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

APPELLANT'S REPLY TO APPELLEE'S OBJECTION TO APPELLANT'S EMERGENCY MOTION FOR SUSPENSION

Terry Clark (also, "Clark"), the appellant in this appeal, hereby respectfully submits this reply to the objection of the appellee, Liberty Utilities (EnergyNorth Natural Gas) Corp. (also, "Liberty Utilities"), to Clark's emergency motion for suspension ("Suspension Motion"):

1. The appellant filed the Suspension Motion on January 22, 2020.
2. On January 27, 2020, the appellee filed a preliminary objection ("Prel. Obj.") to the Suspension Motion and, on February 3, 2020, the utility filed a further written objection ("Fin. Obj."), with supporting Affidavit of Mark Stevens ("St. Aff.") (collectively, all three filings are referred to herein as the "Complete Objection").
3. On February 4, 2020, the appellant filed a motion for leave to reply to the appellee's Complete Objection and, on February 6, 2020, the Court granted the motion, allowing Clark until February 10, 2020 to file this reply, which is timely.
4. First, Clark thanks the appellee for not objecting to his motion to file this reply, and for notifying the Court of its position.[1]
5. The utility's Complete Objection only bolsters Clark's entitlement to a suspension of the underlying Commission Orders as it confirms that the company has unlawfully acted without authority under the orders and, particularly as it shows no remorse or even acknowledgment of its "misreading" of the orders, should be expected to continue to act in such a manner unless the Commission Orders are suspended and remove the source of claimed authority. Moreover, the Complete

[1] The utilities' non-objection position was not reflected in Clark's motion to file this reply as his counsel was (too hastily, in retrospect) preparing and filing the motion to bring it to the Court's attention as soon as possible when the position was e-mailed, and Clark's counsel did not see it until after the filing.

Objection establishes that the company intends to harm Clark during this appeal by "curing" its unauthorized, unlawful conduct to date (and likely "curing" such conduct going forward, as "needed") through post-appeal, retroactive Commission modification of the orders at issue,[2] and strongly suggests that the company also intends to undertake construction, expansion or other *status quo* altering activities during the appeal, if the Commission Orders are not suspended. Thus, as preserving the *status quo* is precisely the purpose of RSA 541:18 and the *only* just result under the circumstances, suspension should be granted:

> "The power to suspend under RSA 541:18 is designed to aid the court in preserving the status quo pending appeal so that, on appeal, it may achieve the most just result."

Appeal of Seacoast Anti-Pollution League, 125 N.H. 708, 731 (1985).

6. Indeed, given the substantial statutory, procedural, climate, health, safety and other concerns with the lawfulness of the Commission Orders and Keene project raised in this appeal, and for the additional reasons discussed below, preserving the *status quo* provides not only the *only* just result, but also the *only* fair and reasonable result at this point in time.

7. Contrary to suggestions in the Complete Objection, Liberty Utilities was not authorized to undertake and complete the Keene project under the Commission's initial October 20, 2017 declaratory ruling, Order No. 26,065 (Oct. 20, 2017). Rather, that decision was limited to a ruling that "Liberty has the *general right* to change the type of gas that it provides to its customers under its franchise authority," as the Commission "determined that Liberty had the legal authority to offer CNG and LNG service in Keene, but recognized that certain conditions and approvals related to the safety and reliability of the service of CNG or LNG were warranted before Liberty could proceed to exercise that authority." Order No. 26,294 (Sep. 25, 2019) at 8 (emphasis added); Clark's Appeal Appendix ("Clark App.") at 8. The Commission's subsequent orders in the case, Order No. 26,274

[2] "Commission Orders" is a collective reference to the orders on appeal, Order No. 26,065 (Oct. 20, 2017), Order No. 26,274 (Jul. 26, 2019) and Order No. 26,294 (Sep. 25, 2019).

(Jul. 26, 2019) and Order No. 26,294 (Sep. 25, 2019), set forth such terms and required approvals. *See generally id.*

8. As stated in the Suspension Motion, ¶ 12, Clark's timely motions for rehearing challenging the Commission Orders, Clark App. at 19, 35, precluded action on them until the final September 25, 2019 order denied Clark's last motion under *Appeal of Seacoast Anti-Pollution League*, 125 N.H. at 721:

> "An unsuspended commission order becomes effective upon completion (or denial) of rehearing, unless a request for suspension is promptly filed with, and granted by, this court."

Id.[3] Thus, as the conversion work was supposed to take 60 days, Clark App. at 336, it should not have been completed until about December, 2019. *See also* Steven Affidavit, ¶¶ 9, 10, 21 (detailing lengthy conversion/reconversion work).

9. But, while the phase one conversion work should not have been completed until about December, the Complete Objection establishes that it was completed well before then, *i.e.*, by "approximately October 4, 2019," St. Aff., ¶ 6, only nine days after authority to act on the Commission Orders arose. Although the utility now claims, without providing supporting time records, that it only took "several days of actual conversion work," St. Aff., ¶ 8, to complete the 60 days of work the company had represented was needed, it does not deny that it worked before September 25th while admitting September work. *Id.*, ¶ 6. As the Suspension Motion clearly raises the issue, *id.*, ¶¶ 12-14, and the Complete Objection does

[3] In Footnote 2 of its Final Objection, Liberty Utilities incorrectly argues that Clark cited *Appeal of Seacoast Anti-Pollution League* in paragraph 12 of the Suspension Motion for an entirely different proposition. As indicated in the Suspension Motion, ¶ 12, *Appeal of Seacoast Anti-Pollution League* was cited only for the text of that decision quoted herein. Contrary to the utility's argument in Final Objection Footnote 2, Clark does not contend that this principle operates to *completely* "bar Liberty's rights to proceed under the Commission Orders—both prior to and following the commencement of this appeal." Rather, Clark only contends that it precluded action prior to September 25, 2019—which is obviously the law, as stated by this Court in *Appeal of Seacoast Anti-Pollution League*. The utility does not cite any authority in support of its apparent position, *i.e.*, that RSA 541:18 allows utilities to operate under routine Commission orders, not entered on any emergency basis, the second they issue without opportunity for challenge or regard for appellate rights; and this position must be rejected since it is not only contrary to the law as stated by this Court, but (as shown here) would obliterate both the opportunity for challenge and appellate rights and allow no room to prevent potentially egregious harms to not only Commission litigants, but the public at large. Moreover, the company's apparent current position is also plainly contrary to the utility's real belief that Clark's case was an "unresolved issue in this docket" and an "obstacle to Liberty beginning the conversion process …" Clark App. at 336.

not disprove or even deny substantial phase one work prior to September 25, 2019, the utility should be found to have engaged in it, and "jumped the gun."

10. However, the Complete Objection additionally confirms Clark's position that the company was otherwise not authorized to complete phase one under the Commission Orders because it had not met their conditions and requirements.

11. As of September 25, 2019, Liberty Utilities became authorized to operate under the Commission Orders pursuant to RSA 541:18, but was also subject to their terms, including the September 25th order's requirement that the utility "make several filings and obtain approvals, as outlined below" before the utility could "convert and expand *any* phase of its distribution system." Order No. 26,294 (Sep. 25, 2019) at 13 (emphasis added); Clark App. at 29: Suspension Motion, ¶ 6. These requirements included a *comprehensive* business plan, previously ordered to be filed by October 24, 2019, Suspension Motion, ¶¶ 5, 8, which had to include DCF analyses that the Commission indicated "are **the first step in gaining approval for each phase** of the conversion/expansion." Clark App. at 30 (emphasis added). Non-compliance with this requirement would not constitute a "*de minimis* and easily curable" deficiency, as the utility contends, Prel. Obj., ¶ 14, but failure to meet a sound fiscal prerequisite to authorization the Commission prudently considered necessary "to demonstrate that Liberty's New Hampshire ratepayers are not burdened with unfair or unwarranted costs." Order No. 26,294 (Sep. 25, 2019) at 13-14; Clark App. at 29-30. Indeed, Order No. 26,274 (Jul. 26, 2019) indicates that Commission Staff has been trying to get such a business plan for a while, since at least the most recent rate case, again noting concern that the utility ad "provided little to no economic analysis or justification of the costs of the proposed system to ratepayers." *Id*. at 11, Clark App. at 11.

12. The Complete Objection further confirms that the utility's phase one work was unauthorized due to its failure to ever meet the business plan requirements, as the company admits that it never submitted the DCF analyses, St. Aff., ¶ 20.

13. Liberty Utilities was not authorized to work on the Keene project before September 25, 2019 as it had no authority to operate under the Commission Orders pursuant to RSA 541:18, and it had no authority to work after that date (or

before) as it never met the orders' requirements, including the September order's requirements that the utility "make several filings and obtain approvals, as outlined below," including (the previously ordered) comprehensive business plan, before the utility could "convert and expand *any* phase of its distribution system." Order No. 26,294 (Sep. 25, 2019) at 13 (emphasis added); Clark App. at 29: Suspension Motion, ¶ 6. Yet, phase one was completed, unauthorized.

14. The utility's defenses to its unauthorized conduct are unavailing.

15. The company has never even submitted anything that it felt it could straight-faced call a "comprehensive business plan": the docket establishes that such a plan could only have been submitted in the utility's October 24, 2019 filing, but that filing does not even include the words "business plan." St. Aff., Exhibit "F."

16. The utility argues that the DCF analyses requirements for the phase one business plan are exempted from and should be read out of the Commission Orders because the company does not have customer data needed for the analyses. *See* Fin. Obj., ¶¶ 31-33. However, there is no reason why these "first step" approval requirements—and the rest of the comprehensive business plan they were required to be a part of—should be any less important for phase one than they are for any of the other phases of the project, and the language of the Commission Orders does not support the company's position, for the reasons aforesaid. The narrow opinion language the utility focuses on in Fin. Obj. ¶ 32 must be read in the totality of language of both the July and September orders, which confirms that the language quoted in ¶ 32 is using "report" interchangeably with "plan" and the comprehensive business plan requirements remained. If the company did not have needed customer data, it should (and likely easily could) have obtained it. Otherwise, it was required to obtain a modification of the Commission Orders in order to avoid the DCF requirement; it could not, as it did, unilaterally ignore it. The four corners of the orders provide the only "knowledge and approval" of the Commission, St, Aff., ¶ 6, that Liberty Utilities was ever entitled to rely on; and, at this point, never having contested the business plan requirements by motion for rehearing, or appeal, the utility should be found to have lost the right.

17. Any burden to the utility in reconverting wrongfully converted customers should not shelter the utility from its wrongful conduct. but reconversion is not even requested now, just a suspension of the Commission Orders to freeze the *status quo* and prevent expansion to new customers. Likewise, the company should not be allowed to use its wrongfully converted customers as a conduit for expansion, as discussed below, and further harm to Clark and the *status quo*. In its analysis, the Court should not reward the utility's blatant disregard of the Commission Orders to achieve the relief it seeks, but hand it that which justice demands it get: "the expectable consequences of its own course of conduct." *Cumberland Farms Northern, Inc. v. New Hampshire Milk Control Bd.*, 104 N.H. 364, 367 (1963).

18. If Commission Staff were mistakenly present for unauthorized conversion work in September and October, St. Aff., ¶ 11, that does not legitimize it; rather, it confirms that the orders must be immediately suspended, so that there are no more mistakes, by anyone, that may be argued to legitimize violations of the orders.

19. The utility's obvious intent to legitimize its past (and, if needed, future) unlawful conduct by Commission modification of the Commission Orders, Prel. Obj., ¶ 14, alone presents sufficient threat of harm and other justification for suspension of the orders to preserve the *status quo* and Clark's rights.

20. The Complete Objection also strongly suggests that Liberty Utilities intends to undertake construction on the new permanent distribution facilities for the project during this appeal. *See, e.g.*, St. Aff., ¶ (permanent facility to be "fully operational" as early as the spring of 2021); Fin. Obj., ¶ 43 (company to begin phase two conversion construction as early as the spring of 2021, *after* the permanent facility has been constructed.). Moreover, while the company claims that it will not undertake any more unauthorized *conversion* work during the appeal, St. Aff., ¶ 17, it does not deny that it will undertake such work with approvals, or that it will engage in *expansion* work off phase one without further approvals. Such expansion should clearly be expected since expansion is planned for phase one as well as all five phases of the project, Clark App. at 170-171, and will tax the phase one temporary facilities, supporting the utility's argument for the permanent facilities of the remaining phases. *See* St. Aff., 13, 17.

21. As noted at the end of the Suspension Motion, this is a case considered under "extraordinary circumstances." Subsequent to the Commission's initial declaratory ruling in the matter in October, 2017, the IPCC warned that we have only until the end of this decade to drastically cut emissions, and only until circa 2050 to achieve net-zero in human caused emissions, to avoid the worst of climate change, and that everything we do to mitigate, or increase, warming matters, as every fraction of a degree will make a difference. Petition for Appeal at 16-19. Climate change (and fracked gas use) will come with great hidden costs to New Hampshire not associated with green energy, including health problems and the loss of thousands of seacoast properties. Clark App. at 243-251.

22. Subsequent to the IPCC's dire warning, though, Governor Sununu gave hope that offshore wind (along with other state renewable development) may be available in time to meet the challenge. Clark App. at 189-190, 199. Keene should be the flagship in the state's transition to green energy, and it can be, if the *status quo* is preserved and the current propane air system is used as long as possible with its current base of only approximately 1200 customers, and not changed to an all new natural gas system adding potentially many, many more customers.

23. At this critical moment in time, no natural gas project or expansion should be approved in New Hampshire unless and until it is established that there is no reasonable alternative and that the project/expansion will have a positive climate impact during both the next decade and for the full projected life of all of the associated infrastructure. This was never done with the Keene project and the opportunity will only be preserved by preservation of the *status quo*.

24. Between the Keene project and the Granite Bridge Project, due for decision in Commission Docket No. DG 17-198, Liberty Utilities has roughly **half a billion dollars** of fossil fuel infrastructure lined up for permanent installation and use in New Hampshire for *decades*. If the Court agrees with the world's scientists that this is not in the public interest, now would be a good time to make this known.

Respectfully submitted,

Terry Clark,

Dated: February 10, 2020

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 10th day of February, 2020, I served copies of the foregoing pleading and this notice of filing on the Attorney General and all counsel and parties registered with the electronic filing system via the system, and on the Public Utilities Commission via first-class mail, postage prepaid and the Commission e-mail addresses of Attorney Fabrizio and Executive Director Howland.

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