BEFORE THE NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

Re: Liberty Utilities (EnergyNorth Natural Gas) Corp.

d/b/a Liberty Utilities - Keene Division

Docket No. DG 17-068

REPLY BRIEF OF INTERVENOR, TERRY CLARK

Intervenor, Terry Clark ("Clark"), by and through undersigned counsel, Richard M. Husband, Esquire, hereby respectfully submits his reply brief to the Public Utilities Commission ("Commission") pursuant to the Order of Notice and approved schedule for this proceeding.

I. INTRODUCTION

On May 1, 2018, Clark and the petitioner, Liberty Utilities (EnergyNorth Natural Gas) Corp. d/b/a Liberty Utilities -- Keene Division ("Liberty"), submitted their initial briefs pursuant to the Order of Notice and approved schedule for this proceeding. The Order of Notice followed Commission Order No. 26,087 (Dec. 18, 2017), which indicated that the briefs would address "the question of whether [Liberty] has the legal authority to offer CNG/LNG service in its existing City of Keene franchise area," in light of arguments already raised in Clark's motion for rehearing, or as might be raised by Clark or other interested persons in a reopened proceeding. *Id.* at 5. In relevant part, the order provides:

> "… [W]e will afford Mr. Clark and other interested persons the opportunity to present their legal arguments to the Commission in this matter.
>
> Therefore, we hereby reopen the record and we will schedule a Status Conference for public participation in early 2018 through an Order of Notice to be issued shortly. The Order of Notice will provide details as to how interested parties can submit legal briefs and additional public comments **on the question of whether the Company has the legal authority to offer CNG/LNG service in its existing City of Keene franchise area.**
>
> **We will not address the various arguments presented by Mr. Clark** related to purported technical defects with the Petition, matters in connection with Site Evaluation Committee jurisdiction, or the supposed violation of the public interest by our grant of the Company's initial Petition for Declaratory Ruling. In

> light of Mr. Clark's prayer for relief, which seeks an opportunity to be heard, and our decision to reopen the proceeding, we find that it is unnecessary to address those arguments **at this time.**"

Id. emphasis added).

Consistently, the Order of Notice affords such briefing, with an opportunity for the parties to state their positions with respect to the same:

> "The Commission determined to afford Mr. Clark and any other person with a direct interest in the outcome of the proceeding the opportunity to present legal arguments in the form of legal briefs …
>
> ORDERED, that a Prehearing Conference, pursuant to N.H. Code Admin. Rules Puc 203.15, be held before the Commission located at 21 S. Fruit St., Suite 10, Concord, New Hampshire on April 6, 2018 at 10:00 a.m., at which each party will provide a preliminary statement of its position with regard to the petition …"

Id. at 2(emphasis added).

At the prehearing conference held on April 6, 2018 pursuant to the Order of Notice, Clark noted that his position was detailed in his filings in both this and Commission Docket No. DG 17-152 (the "LCIRP case"), but it was also discussed at length, including his contentions that Liberty's petition is inconsistent with New Hampshire law (primarily because it is part of expansion plans that are contrary to the public interest and the requirements of the official state energy policy codified under R.S.A. 378:37) , involves matters for the Site Evaluation Committee ("SEC"), and cannot be approved as the relief it seeks must be sought by a petition filed under R.S.A. 374:22 and R.S.A. 374:26. *See* Transcript of April 6, 2018 prehearing conference at 9:6 – 26:11. Initial briefing followed, with Clark's brief arguing for dismissal and a moratorium on Liberty's gas expansion plans for these, and other reasons discussed therein.

Clark details the scope of briefing as his first reply to Liberty's initial brief, as Liberty's brief suggests that the scope of briefing may have been more limited than the positions of the parties. *See* Liberty's brief at 1-2. That is not the case.

In further reply, Clark states as follows, in supplementation of the arguments set forth in his initial brief.

II. REPLY

Contrary to the arguments in Liberty's brief, Liberty **does not** have "the legal authority to offer CNG/LNG service in its existing City of Keene franchise area."

Again, the service Liberty proposes is part of its expansion plans contested in the LCIRP case, which are inconsistent with New Hampshire law, and therefore incapable of legal authorization. The legal authorization sought must be considered to go to expansion because nothing in Liberty's petition restricts it to conversion, and it is otherwise clear from Liberty's filings that the Keene project is all about expansion: the petition does not request a limited authorization to *replace* the existing system with one it claims to be of the same character, but a broad authorization that Liberty may carry on a LNG/CNG business, which allow such service *in addition to* its current gas service, and, consequently, Liberty will be *adding* a gas plant with a 100,000 gallon fuel storage tank[1] on site and 77 weeks more worth of fuel at its immediate disposal in Epping,[2] to "expand and grow the system" in the Keene area. *See* Liberty's petition at Footnote 1.

Moreover, because the legal authorization Liberty seeks involves the construction of a gas plant and related facilities falling under the SEC's jurisdiction, the Commission should defer to the SEC for any consideration of such authority. Again, if Liberty obtains the decision it is

[1] *See* Liberty's response to Clark Data Request No. 1-10 in **Exhibit "C"** to Clark's initial brief.

[2] *See* Liberty's response to Clark Data Request No. 1-12 in **Exhibit "C"** to Clark's initial brief.

seeking in this case and previously received, it will be set up for expansion for decades: with its huge hub in Epping, Liberty will not have to build a gas plant in every town to pursue unbridled expansion—but it could. The order would provide Liberty with tremendous flexibility, completely releasing it from the pipeline constraints to expansion that the utility has been complaining about for years. If we love our children and are serious about addressing climate change, we cannot allow this: whatever good natural gas may have done in reducing CO2 emissions to date, we are far too low on our carbon budget to be swapping one greenhouse gas for another and must eliminate all methane use as well as all CO2 fossil fuel use as soon as possible. *See* Clark's initial brief at 10-12.

Besides, again, there are also the health concerns.

As discussed in Clark's initial brief, *id*. at 40-41, Keene, has a pollution/particulate problem and particulates, including PM2.5, are a well-established component of fracked gas emissions.[3] *See, e.g.*, "Madison County, New York Department of Health Comments to the Federal Energy Regulatory Committee," prepared for Madison County Department of Health by Thimble Creek Research (September 30, 2014), pp. 19-20; *see also generally* "Compendium of Scientific, Medical, and Media Findings Demonstrating Risks and Harms of Fracking (Unconventional Gas and Oil Extraction)" by Physicians for Social Responsibility (Fifth Edition, March 2018). PM2.5 causes serious health problems. From "Madison County, New York

[3] If Liberty denies using and intending to use fracked gas in New Hampshire, it should stop equivocating, as it has in its discovery responses, *see* Clark's initial brief at 21-22, flat out deny that it uses it and agree that it will never use it as a condition on all of its various franchise rights going forward—although this would, of course, strain credulity, given how fracked gas dominates the market, *see* "Summary" of Tiemann and Vann, "Hydraulic Fracturing and Safe Drinking Water Act Regulatory Issues," Introduction (Congressional Research Service)(2015), and seemingly would have to be the "cheap" gas that Liberty proposes to purchase for its customers (the small amount of non-fracked gas left out there would, presumably, go for a premium, given its desirability over fracked gas). Indeed, if Liberty is not concerned that fracked gas is a problem, why is it not touting its use, rather than apparently attempting to conceal it?

Department of Health Comments to the Federal Energy Regulatory Committee," prepared for Madison County Department of Health by Thimble Creek Research (September 30, 2014), pp. 19-20:

> "In addition to the VOC exposure presented above, PM2.5 also poses a significant health concern and interacts with the airborne VOCs increasing their impact. In fact, at a compressor station PM2.5 may pose the greatest threat to the health of nearby residents …
>
> The size of particles determines the depth of inhalation into the lung; the smaller the particles are, the more readily they reach the deep lung. Particulate matter (PM10, PM2.5 and ultrafine PM), in conjunction with other emissions, are at the core of concern over potential effects of [fracked gas development sites].
>
> High particulate concentrations are of grave concern because they absorb airborne chemicals in their midst. The more water soluble the chemical, the more likely it is to be absorbed onto a particle. Larger sized particles are trapped in the nose and moist upper respiratory tract thereby blocking or minimizing their absorption into the blood stream. The smaller PM2.5 however, is more readily brought into the deep lung with airborne chemicals and from there into the blood stream. As the particulates reach the deep lung alveoli the chemicals on their surface are released at higher concentrations than they would in the absence of particles. The combination of particles and chemicals serves, in effect, to increase in the dose of the chemical. The consequences are much greater than additivity would indicate; and the physiological response is intensified. Once in the body, the actions between particles and chemicals are synergistic, enhancing or altering the effects of chemicals in sometimes known and often unknown ways.
>
> Reported clinical actions resulting from PM2.5 inhalation affect both the respiratory and cardiovascular systems. Inhalation of PM2.5 can cause decreased lung function, aggravate asthma symptoms, cause nonfatal heart attacks and high blood pressure. Research reviewing health effects from highway traffic, which, like [unconventional natural gas development], has especially high particulates, concludes, "[s]hort-term exposure to fine particulate pollution exacerbates existing pulmonary and cardiovascular disease and long-term repeated exposures increases the risk of cardiovascular disease and death." PM2.5, it has been suggested, "appears to be a risk factor for cardiovascular disease via mechanisms that likely include pulmonary and systemic inflammation, accelerated atherosclerosis and altered cardiac autonomic function. Uptake of particles or particle constituents in the blood can affect the autonomic control of the heart and circulatory system.
>
> Ultrafine particles (<0.1) get less attention in the literature than PM2.5 but is found to have high toxic potency. These particles readily deposit in the airways and centriacinar region of the lung. Research suggests increases in ultrafine particles pose additional risk to asthmatic patients …
>
> There is an abundance of research on the health effects of short term PM2.5 exposure … health effects can occur within 6 hours of elevated PM2.5

> exposures, the strongest effects occurring between 3 and 6 hours. Such an acute effect of PM2.5 may contribute to acute increase in the risk of cardiac disease, or trigger the onset of acute cardiac events, such as arrhythmia and sudden cardiac death …
>
> In addition to short term exposures and associated effects, there is evidence of health impacts from long-term exposures. An [health impact assessment] reviewing data from a number of European cities found that nearly 17,000 premature deaths from all causes, including cardiopulmonary deaths and lung-cancer deaths, could be prevented annually if long-term exposure to PM2.5 levels were reduced …"

From the EPA website:

> "Particulate matter (PM), also known as particle pollution, is a complex mixture of extremely small particles and liquid droplets that get into the air. Once inhaled, these particles can affect the heart and lungs and cause serious health effects."

From ATSDR/CDC Health Consultation Report (Jan. 29, 2016), p. ii:

> "Particulate Matter (PM2.5) - The World Health Organization notes that when annual mean concentrations are in the range of 11-15 µg/m3, health effects can be expected (WHO 2006 …"

See also "PA expands particulate monitoring as federal study finds high level in one location," May 5, 2016 online article; and ATSDR/CDC Health Consultation Report (Apr. 22, 2016), pp. ii-iii (short term exposures "to maximum levels of PM2.5 may be harmful to unusually sensitive populations, such as those with respiratory or heart disease" and chronic exposures in "concentration of 15 to 16 µg/m3 may be harmful to the general population and sensitive subpopulations, including the elderly, children, and those with respiratory or heart disease.").

A substantial increase in fracked gas particulate emissions could only exacerbate Keene's pollution/particulate problem: Keene does not need more particulate emissions, it needs a utility which relies on clean energy sources.

In any event, Liberty plainly **does not** have "the legal authority to offer CNG/LNG service in its existing City of Keene franchise area" under its existing franchise grant and cannot obtain the same through the petition for declaratory judgment filing in this proceeding, but must

obtain the proper authorization under a petition filed pursuant to R.S.A. 374:22 and R.S.A. 374:26.

Again, the 1860 legislative gas franchise grant under consideration must be strictly construed as it bestows rights not known under common law, *Buatti v. Prentice*, 162 N.H. 228, 230 (2011), with "[t]he limits of the right … fixed by the grant," and "[n]o act, or failure to act, on the part of state officials could enlarge it"—only an act of the legislature. *See State v. Hutchins*, 79 N.H. 132, 139 (1919). The type of gas and service authorized by the grant must be interpreted to comport with the meanings used and understood at the time it was enacted, *see Attorney General ex rel. Abbot v. Town of Dublin*, 38 N.H. 459, (1859)("This is but the application to a particular subject of a well settled general rule, applicable to all trades, professions and customs, that the meaning of the word is to be ascertained by the usage of the time when employed …"), and with the rights customarily granted under such charters at the time. *See State v. Hutchins*, *supra*, 79 N.H. at 137 ("The evidence seems conclusive that it was the legislative custom, at and before the time of the grant to Davis, to treat the term boats as including all craft that navigate the inland waters of the state. It follows that his grant is subject to the right of passage for all craft having reasonable occasion to navigate the strait."). Even if the language of the grant is broad enough to allow for certain utility activities, a legislative intent to include those activities within the authority of the grant should not found where the Commission has not previously regulated them, *see Allied New Hampshire Gas Co. v. Tri-State Gas & Supply Co.*, 107 N.H. 306 (1966), and such activities cannot be found to have been *acquired* by unchecked expansion of a utility's business as "It would be an anomalous situation if [an] unauthorized act… before legislative sanction therefor was obtained should be the means of … thereafter acquiring a grant of extraordinary rights." *State v. Hutchins*, 79 N.H. at 137. In

Allied New Hampshire Gas Co., supra, the New Hampshire Supreme Court rejected the argument that a distributor of liquid petroleum gas would be a "public utility" under the version of R.S.A. 362:2 in effect at the time, finding:

> "… In pertinent part RSA 362:2 reads as follows: 'The term public utility shall include every corporation * * * owning, operating or managing * * * any plant or equipment or any part of the same * * * for the manufacture or furnishing of light, heat, power or water for the public * * * or owning or operating any pipe line, including pumping stations, storage depots and other facilities, for the transportation, distribution or sale of gas, crude petroleum, refined petroleum products, or combinations thereof * * *.' This statute delegates broad regulatory powers to the Public Utilities Commission (Opinion of the Justices, 84 N.H. 559, 149 A. 321; State v. New Hampshire Gas & Electric Co., 86 N.H. 16, 163 A. 724) but its powers are necessarily circumscribed by the purposes which the statute seeks to accomplish. Claremont Gas Light Co. v. Monadnock Mills, 92 N.H. 468, 32 A.2d 823; Blair v. Manchester Water Works, 103 N.H. 505, 175 A.2d 525.
>
> The plaintiff points to the literal words of the statute which include the 'furnishing of light, heat, power' as indicating the defendant is a public utility. **This language, in isolation, is broad enough to include those who distribute coal, wood, gasoline, oil or liquefied petroleum gas in bottles, cylinders, drums or tanks. However, the Public Utilities Commission has never regulated such activities under the statute and have confined their regularity control to pipeline companies and gas companies using a system of underground mains for the distribution of gas to an entire community or area. The statute has been amended on two occasions and no attempt has been made by the Legislature to include these unregulated activities as public utilities under the statute. We agree with the administrative interpretation placed on the quoted words of the statute by the Public Utilities Commission as reflecting the legislative intent not to include in the category of a public utility the sale and distribution of liquefied petroleum gas in the manner disclosed by the evidence in this case."**

Id. at 308 (emphasis added).

As the New Hampshire Supreme Court found that public utilities did not include gas service involving "bottles, cylinders, drums or tanks" of gas as of 1966 per the above case, the Commission cannot find that Liberty is so authorized to conduct business under its 1860 franchise grant now: again, the grant was never expanded but holds to its original language and intent, which cannot possibly be construed to include the proposed LNG/CNG business as of that

time as such a business was far beyond legislative contemplation.[4]

Liberty's initial brief is completely void of any discussion of the above controlling legal principles.

Again, Liberty has not met its burden of proving, by a preponderance of the evidence, as required under Puc 203.25, that the gas and service it proposes to provide are of the same character as the gas and service authorized under its franchise grant. Merely alleging that *some kind* of "manufactured gas" was used, *see* Liberty's initial brief at 6 ("Liberty's earliest predecessor distributed manufactured gas"), while admitting that it has no idea what that gas was, *see* Clark's initial brief at 45 and Liberty's response to Clark Data Request No. 1-7 discussed therein, and providing no information in its petition concerning the current and proposed services which would allow for a determination that they are the same,[5] clearly does not come close to the requisite proof. **DISMISSAL** is merited and appropriate for that reason alone. The 1860 franchise does not grant the right to operate a LNG/CNG business and, even if it does, the right has never been exercised, precluding such a business now without permission under R.S.A. 374:22. There is a huge difference between the standards for approving a declaratory judgment petition and a petition brought under R.S.A. 374:22 (the latter requires a public interest determination after a complete adjudicative proceeding involving discovery,

[4] Whether the current version of R.S.A. 362:2 is broad enough to include Liberty's proposed business within the definition of a "public utility" has no bearing on whether Liberty is authorized to conduct the business under the 1860 grant: the legislature could extend the scope of covered utilities under the statute to include such a business, but the only business rights granted each utility under its franchise are specific to, and limited by, the four corners of its particular grant.

[5] Which they are plainly not. Again, besides the difference in gas, Liberty's proposed new service would add extensive, complex facilities (including a 100,000 gallon LNG storage tank and gas compression equipment) and "technology and piping that requires much higher operating pressures than are found in New Hampshire gas distribution systems." Commission Order No. 26,065 at 3.

witnesses, testimony, a hearing, *etc.*), which really must be recognized and enforced respecting a determination which potentially impacts so many.

Respectfully submitted,

Terry Clark,

By his Attorney:

Dated: May 15, 2018

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CERTIFICATE OF SERVICE

I hereby certify that I have, on this 15st day of May, 2018, submitted seven copies of this reply brief to the Commission by hand delivery, with copies e-mailed to the petitioner and the Consumer Advocate. I further certify that I have, on this 15st day of May, 2018, served an electronic copy of this reply brief on every other person/party identified on the Commission's service list for this docket by delivering it to the e-mail address identified on the Commission's service list for the docket.

//s//Richard M. Husband, Esquire
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