customers. This claim fails the test of Puc 203.08(b)(3) if for no other reason than that much of the data in the Table has been previously disclosed by the potential customers. In some cases the data have been disclosed in Liberty testimony or otherwise appears in the public record. Take for example Dartmouth College. The College itself has disclosed that it uses approximately 3.8 million gallons of #6 fuel oil annually. Dartmouth College Sustainability Office<sup>2</sup>. That is approximately 574,000 ADTH. James

---

<sup>1</sup> <https://www.nhes.nh.gov/elmi/products/cp/profiles-htm/lebanon.htm> and <https://www.nhes.nh.gov/elmi/products/cp/profiles-htm/hanover.htm>

<sup>2</sup> <http://sustainability.dartmouth.edu/power/>

Campion, President of Valley Green Natural Gas, filed testimony before the Commission that included a heating load estimate for the college that was quite close to that figure. DG 15-155 Pre-filed Direct Testimony of James Campion.

It is known that Dartmouth Hitchcock Medical Center (DHMC) uses compressed natural gas (CNG). Mr. Campion gave a figure for DHMC's gas usage that, when converted to the same units that Liberty uses in the redacted table, comes out to approximately 144,000 ADTH. DG 15-155 Pre-filed Direct Testimony of James Campion. Liberty has redacted both DHMC's fuel type and usage, data which is already in the public record.

On bates page 52 Attachment WJC-5, Liberty identifies Kleen Laundry as a user of liquefied natural gas (LNG). Yet, absurdly, on bates page 80 Liberty redacts the identification of Kleen's current fuel from the Table. In the Motion Liberty claims that disclosure of the redacted information, which it provided earlier in the attachment, "may violate the customer's privacy and may cause the Company economic harm". Likewise, we know from Attachment WJC-5 the amount of propane Kleen used before converting to LNG. Even though it is a trivial calculation to estimate how much LNG Kleen now uses, Liberty claims the information should be covered by a protective order. In this case again, Liberty fails to meet the burden of proof established in Professional Firefighters of New Hampshire v. New Hampshire Local Government Center, 163 N.H. 613, 614 (2012).

We know that Pike Industries uses CNG. Here again Liberty redacts the identification of Pike's current fuel in an appendix to William Clark's testimony, yet Mr. Clark's testimony in this docket identifies Pike as a user of CNG. Direct Testimony of William J. Clark. The redaction is all the more troubling because the text immediately below the table says: "As shown in the table above, two of these customers are already utilizing some form of delivered natural gas", when in fact the number is three. Attachment WJC-8. There is no way for somebody looking only at the redacted appendix to tell that there are inconsistencies between the Table and the narrative that describes it.

Thus we are able, from publicly available information, to fill in Liberty's redacted table to account for 769,000 ADTH of the 1,199,000 ADTH that Liberty claims is the potential load. We have accounted for approximately two thirds of the purported potential load.

<b>Potential customers</b>	<b>ADTH</b>	<b>Current Fuel</b>
Dartmouth College	552,000	#6 fuel oil
DHMC	144,000	CNG
Kleen Laundry	73,000	LNG
Pike Industries		CNG
Alice Peck Hospital		propane
Hypertherm		various
Timken		propane
Upper Valley Plaza		propane

Valley Square Shopping		propane
Centerra Business Park		propane

Liberty claims in its Motion that the “harm that would result from disclosure” of “an indicative price range” offered to Dartmouth College several years ago because “disclosure could jeopardize the Company’s ability to negotiate with potential anchor customers to the detriment of all Liberty Utilities customers.” This unsubstantiated claim fails to meet the burden of proof to qualify for the RSA 91A:5, IV disclosure exemption for “confidential, commercial or financial information.”

Perhaps the most disturbing of Liberty’s claims of confidentiality is for the table on bates page 083 “showing the design basis for Sanborn Head ‘fatal flaw’ analysis”. Liberty makes the unsubstantiated claim that “disclosure of Sanborn Head work product could cause financial harm as it is proprietary, non-public, and commercially sensitive.” Liberty also claims that it would suffer harm because “disclosure may publicize the Company’s planned infrastructure.” This justification is simply specious.

We are pro se citizen intervenors who lack the resources to exhaustively dismantle each of Liberty’s unsubstantiated claims for confidentiality. We respectfully remind the Commission that the burden of proof rests with the party seeking to avoid disclosure.

Liberty is asking the State to grant it a franchise to distribute gas in Lebanon and Hanover, with a guaranteed rate of return on investment. There will be no competitors if Liberty is granted the franchise. There is no competitive advantage to be gained or lost by the disclosure of rates offered. The public ought to expect a different standard of transparency from a company that is asking the State to grant it an exclusive monopoly than would be expected from a company forced to compete for customers in a free market.

**D. Pursuing a protective agreement is inappropriate in these circumstances**

We understand that we could request disclosure of some of the redacted material to us as intervenors pursuant to a protective non-disclosure agreement with Liberty. However, that avenue is not appropriate in these circumstances for at least two reasons.

First, as we have demonstrated, much of the data Liberty claims as confidential is already in the public record. Were we to have access to information only pursuant to a non-disclosure agreement with Liberty, we would be in violation of that agreement if we were to “disclose” information that is already public. That is an unacceptable situation.

Second, we are not simply pro se intervenors in this docket. We are also citizens of Lebanon. While we have the particular interests articulated in our petition to intervene, we also share the same generalized interests as any other citizen who is willing to scrutinize the workings of government. When information that is in the public domain is used in the Commission’s proceedings, we, the public, should be able to compare Liberty’s assertions to that public information.

We acknowledge that we lack the technical competence to evaluate all of the information for which that Liberty seeks a protective order, including a “fatal flaw” analysis specific to Liberty’s site. However, the community has a compelling interest in the safety of public infrastructure. Additionally, it is possible that the community has the collective resources to conduct an independent analysis. Without access to the information that Liberty wants to keep from the public, the community will have no opportunity to make an evaluation of the quality of either Liberty’s analysis or the outcome of the Commission’s proceedings.

### **E. The public interest**

The public has shown considerable interest in Liberty’s petition for a gas franchise in Lebanon and Hanover, as evidenced by several forums, one with about 130 people in attendance; a vigil outside of Liberty’s West Lebanon field office attended by more than 40 people; letters to the editor; and an op-ed column published in the Valley News.

When information that is in the public domain is used in the Commission’s proceedings, the public should be able to compare Liberty’s assertions to that public information. We can not do that if Liberty’s assertions are taken at face value and public information is treated as “proprietary”.

For example, the public’s interest in full disclosure of a fatal flaw analysis surely outweighs any conceivable harm Liberty might suffer because “disclosure may publicize the Company’s planned infrastructure”, which will be located in a densely developed and heavily trafficked district in West Lebanon.

### **F. Conclusion**

We are able to demonstrate that Liberty has no legitimate claim of harm from disclosure of some of the information for which it seeks a protective order, because we already know the information. Furthermore, Liberty has failed to meet the burden of proof for the RSA 91A:5, IV disclosure exemption. However, there are redactions whose nature we can not determine. In other words, we don’t know what we don’t know. We believe that Liberty has demonstrated, either through carelessness or negligence, a lack of credibility sufficient to require full disclosure of the redacted information.

We therefore respectfully request that the Commission

1. Deny Liberty’s motion in its entirety.

In the alternative:

2. Require Liberty to provide revised filings with redactions removed from information that is in the public domain or which can be readily derived from publicly available data; and

3. Provide concrete evidence that it has met the burden of proof for the RSA 91A:5, IV disclosure exemption.

RESPECTFULLY SUBMITTED this 3rd day of April, 2017.

*Ariel Arwen*

---

Ariel Arwen  
4 Dana St.  
Apt. F  
W. Lebanon, NH 03784  
arielarwen@gmail.com  
(603) 443-3561

151

---

Jonathan Chaffee  
21 Highland Avenue  
W. Lebanon, NH 03784  
jonathan.chaffee@valley.net  
(603) 298-7623

**CERTIFICATE OF SERVICE**

I hereby certify that on April 3, 2017, I served an electronic copy of this filing with each person identified on the Commission's service list for Docket No. DG 16-852 pursuant to Rule Puc 203.02(a)

Ariel Arwen

**Ariel Arwen**