

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DG 18-092

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

**Petition for a License to Construct and Maintain a Natural Gas Pipeline
Beneath the Ashuelot River in Keene**

Order Granting License

ORDER NO. 26,212

January 18, 2019

APPEARANCES: Michael J. Sheehan, Esq., on behalf of Liberty Utilities (EnergyNorth Natural Gas) Corp. d/b/a Liberty Utilities; Richard M. Husband, Esq., on behalf of Mr. Terry Clark; Barbara Skuly, on behalf of the Ashuelot River Local Advisory Committee; and Paul B. Dexter, Esq., on behalf of Commission Staff.

In this order, the Commission grants Liberty a license to construct and maintain a natural gas pipeline under the public waters of the Ashuelot River in Keene, New Hampshire, subject to certain conditions. The Commission finds that the proposed crossing is necessary under RSA 371:17 and will not interfere with the public's use of the river.

I. PROCEDURAL HISTORY

On May 31, 2018, Liberty Utilities (EnergyNorth Natural Gas) Corp. d/b/a Liberty Utilities (Liberty) filed a petition pursuant to RSA 371:17 for a license to construct and maintain a natural gas pipeline under the Ashuelot River in the vicinity of the Winchester Street bridge in Keene. The proposed crossing would provide Liberty with a second pipeline across the Ashuelot River in Keene. In support of its petition, Liberty submitted a title sheet showing a map of the vicinity and project description, as well as a layout sheet showing construction details. The petition and subsequent docket filings, other than any information for which confidential

treatment is requested of or granted by the Commission, are posted at <http://puc.nh.gov/Regulatory/Docketbk/2018/18-092.html>.

Terry Clark, a Keene resident, and the Ashuelot River Local Advisory Committee (ARLAC) both filed petitions to intervene. Public comments were also filed which opposed the proposed crossing.

On September 5, 2018, the Commission held a prehearing conference and technical session. During the prehearing conference, the Commission stated that the scope of these proceedings would be limited in accordance with *Northern Pass Transmission LLC*, Order No. 25,910 (June 28, 2016). In a secretarial letter issued on October 11, 2018, the Commission granted the unopposed petitions to intervene and stated that the scope of the proceedings would not include the adjudication of environmental concerns associated with the proposed crossing.

Mr. Clark filed a motion for reconsideration, clarification and/or *in limine* regarding the Commission's ruling on the scope of the proceedings. Liberty filed an objection to that motion. The Commission denied Mr. Clark's motion for reconsideration and motion *in limine*, confirming that it would not consider environmental concerns. Order No. 26,193 at 3-5 (November 20, 2018). The Commission clarified that Mr. Clark would be permitted "to introduce evidence at hearing to contest Liberty's representation that the proposed crossing is necessary to meet its reasonable requirements of service to the public within its authorized franchise area." *See id.* at 4-5.

The parties and Commission Staff (Staff) engaged in discovery, and a second technical session was held on November 8, 2018. On November 21, 2018, Staff filed a memorandum summarizing the results of its review of the petition and suggested conditions the Commission

could consider imposing if an approval were to be granted. Staff addressed only one of Liberty's options for constructing the crossing, referred to as "Option A."

The Commission held a hearing on the merits on November 26, 2018. On the date of the merits hearing, Mr. Clark filed the direct testimony of Patricia A. Martin. ARLAC also submitted written testimony. Liberty filed a motion for protective order regarding certain information it had provided during discovery. Staff objected to this motion in part, and Liberty subsequently filed a response to the objection.

In response to a record request, Staff filed a supplemental memorandum on December 4, 2018, regarding Liberty's use of a second option, "Option B," to construct the proposed crossing. In its memorandum, Staff stated that Option B was an equally acceptable alternative to Option A.

II. POSITIONS ON THE MERITS OF THE CROSSING PETITION

A. Liberty

During the November 26 hearing, Liberty presented the testimony of two Company employees: Andrew Mills, Planning Engineer; and Stephen Rokes, Operations Manager for Keene. Mr. Mills stated that Liberty had two alternatives for constructing the crossing, referred to as Option A and Option B, which were shown on Exhibit 4. Transcript of November 26, 2018, Hearing (Tr.) at 24-25, 28-29. With both options, the proposed crossing would begin at a pit located on property owned by the City of Keene near the north side of Winchester Street, east of the Winchester Street bridge.¹ See Tr. at 23, 33; Exhibit (Exh.) 4. A horizontal directional drilling (HDD) process would be used to install an 8-inch diameter high density polyethylene gas pipeline underneath the Ashuelot River, proceeding west along the north side of Winchester

¹ Liberty identified this property in paragraph 6 of its petition as Tax Map 51, Lot 13.

Street. *See* Tr. at 23-24; Exh. 4. The horizontal directional drill would be approximately 720 feet in length. Tr. at 24, 58. The crossing would exit at a pit located within the public right-of-way west of the Winchester Street bridge. *See* Tr. at 23, 33; Exh. 4. Liberty stated in its petition that it would apply for an easement from the City of Keene with regard to the eastern limit of the crossing. *See* Petition at 2.

Mr. Mills testified regarding Option A that the crossing would deviate slightly north before the Winchester Street bridge and would require drilling under a city park to avoid proceeding under the bridge's "wing walls," which act as retaining walls. *See* Tr. at 25, 29-30. Liberty would be required to obtain another easement from the City of Keene to drill under the park before using Option A, its preferred route. *See* Tr. at 25-26. He stated that Option B was a back-up plan for Liberty to use in the event the City of Keene did not grant this second easement. Tr. at 29. Under Option B, the crossing would stay within the public right-of-way and continue under the Winchester Street bridge wing walls. Tr. at 29-30. Mr. Mills testified that Option B was a safe route, but acknowledged the possibility that the HDD process could damage the wing walls. Tr. at 32-33. Liberty represented in its petition that qualified contractors would construct the crossing, which Liberty would own and maintain. Petition at 2.

In addition to the easements from the City of Keene, Liberty would require an excavation permit from the City and a shoreland permit from the New Hampshire Department of Environmental Services (NHDES) to construct the proposed crossing under both Options A and B. *See* Petition at 2; Exh. 4 ("Project Information" for Options A and B). NHDES has accepted Liberty's Shoreland Permit by Notification # 2018-01757 and issued the permit. *See* Exh. 2. According to Liberty's petition, a wetlands permit will not be required because construction of the crossing will not disturb any wetlands. Petition at 2.

Much of Liberty's testimony during the November 26 hearing focused on the necessity for, and safety of, the proposed crossing. Mr. Mills testified that there were a number of reasons why Liberty should construct a second crossing over the Ashuelot River in Keene. He noted that the existing crossing at the West Street bridge consists of an 8-inch diameter steel pipe that is hanging on the bridge. Tr. at 34; *see also* Exh. 6 (Liberty's Response to Data Request No. Clark 2-1). The West Street pipeline is a one-way feed that serves 107 Liberty customers. The area served by that pipe represents Liberty's most concentrated customer area in Keene without "redundancy" (*i.e.*, an alternative way of getting gas to them). *See* Tr. at 38, 74, 96. Those customers may use natural gas for hot water and cooking, and 54 of the 107 customers also use gas for heating. Tr. at 53-54. Mr. Rokes testified that a new fast food restaurant scheduled to be built in 2019 in the same service area will add a load equivalent to another 25 residential customers. *See* Tr. at 50-51. Mr. Mills stated that this segment of Liberty's distribution system will be at capacity once the new restaurant begins operations. *See* Tr. at 89-91.

Mr. Rokes advised that the West Street bridge pipeline was installed in approximately 1966. Tr. at 46, 82. Mr. Mills testified that its expected lifespan is 50-60 years and that the West Street bridge pipeline will have to be replaced sometime in the next 1-3 years, even though repairs are not required at the present time, to avoid the need for emergency repairs. Tr. at 47, 54-55, 74-75, 83. Further, Liberty stated in discovery that the West Street bridge is in poor condition. Exh. 6. Liberty indicated in its petition and through Mr. Mills' and Mr. Rokes' testimony, that the West Street bridge pipeline will have to be shut down temporarily for Liberty to repair or replace the pipeline and for the City of Keene to repair the bridge. *See* Tr. at 41-44; Petition at 2-3.

Liberty asserted that a second crossing at the Winchester Street bridge would provide the benefits of redundancy and reliability. Exh. 6. Mr. Mills testified that, if constructed, the crossing would allow Liberty to connect two existing pipelines to form a loop, thus eliminating the single feed to the 107 existing customers served by the West Street bridge pipeline. *See* Tr. at 35-37. He submitted that, although there are a few areas in Liberty's gas pipeline system in which there are river crossings with no redundancies, none of those areas has 100 customers or more on a single feed. Tr. at 94, 96. Mr. Mills maintained that it is good utility practice to have multiple feeds. Tr. at 33-34, 73-74. With the proposed Winchester Street bridge crossing in place, Liberty would be able to serve all of its customers if the West Street bridge crossing became unavailable. *See* Tr. at 39-42, 62-63, 86-87.

Mr. Mills rejected the proposal by Mr. Clark and ARLAC that a 6-inch plastic pipe could be inserted into the existing 8-inch steel pipeline on the West Street bridge as an alternative to constructing the new crossing at the Winchester Street bridge. *See* Tr. at 48-50. He disputed the underlying calculations by Mr. Clark's witness, Patricia A. Martin, based on the use of polyvinyl chloride (PVC) piping, stating that a higher density polyethylene material was required. Tr. at 52-53. This higher density polyethylene material has a smaller internal area than PVC. Tr. at 53. Mr. Mills testified there was a risk that Liberty would not have the capacity to meet "Design Day" conditions for the 107 customers served if the diameter of the pipeline were reduced from 8 inches. Tr. at 48-50, 59-60, 91-92. A Design Day is based on past usage and historical weather data, and is a day with an average hourly temperature of minus 6 degrees Fahrenheit, a condition which almost occurred during last winter. *See* Tr. at 40-41, 58-59, 71-72, 91.

Similarly, Mr. Mills testified that reduced demand was not a viable alternative to the proposed Winchester Street bridge crossing. *See* Tr. at 87-88. He acknowledged that it was theoretically possible, with greater efficiencies, for Liberty to serve its existing customers and accommodate growth from the West Street bridge pipeline, but stated that Liberty could not force its customers to take measures necessary to reduce demand. Tr. at 61-62, 87, 96-97. According to Mr. Mills, relying exclusively on reduced demand is not viable, especially when efficiency measures, such as weatherization often cost customers money to implement. *See* Tr. at 87-88.

Regarding the safety of the proposed crossing, Mr. Mills asserted that an underground crossing would be safer than the West Street bridge crossing located on the bridge. Tr. at 76-77, 95. Mr. Rokes and Mr. Mills stated that Keene has experienced flooding in the past, and it would be possible to lose the pipeline on the West Street bridge if the bridge were ever flooded. *See* Tr. at 46, 76-77.

Mr. Mills explained that it was unlikely for a “frac-out” to occur during construction of the Winchester Street bridge crossing. *See* Tr. at 78. A frac-out occurs when too much pressure is used during the HDD process, causing a substance known as bentonite to be released. Tr. at 77-78. According to Mr. Mills, the State of New Hampshire completed a geotechnical analysis of the soil, which permitted Liberty to determine the amount of pressure that safely could be used during the HDD process. *See* Tr. at 79. Should a frac-out occur, Mr. Mills represented that Liberty would immediately stop drilling, put up turbidity curtains or a silt fence to contain the frac-out, and contact NHDES. Tr. at 79-81.

Counsel for Liberty concluded its presentation by stating that Liberty had satisfied the requirements for a crossing license with regard to the proposed crossing at the Winchester Street

bridge. Tr. at 164. He noted that there was no evidence to counter testimony that replacement of the West Street bridge pipeline was necessary. *See* Tr. at 164-65. Liberty requested that the Commission grant it a license for both Option A and Option B without the requirement that an independent monitor oversee the HDD process. Tr. at 165-66.

B. Terry Clark

Patricia A. Martin, a retired electrical engineer, testified on behalf of Mr. Clark that the Winchester Street bridge crossing is unnecessary. Exh. 8 (Direct Testimony of Patricia A. Martin) at 2-3. First, Ms. Martin disputed the necessity for the proposed crossing based on the condition of the West Street bridge. Exh. 8 at 10-11; *see* Tr. at 105. She testified that, contrary to Liberty's representation, the West Street bridge is listed in "good condition," so it was unlikely that it will have to be repaired or replaced in the near future. Exh. 8 at 10; *see* Tr. at 105. In addition, she stated that Mr. Clark, a Keene city councilor, had advised her that Keene's capital improvement plans for 2019 through 2026 did not provide for the repair or replacement of the West Street bridge. Exh. 8 at 11; Tr. at 105-06.

Ms. Martin testified that the proposed Winchester Street bridge crossing was unnecessary, in that there were alternatives which would ensure the West Street bridge pipeline could continue to serve Liberty's existing and new customers. Exh. 8 at 3-5. Those alternative measures included repair of the West Street bridge pipeline by inserting a 6-inch PVC pipe into the existing 8-inch steel pipe. Exh. 8 at 4-5.

Ms. Martin submitted that, based on Liberty's representations at the November 8, 2018, technical session, the West Street bridge pipeline is fed by a 6-inch main and empties into a 6-inch main on one side. Exh. 8 at 4-5; *see* Tr. at 103. Therefore, she calculated that any reduction in flow between a 6-inch main and a 6-inch PVC pipe at the same pressure would be

approximately 10 percent. Exh. 8 at 5. Ms. Martin opined that this 10 percent reduction in flow could be equalized by a 10 percent reduction in demand achieved through efficiency measures, such as weatherization, which could be undertaken by the 107 Liberty customers served by the West Street bridge pipeline. Exh. 8 at 5. She stated that avoiding a second crossing over the Ashuelot River would be consistent with the support of Keene residents for clean energy and a healthy environment. Exh. 8 at 6, 11.

According to Ms. Martin, financial and other incentives exist to motivate Liberty, its shareholders, and its customers to implement energy efficiency measures to reduce demand, including programs such as NHSaves and the Home Energy Assistance Program. Exh. 8 at 5-7, 10. She acknowledged that she had not approached any Liberty customers formally to gauge their interest in implementing these energy efficiency measures. Tr. at 109.

In summation, counsel for Mr. Clark argued that Liberty had not met the required standard for proving that the Winchester Street bridge crossing is necessary, given the availability of alternatives. Tr. at 162-63. He maintained the evidence was insufficient to demonstrate the need to repair or replace the existing West Street bridge pipeline at this time. *See* Tr. at 162.

C. ARLAC

Barbara Skuly testified on behalf of ARLAC that, if the proposed Winchester Street bridge crossing goes forward, an independent monitor should oversee the HDD process. *See* Tr. at 114, 163. Ms. Skuly introduced into evidence an email exchange between her and Ted Diers, NHDES Watershed Management Bureau Administrator. In this email exchange, Mr. Diers stated that NHDES's jurisdiction over the proposed crossing was limited. *See* Exh. 9; *see also* Tr. at 112. Mr. Diers also indicated that NHDES would not oversee the drilling portion

of the construction process, but would become involved only after an adverse environmental impact had already occurred. *See* Exh. 9.

Ms. Skuly referred to a *Keene Sentinel* article dated October 31, 2018, as proof that Liberty cannot be relied on to follow its drilling procedures and protocols. Tr. at 113-14. The article reported that the Commission's Safety Division had recently fined Liberty \$20,000 for failure to follow its own procedures. Exh. 10. In ARLAC's written testimony, Ms. Skuly noted that the Commission's Safety Division report dated October 3, 2018, cited in the *Keene Sentinel* article, found that Liberty had instances of incomplete or incorrect documentation and planning deficiencies that had to be corrected. Exh. 11 at 1-2.

Ms. Skuly concluded that, if the Winchester Street bridge crossing were approved, the Commission should appoint a monitor to oversee construction of the crossing and ensure compliance with the correct procedures. Tr. at 114, 115-16, 119, 121-22; *see* Exh. 11 at 2. She stated that the monitor should be independent of both Liberty and the contractor doing the drilling, although she had no specific firm in mind. Tr. at 121-22. Ms. Skuly recommended that the monitor have current knowledge of, and experience with, the HDD process. Tr. at 116, 120-21. Lack of oversight by a monitor, in Ms. Skuly's view, could have adverse impacts on the public's right to a clean and healthy Ashuelot River. Tr. at 115; Exh. 11 at 1.

D. Staff

Staff offered the testimony of Randall Knepper and Paul Kasper. Mr. Knepper and Mr. Kasper, respectively, are the Director and Assistant Director of the Commission's Safety Division. Mr. Knepper confirmed that, in its November 21, 2018, memorandum, Staff supported approval of the Winchester Street bridge crossing, Option A, subject to a number of conditions. *See* Tr. at 127-35; Exh. 12 at 3-4. Mr. Kasper testified that he needed additional time to review

Option B and would file a supplemental report. Tr. at 149, 158-60. On December 4, 2018, Staff filed a supplemental memorandum, in which it recommended approval of Option B, subject to the same conditions contained in the earlier recommendation concerning Option A.

Mr. Kasper stated that it is common for utilities to have loops or redundancies in their systems to provide safer and more reliable service to their customers. *See* Tr. at 128. Staff noted in the November 21 memorandum that, without the second crossing at the Winchester Street bridge, Liberty would have few options to provide service to its existing customers if the West Street bridge pipeline ever became unavailable. Exh. 12 at 3. It was Staff's opinion that the proposed crossing is necessary to meet the reasonable requirements of service to the public under RSA 371:17. Exh. 12 at 4. Staff also stated that the proposed crossing would have a negligible impact on the Ashuelot River as a result of the directional bore and its prescribed depth below the river bed. Exh. 12 at 3.

Mr. Knepper confirmed that the Safety Division had fined Liberty pursuant to a notice of probable violation in its October 3, 2018, report. Tr. at 147-48. He testified that there were many instances in that matter in which Liberty had not followed its own procedures. *See id.* Mr. Knepper stated that the Safety Division recommended that Liberty provide continuous monitoring of the HDD process for possible hydro fracture situations or "frac-outs." Tr. at 133, 152-54; *see* Exh. 12 at 3. He maintained that Liberty should have someone on site to monitor the HDD process, but did not specify what the monitor's qualifications should be. Tr. at 152-58. Staff would not require that the monitor be independent of both Liberty and the contractor it hired to do the drilling. *See* Tr. at 133; Exh. 12 at 3-4. Mr. Knepper testified that he has never seen the appointment of an independent monitor, such as an environmental engineer, to monitor an HDD process. *See* Tr. at 152. He advised that, if possible and with advanced coordination, a

member of the Safety Division could try to be on site during the HDD process. Tr. at 134-35, 149-50, 154-55.

In summary, Staff stated during the hearing that it supported the Commission's approval of the proposed crossing subject to the Safety Division's review of Option B. Tr. at 163-64. In its supplemental memorandum dated December 4, 2018, the Safety Division supported approval of Option B, subject to the same conditions attached to its approval of Option A. The Safety Division also found that the proposed crossing, using either option, is necessary to meet the reasonable requirements of service to the public under RSA 371:17 and will have a negligible impact on the Ashuelot River as a result of the directional bore at its prescribed depth below the river bed.

III. COMMISSION ANALYSIS OF THE CROSSING PETITION

“Whenever it is necessary, in order to meet the reasonable requirements of service to the public, that any public utility should construct a pipeline, cable, or conduit, or a line of poles or towers and wires and fixtures thereon, over, under or across any of the public waters of this state, or over, under or across any of the land owned by this state, it shall petition the commission for a license to construct and maintain the same.” RSA 371:17. The Commission is authorized to grant such a license if it “may be exercised without substantially affecting the public rights in said waters or lands.” RSA 371:20. NHDES has classified the Ashuelot River as a “public water.”²

Based on the entire record of this proceeding, we find that the proposed crossing, regardless of which option is chosen, is necessary to meet the reasonable requirements of reliable

² NHDES prepares, maintains, and publishes an official list of all public waters in the state. See <https://www.des.nh.gov/organization/commissioner/pip/publications/wd/documents/olpw.pdf>.

service to the public, as required by RSA 371:17. Without the proposed Winchester Street bridge pipeline, 107 existing Liberty customers, in addition to future customers, would have no gas service if the West Street bridge pipeline ever became unavailable. In addition, the proposed crossing will improve reliability as the pipeline on the bridge is nearing the end of its useful life, and replacement should help prevent the need for an emergency repair. Tr. at 83.

In response to cross examination by the company, Mr. Clark's witness conceded she could not contest Liberty's representation that the West Street bridge pipeline was 50 years old and approaching the end of its service life. She further agreed that a second feed to a neighborhood is consistent with good gas engineering planning. *See* Tr. at 107-08. Regarding the alternatives to the Winchester Street bridge pipeline proposed by Ms. Martin, *i.e.*, replacement of the West Street bridge pipeline through the insertion of a 6-inch diameter PVC pipe, combined with energy efficiency measures to be taken by the Liberty customers served by this pipeline, there was insufficient evidence to show that: (1) the insertion alternative would allow for adequate capacity; and (2) Liberty customers would be willing to overcome any reduction in capacity by implementing efficiency measures that could cost them additional money.

We further find that, with the conditions recommended by Staff, the requested license may be exercised without substantially affecting the public rights in the Ashuelot River under either option, as required for approval under RSA 371:20. A separate monitor, in addition to or instead of a member of the Safety Division, shall continuously oversee the HDD process during the construction of the Winchester Street bridge crossing. This individual may be an employee of Liberty or an employee of the contractor Liberty hires to do the drilling (but not the employee operating the drill), or someone independent of Liberty and its contractor. Regardless of who is

chosen to be the monitor, the monitor shall be an individual whose sole responsibility during the drilling shall be to observe the river for indications of a frac-out. In addition, the monitor shall have the authority to immediately halt drilling, implement containment and cleanup measures should a frac-out occur, and shall be responsible for notifying the Safety Division and NHDES if one occurs.

Therefore, we approve the petition subject to the conditions contained in the ordering clauses below, which shall apply to both Option A and Option B. This approval is only for the pipeline with the specifications proposed in this docket, whether under Option A or Option B. Should Liberty seek further modification, it must make the appropriate filing. Liberty is responsible for obtaining any and all federal, state, or local permits required by authorities having jurisdiction for the construction and installation of the proposed crossing.

IV. MOTION FOR PROTECTIVE ORDER

Liberty moved for an order, pursuant to New Hampshire Code of Administrative Rules Puc 203.08, to protect its response to Clark 1-17, stating the bid price for the HDD process to construct the proposed crossing; and its response to Clark 1-18, stating the estimated price to replace the West Street bridge pipeline. Liberty argued that revealing the amount of the bids contained in Liberty's responses to Clark 1-17 and 1-18, which bids Liberty did not accept, could result in less competitive bids when Liberty re-bids the project. Liberty submitted that these amounts constitute "confidential, commercial, or financial information" under RSA 91-A:5, IV and noted that the Commission has routinely treated third-party bid information as confidential.

Liberty also requested confidential treatment of its attachment to Clark 1-20, which is a map prepared by Liberty of its Keene distribution system. This map shows where gas pipes are located in relation to named streets. Liberty contended that this attachment is a detailed map of

its distribution system which should be kept confidential for security reasons. Liberty maintained that granting the map confidential status would be consistent with the federal Office of Pipeline Safety's practice of removing pipeline maps from its website.

Staff objected to a protective order with regard to the attachment to Clark 1-20 on the grounds that: (1) the attachment does not contain sufficient detail to raise any security concerns, and furthermore, the information it contains is readily available to the public; and (2) Liberty failed to meet its burden of proving that the information was exempt from disclosure under RSA 91-A:5. Specifically, Staff noted that the attachment does not show the pipes in relation to other utilities, natural or man-made features, such as buildings, or on which side of the street they are located. Nor does it indicate pressures, flow directions, materials, sizes, or gas commodity used. Staff argued that the information contained in the attachment "could be obtained through casual observation made while walking down public streets and sidewalks in Keene and looking for gas meters."

In its response to Staff's objection, Liberty asserted that the attachment to Clark 1-20 is entitled to confidential treatment under RSA 91-A:5, IV and VI, because disclosure of information contained in utility system maps could result in security risks. Next, it argued that confidential treatment is warranted under the Commission's decisions in *Aquarion Water Co. of New Hampshire, Inc.*, Order No. 25,863 (February 1, 2016), and *New Hampshire Regulated Utilities*, Order No. 25,457 (January 18, 2013). Finally, Liberty stated that the attachment – a map, the electronic version of which can be enlarged to show where the pipes start, end, and join – contains information that is not available to the public through the National Pipeline Mapping System's website, which shows only a satellite view.

The purpose of RSA Chapter 91-A is to ensure the public access to information that informs it about the conduct and activities of government agencies or “public bodies,” such as the Commission. *See Reid v. N.H. Attorney Gen.*, 169 N.H. 509, 532 (2016); RSA 91-A:1-a, VI (defining “public body”). Disclosure may be required unless the information is exempt from disclosure under RSA 91-A:5. Among other types of information, RSA 91-A:5 exempts “confidential, commercial, or financial information” and “personnel ... and other files whose disclosure would constitute invasion of privacy.” RSA 91-A:5, IV. The party seeking protection of the information in question has the burden of proving that confidentiality and/or privacy interests outweigh the public’s interest in disclosure. *Grafton County Attorney’s Office v. Canner*, 169 N.H. 319, 322 (2016). Rule Puc 203.08(b) of the Commission’s administrative rules requires a motion for confidential treatment to include, among other things, a “[s]pecific reference to the statutory or common law support for confidentiality” and a “detailed statement of the harm that would result from disclosure.”

Liberty has asserted no privacy interest in the information it seeks to protect. Therefore, we will determine whether disclosure of this information is warranted using the analysis applicable to exemptions claimed on confidentiality grounds, which requires Liberty to “prove that disclosure is likely to: (1) impair the information holder’s ability to obtain necessary information in the future; or (2) cause substantial harm to the competitive position of the person from whom the information was obtained.” *Hampton Police Ass’n, Inc. v. Town of Hampton*, 162 N.H. 7, 14 (2011). We then weigh the benefits of disclosure to the public against the interest(s) in nondisclosure. *See id.*

With respect to the information in Clark 1-17 and Clark 1-18, Liberty claims that disclosure of the information would impair Liberty’s ability to obtain competitive bids for the

HDD process and replacement of the West Street bridge pipeline. We find that disclosure of this information is likely to cause substantial harm to Liberty's ability to obtain competitive bids. Further, the information would not inform the public about the Commission's regulatory activities, so that the public's interest in its disclosure is minimal. Weighing the public's interest in disclosure against Liberty's interest in nondisclosure, we find that Liberty has established that its interest in nondisclosure outweighs the public's interest in disclosure. Therefore, we grant Liberty's Motion for Protective Order Related to Discovery Responses to Clark 1-17 and Clark 1-18. This ruling is subject to our on-going authority, on our own motion, on the motion of Staff, or on the motion of any party or member of the public, to reconsider our determination. *See* Puc 203.08(k).

With respect to Liberty's map of its Keene distribution system contained in the attachment to Clark 1-20, however, we find that Liberty has failed to sustain its burden of proving that this information is exempt from disclosure under either RSA 91-A:5, VI or IV. RSA 91-A:5, VI exempts from disclosure

Records pertaining to matters relating to the preparation for and the carrying out of all emergency functions, including training to carry out such functions, developed by local or state safety officials that are directly intended to thwart a deliberate act that is intended to result in widespread or severe damage to property or widespread injury or loss of life.

Nothing about a street map showing a line representing distribution gas pipelines constitutes a record related to preparing for, or carrying out, an emergency plan and thus, this exemption does not apply to Liberty's request.

The Commission has protected infrastructure information from disclosure pursuant to RSA 91-A:5, IV on security grounds when the information contained sufficient detail to constitute a security risk. For example, in *Unitil Energy Systems, Inc.*, Order No. 24,677 (October 6, 2006), the Commission granted the company's motion for confidential treatment of

information regarding its electric distribution system that “disclose[d] detailed information as to how the distribution system is designed and configured, revealing key components and their locations [, including] ... planning information as to how the system may be configured in the near future.” *Id.* at 14-15, 23. The Commission also protected information locating and identifying “blackstart” units, so-designated because they are generators capable of starting themselves and producing power to start other generators, and therefore “support essential power supply in New England.” *Public Service Co. of N.H.*, Order No. 24,750 at 18, 25 (May 25, 2007).

The information the Commission protected in the *Aquarion Water* and *New Hampshire Regulated Utilities* decisions is similarly distinguishable from the information contained in the attachment to Clark 1-20. In *Aquarion Water Co. of New Hampshire, Inc.*, Order No. 25,863 (February 1, 2016), the information was a study prepared for Aquarion that identified vulnerable areas of its distribution system; specifically, “areas of the distribution system in need of rehabilitation, repair, or replacement.” *Id.* at 1.

In *New Hampshire Regulated Utilities*, Order No. 25,457 (January 18, 2013), the Commission ruled that Public Service Company of New Hampshire’s (PSNH) and Unitil Energy Systems, Inc.’s, system circuit maps were exempt from disclosure. *Id.* at 8. In addition to asserting that its detailed system circuit maps were exempt under RSA 91-A:5 as “confidential, commercial information,” PSNH had argued that the maps contained information “similar or identical to that deemed by the Federal Energy Regulatory Commission (FERC) to be critical energy infrastructure information (CEII) that is exempt from mandatory disclosure under the federal Freedom of Information Act [FOIA].” Order No. 25,457 at 4. Information constituting CEII is exempt from mandatory disclosure under the FOIA. *See* 18 C.F.R. § 388.113(c)(1). But,

18 C.F.R. § 388.113(c)(2)(iv) defines CEII as, among other things, “specific engineering, vulnerability, or detailed information about proposed or existing critical infrastructure that “[d]oes not simply give the general location of the critical infrastructure.”

Liberty’s map displays nothing more than the general street location of gas distribution pipelines in Keene and does not display CEII. Accordingly, we find that Liberty has failed to show that the attachment contained in Clark 1-20 contains sufficient detail to warrant protection under RSA 91-A:5, IV on security grounds. Moreover, we agree with Staff that information about Liberty’s Keene distribution system is already in the public domain, because gas meters that are visible to the public indicate the extent of Liberty’s distribution system. We find that the public has an interest in this information in that it shows the extent of Liberty’s Keene distribution system, portions of which are at issue in this case, *i.e.*, the use of the West Street bridge to serve load proposed to be served by the Winchester Street crossing. Weighing the public’s interest in disclosure against Liberty’s interest in nondisclosure, we find that Liberty has failed to establish that its interest in nondisclosure outweighs the public’s interest in disclosure. *See Public Service Co. of N.H.*, Order No. 26,064 at 5 (October 17, 2017) (stating that decision to deny company’s motion for confidential treatment was influenced by fact information could be easily derived from publicly known data).

Based upon the foregoing, it is hereby

ORDERED, that Liberty is authorized, pursuant to RSA 371:17, *et seq.*, to construct, install, operate, and maintain a natural gas pipeline, using either Option A or Option B, under and across the Ashuelot River as described in its petition and depicted in its filings; and it is

FURTHER ORDERED, that Liberty shall inform the Commission which of Option A or Option B it intends to construct promptly after making its decision regarding the two options; and it is

FURTHER ORDERED, that the construction of the pipeline shall be implemented as depicted in the documents filed in this docket; and it is

FURTHER ORDERED, that this approval is limited to the construction or alteration of the natural gas pipeline under consideration in this docket, whether under Option A or Option B, and is conditioned on the requirement that Liberty construct, operate, maintain and, if necessary, alter the pipeline consistent with the provisions of N.H. Code Admin. Rules Puc 500, *et seq.*, and 49 CFR Part 192, as may apply, and as amended from time to time, and all other applicable safety standards in existence at that time, including the North American Society for Trenchless Technology's Horizontal Directional Drilling Good Practices Guidelines (4th edition); and it is

FURTHER ORDERED, that Liberty shall submit any future proposed alteration(s) to the crossing license granted herein at least 60 days prior to undertaking any such alteration(s); and it is

FURTHER ORDERED, that Liberty use above-ground markers to identify the gas pipeline, with appropriate warnings and Company contact information, on each bank of the crossing. A method for detecting the pipeline for future location purposes shall be installed, such as using tracer wire or other suitable methods; and it is

FURTHER ORDERED, that Liberty shall arrange for a monitor whose sole responsibility during drilling shall be to observe the river for indications of hydro fracture, regardless of whether Option A or Option B is used, and that monitor shall be vested with the

authority to halt drilling in the event of a frac-out and implement containment and clean-up measures; and it is

FURTHER ORDERED, that, in the event a frac-out occurs, Liberty shall ensure that: (1) containment measures are implemented immediately, that at a minimum include notifications to the Commission's Safety Division and NHDES; and (2) cleanup procedures are implemented; and it is

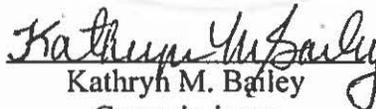
FURTHER ORDERED, that Liberty shall provide a copy of this order to (i) the City Clerk of Keene, New Hampshire; (ii) the New Hampshire Attorney General and all owners of the land bordering on said public waters at the location of the crossing, as required by RSA 371:19; and (iii) the New Hampshire Department of Environmental Services, by first class mail, no later than January 28, 2019, to be documented by affidavit filed with this office on or before February 11, 2019; and it is

FURTHER ORDERED, that Liberty's Motion for Protective Order Related to Discovery Responses is GRANTED as to its responses to Clark 1-17 and Clark 1-18; and DENIED as to the attachment to Clark 1-20.

By order of the Public Utilities Commission of New Hampshire this eighteenth day of January, 2019.



Martin P. Honigberg
Chairman

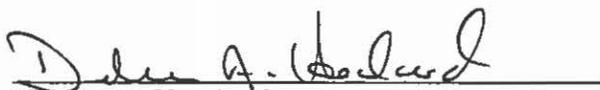


Kathryn M. Bailey
Commissioner



Michael S. Giaimo
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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Docket #: 18-092-1 Printed: January 18, 2019

FILING INSTRUCTIONS:

- a) Pursuant to N.H. Admin Rule Puc 203.02 (a), with the exception of Discovery, file 7 copies, as well as an electronic copy, of all documents including cover letter with: DEBRA A HOWLAND
EXEC DIRECTOR
NHPUC
21 S. FRUIT ST, SUITE 10
CONCORD NH 03301-2429
- b) Serve an electronic copy with each person identified on the Commission's service list and with the Office of Consumer Advocate.
- c) Serve a written copy on each person on the service list not able to receive electronic mail.