DG 17-068

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

NO. 2019-0629

LIBERTY UTILITIES (ENERGYNORTH NATURAL GAS) CORP.
d/b/a LIBERTY UTILITIES – KEENE DIVISION
PUBLIC UTILITIES COMMISSION CASE DG-17-068

APPEAL OF TERRY CLARK PURSUANT TO SUPREME COURT RULE 10

PETITIONER'S OBJECTION TO MOTION FOR SUMMARY AFFIRMANCE

Terry Clark, the petitioner in this appeal pursuant to Supreme Court Rule 10, hereby respectfully objects to the Motion for Summary Disposition ("Motion") filed by Liberty Utilities (EnergyNorth Natural Gas) Corp. d/b/a Liberty Utilities ("Liberty Utilities") pursuant to Supreme Court Rule 25, stating as follows:

1. The Motion must be denied because it does not meet the standard. In relevant part, Supreme Court Rule 25 provides:

> "(1) Except in a mandatory appeal, the supreme court may at any time, on its own motion and without notice or on such notice as it may order, dispose of a case, or any question raised therein, summarily. **An order of summary affirmance under this rule may be entered when (a) no substantial question of law is presented and the supreme court does not disagree with the result below, or** (b) the case includes the opinion of the trial court, which identifies and discusses the issues presented and with which the supreme court does not disagree, or (c) **the case includes the decision of the administrative agency appealed from, and no substantial question of law is presented and the supreme court does not find the decision unjust or unreasonable, or (d) other just cause exists …"**

Id. (emphasis added).

2. Thus, the Motion may only be granted if this Court finds either that (1) **both** no substantial question of law is presented and the Court does not disagree with the result below or find it unjust or unreasonable, or (2) "other just cause exists ..." Supreme Court Rule 25.

For the reasons set forth in Clark's petition for appeal filed October 25, 2019 ("Clark's Appeal"), which are incorporated herein in full by reference, substantial questions of law are clearly presented in this appeal, including substantial questions of law concerning the Public Utility Commission ("Commission")'s legal authority and obligations vis-à-vis the public interest, R.S.A. 378:37, the climate crisis, R.S.A. 374:22 and R.S.A. 374:26, and the Commission's own rules and orders, which preclude summary disposition under the first potential Rule 25 basis for such relief.[1] Indeed, if such substantial questions of law were not present and did not need to be addressed by this Court in some breadth for the Commission's information and the public good, for the numerous reasons supporting the same in his appeal, Clark would have moved for Rule 25 summary reversal.[2]

3. But, even if substantial questions of law did not compel denial of the Motion, for the same grounds supporting this appeal and reversal, the Court could not agree with the result below or find it just or reasonable, as it violated or ignored statutes, the Commission's own rules and orders, the requisite (R.S.A. 374:26 public good/public interest) standard, due process and the burden of proof, as detailed in Clark's Appeal. Thus, only the second grounds for summary affirmance under Supreme Court Rule 25, *i.e.*, "other just cause" under Rule 25(1)(d), could be the basis for grant of the Motion, and this grounds must be rejected as the Motion does not

[1] Beginning in paragraph 8 on page 4, the Motion attempts to recharacterize the issues raised in Clark's Appeal. Clark disputes this recharacterization, notes that the appeal speaks for itself, and urges the Court to assess the actual issues raised therein from its four corners.

[2] Either awarding Clark judgment on the merits, given that his public interest/R.S.A. 378:37 position was completely unrebutted by the Commission and Liberty Utilities and the utility otherwise failed to meet its burden of proof, below, or requiring dismissal of the Keene case and the filing of a petition under R.S.A. 374:22 and R.S.A. 374:26, with full adjudicative proceeding rights (including discovery, a hearing with cross-examination, *etc.*), for the relief sought—which new proceeding would allow Clark (and potentially others) to more fully develop their positions and factual and legal arguments through discovery, *etc.*

suggest any basis for relief under this provision; indeed, the sole grounds for the Motion, as recited in its preamble, is that the Commission's "expertise and understanding of the unique facts and specialized law" at issue supported its finding on the evidence. While this should really be viewed as a Rule 25(1)(a) or (c) basis for summary affirmance—and is controverted by the evidence and other reasons supporting this appeal, as detailed in Clark's Appeal—it is not well-grounded in the Motion's arguments, however viewed, for several reasons.

4. First of all, while the Motion contends that the Court should overlook the numerous procedural and substantive legal improprieties in the conduct of the proceedings below, it never explains why the Court should consider the Commission's "expertise and understanding of the unique facts and specialized law" presented below to be superior to the Court's expertise and understanding of the relevant facts and law to the point of precluding the Court's questioning of the results. This Court has all of the "expertise" and "understanding" needed for the proper analysis of the statutes, appropriate (R.S.A. 374:26 public interest/public good) standard, Commission rules and orders, the Court's own decisions, and the facts relevant to the proceedings below to review the results for legal comportment and justice—and must to meet its charge of administering the law and justice.

5. Second, besides not rebutting the legal arguments raised by Clark, Liberty Utilities did not meet its burden of proof on the evidence, as was thoroughly established below and in Clark's Appeal. *See* Clark's Appeal at 6, 14; Appendix accompanying Clark's Appeal ("Appeal Appendix") at 192-193, 260-268, 319.[3] Under Puc 203.25, Liberty Utilities was

[3] To remind the Court: the grounds for appeal include those reasons set forth in the Joint Motion for Rehearing Under R.S.A. 541 of Terry Clark, One Movant, and Beverly Edwards, Elizabeth Fletch, Douglas Whitbeck, Gwen Whitbeck, Susan Durling, Julia Steed Mawson and Marilyn Learner, as They Collectively Comprise the NH Pipeline Health Study Group, and Individually, Appeal Appendix at 47-155, Initial Brief of Intervenor, Terry Clark, Appeal Appendix at 220-301, and Reply Brief of Intervenor, Terry Clark, Appeal Appendix at 311-320, as well as in

required to prove its case by a preponderance of the evidence, meaning, to avoid proceeding under R.S.A. 374:22, the utility had to establish that it would not be engaging in a new business, the "construction of a plant, line, main, or other apparatus or appliance" not already used in the utility's business, or exercising "any right or privilege under any franchise not theretofore actually exercised in such town," requiring Commission permission and approval under R.S.A. 374:22, as Commission Staff contended.[4] With respect to the last requirement for statutory permission and approval, even if the utility is correct that its original 1860 franchise grant authorized LNG/CNG services, Liberty Utilities was required to prove why that right was not lost over the roughly 160 years between the franchise grant and now, requiring new statutory permission and approval, as such a "right or privilege" to provide natural gas and LNG/CNG services has indisputably ***never*** been "actually exercised" in Keene. *See* Motion at ¶¶ 2-3. Yet, the finding upon which the Commission's declaratory ruling in the utility's favor was primarily grounded, *i.e.*, that natural gas is of the "same character" as air propane,[5] is eradicated by the utility's admission that the utility does not even know what is in its gas—but that it is a different

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Terry Clark's Motion for Rehearing or Reconsideration Pursuant to R.S.A. 541, and Reconsideration. *See* Clark's Appeal at 16; Appeal Appendix at 176, ¶ 16 and footnote 19.

[4] The Motion attempts to muddy the requirement for R.S.A. 374:22 permission and approval here by blurring Clark's arguments, see Appeal Appendix at 19 with the Staff's "change in character of service" characterization of the issue as the reason the statute is triggered, which the Motion deems "not a recognized basis to require new franchise approval." Motion at 3. However, while Clark noted Staff's characterization of the issue as a "change in character of service" below and agrees that Liberty Utilities' plans could be generally framed in this regard (although also including entirely "new" services), it is plain from a review of Clark's pleadings and Clark's Appeal that Clark's argument clearly invokes the need for R.S.A. 374:22 permission and approval, however the utility's plans are characterized, and does not rely on a "change in character of service" legal argument independent of the statute.

[5] *See* Commission Order No. 26,065 dated October 20, 2017 at 3. The Commission subsequently acknowledged that the three decisions also cited in support of the declaratory ruling are inapposite. *See* Commission Order No. 26,274 dated July 26, 2019 at 8; Clark's Appeal at 27.

fuel than air propane. *See id*. at 16 footnote 8; Appeal Appendix at 193, 264-265. Moreover, again, Liberty Utilities did not provide sufficient information in its petition for a declaratory ruling concerning the current and proposed services to allow for a determination that they are the same—and the services are clearly not the same, as the Commission ultimately acknowledged that the utility proposes an "extensive whole-system" change, resulting in an all new "separate and distinct" natural gas system, using a whole new fuel, and a permanent LNG gas plant with a 100,000 gallon storage tank, compression and ejection equipment and CNG facilities, *etc.*, *etc.* *See* Clark's Appeal at 26-27 and record cited therein. Additionally, again, neither Liberty Utilities nor the Commission ever properly addressed Clark's meritorious legal arguments against the finding of authority under the original 1860 franchise grant. *See* Clark's Appeal at 16 footnote 8 and record referenced therein.

6. Furthermore, just because the Commission has a degree of "expertise and understanding of the unique facts and specialized law" at issue, and regardless of whether its decisions are afforded some degree of deferential review within that precise arena of "expertise and understanding," *see* Motion at ¶ 9, Commission decisions cannot ignore material facts and applicable law. Statutory requirements must be met. Clark's Appeal at 30-31 and *Clark v. New Hampshire Dept. of Health and Welfare*, 114 N.H. 99, 104 (1974) (NH Department of Health and Welfare regulations contrary to statutory requirements held void) cited therein; Appeal Appendix at 60, 180-181, 268 footnote 59 and *Appeal of Morin*, 140 N.H. 515, 519 (1995)("An agency, like a trial court, must … comply with the governing statute, in both letter and spirit.") cited at 181 therein. The Commission must reach decisions under governing standards. Clark's Appeal at 30-31 and *Appeal of Public Service Co. of New Hampshire*, 122 N.H. 1062, 1073 (1982) (Commission imprudency finding, improperly made in financing hearing under wrong standard, violated due process and ordered expunged) cited therein; Appeal Appendix at 60, 180-

181, 268 footnote 59. The Commission must also follow its own rules. Clark's Appeal at 30-31 and Appeal Appendix at 60, 180-181, 268 footnote 59. Again, just the failure to follow the proper standard alone—as the Commission failed to adhere to the public good/public interest standard required under R.S.A. 374:26 here—is enough to violate due process. *Appeal of Public Service Co. of New Hampshire*, *supra*, 122 N.H. at 1073. But, as the Commission's own rule Puc 102.07 expressly provides that the adjudicative proceeding below had to include a hearing with the "opportunity for any party, intervenor or commission staff to present evidence and conduct cross-examination," *see* Clark's Appeal at 10 and cases cited therein, and this opportunity was denied, due process was clearly otherwise not afforded. *See also Society for Protection of N.H. Forests v. Site Evaluation Comm.*, 115 N.H. 163, 168 (1975) ("Where issues of fact are presented for resolution by an administrative agency due process requires a meaningful opportunity to be heard."); *Appeal of Lathrop*, 122 N.H. 262, 265 (1982) (parties must be afforded a fair opportunity to present their case); Appeal Appendix at 61, 168, 215. Moreover, under this Court's decisions (as well as R.S.A. 374:26, which the underlying proceeding was required to be decided under), the Commission was required to act and decide in the public interest, which precludes the relief sought by Liberty Utilities. Clark's Appeal at 23; Appeal Appendix at 225. Whatever deference the Commission is entitled to does not include *carte blanche* violation of statutes, standards, Commission rules and orders, *etc.*—and disregard of this Court's own decisions.

7. On page 5, the Motion incorrectly argues:

> "The court has no basis to accept and decide issues that were not reached or resolved by the Commission … Since the Commission found that such a franchise filing was not legally required, Liberty never had to present, and the Commission never considered, a franchise case …"

Id. This is a position that Liberty Utilities raised below, *i.e.*, essentially that the utility and/or Commission had the sole right to frame the statutory and rule requirements, and issues, to be considered by the Commission, and that are thus appealable. *See* Appeal Appendix at 200-201 ¶¶ 3, 5. Clark thoroughly dispensed with this argument below. *See* Appeal Appendix at 209-210. Clark is not bound by Liberty Utilities' unlawful attempts to short-cut the required approval process here, or the Commission's mistakes. As the public interest was required to be considered under this Court's precedent and R.S.A. 374:26—pursuant to which the requested authority had to be granted and pursuant to which, on its face, *all* utility activities, not just franchise approvals, are subject—the Commission's failure to apply this standard was fatal to the result, however the case was presented and considered.

8. Liberty Utilities' cursory dismissal of R.S.A. 378:37 as inapplicable to this case, *see* Motion at 5 ("the issue the Commission decided … did not require a review of energy policy"), must be rejected. On its face, R.S.A. 378:37 is legislatively declared to be not just "energy policy," but *the* energy policy of New Hampshire which extends to all aspects of energy decision-making:

> "**378:37 New Hampshire Energy Policy. –** The general court declares that it shall be the energy policy of this state to meet the energy needs of the citizens and businesses of the state at the lowest reasonable cost while providing for the reliability and diversity of energy sources; to maximize the use of cost effective energy efficiency and other demand side resources; and to protect the safety and health of the citizens, the physical environment of the state, and the future supplies of resources, with consideration of the financial stability of the state's utilities."

Id. Second, the statute is not just a symbolic, aspirational legislative statement of policy, but a real law with real teeth which is the touchstone of all approvable utility plans. R.S.A. 378:38, which governs LCIRP submissions, begins by noting that they must be filed "[p]ursuant to the policy established under RSA 378:37." *Id*. Moreover, under R.S.A. 378:39, concerning LCIRP

approvals, the Commission must review LCIRPs "in order to evaluate the consistency of each utility's plan with this subdivision":

> "**378:39 Commission Evaluation of Plans. –**
> The commission shall review integrated least-cost resource plans in order to evaluate the consistency of each utility's plan with this subdivision, in an adjudicative proceeding. In deciding whether or not to approve the utility's plan, the commission shall consider potential environmental, economic, and health-related impacts of each proposed option. The commission is encouraged to consult with appropriate state and federal agencies, alternative and renewable fuel industries, and other organizations in evaluating such impacts. The commission's approval of a utility's plan shall not be deemed a pre-approval of any actions taken or proposed by the utility in implementing the plan. Where the commission determines the options have equivalent financial costs, equivalent reliability, and equivalent environmental, economic, and health-related impacts, the following order of energy policy priorities shall guide the commission's evaluation:
> I. Energy efficiency and other demand-side management resources;
> II. Renewable energy sources;
> III. All other energy sources."

Id. While "subdivision" is not defined under R.S.A. 378:39, the "consistency" required for approval clearly includes consistency with the concerns of R.S.A. 378:37, as R.S.A. 378:37 falls within the same planning "subdivision" provisions of R.S.A. Chapter 378 as R.S.A. 378:39, is clearly intended to hold a pre-eminent role in the statutory planning scheme for the reasons just noted, and expressly requires protection for two of the three concerns also required to be considered under R.S.A. 378:39 for plan approval (potential environmental and health-related impacts). Indeed the express recognition of these environmental and health concerns of R.S.A. 378:37 under R.S.A. 378:39, which does not likewise equally acknowledge other R.S.A. 378:37 considerations (such as "the financial stability of the state's utilities," *see id*.), suggests that environmental and health concerns should be afforded greater weight under R.S.A. 378:37 and in considering utility planning. If a utility's overall planning cannot be approved absent consistency with R.S.A. 378:37, its specific plans, required approvals and permissible authority

must be held to the same requirement. Thus, Liberty Utilities could not, and cannot, be found to have the authority found below, as such authority is inconsistent with the environmental and health protection requirements and concerns of R.S.A. 378:37, and therefore in violation of, the statute.

9. The Motion does not address, and therefore provides no basis for this Court to ignore, the unlawfulness and unreasonable of the decisions below in light of the Commission's order requiring Liberty Utilities to accept the Keene franchise "as is" and requiring further Commission approval for *any* change in business—which clearly meant that the utility did not have the authority it requested under its declaratory judgment petition at the time it filed the petition, precluding the Commission's finding under applicable law. *See* Clark's Appeal at 28-30 and record cited therein.

WHEREFORE, for the reasons expressed, Clark respectfully requests that this Honorable Court:

A. Deny the Motion; or

B. Schedule a hearing on this matter; and

C. Provide such other relief as is just and reasonable.

Respectfully submitted,

Terry Clark,

Dated: November 22, 2019

By: /s/ Richard M. Husband

Richard M. Husband, Esquire
10 Mallard Court
Litchfield, NH 03052
(603) 883-1218
RMHusband@gmail.com
N.H. Bar No. 6532

CERTIFICATE OF SERVICE

I, Richard M. Husband, Esquire, hereby certify that on the 22nd day of November, 2019, I served copies of the foregoing objection on counsel for Liberty Utilities, Michael Sheehan, Esquire, and on all other counsel (Attorneys Fabrizio and Kreis) for the parties in the underlying Commission proceeding, Docket No. DG 17-068, via electronic mail and first-class mail, postage prepaid, and on the Attorney General via first-class mail, postage prepaid.

/s/ Richard M. Husband
Richard M. Husband, Esquire