THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2022-0077

Appeal of Conservation Law Foundation

OBJECTION TO OFFICE OF THE CONSUMER ADVOCATE'S MOTION FOR SUMMARY AFFIRMANCE

NOW COMES Conservation Law Foundation ("CLF"), the appellant in this Rule 10 appeal, and objects to the Office of the Consumer Advocate's ("OCA") Motion for Summary Affirmance ("Motion"). In support of its objection, CLF respectfully states as follows:

1. This appeal involves the Public Utilities Commission's ("Commission") November 12, 2021 approval of a Firm Transportation Agreement between Liberty Utilities (EnergyNorth Natural Gas) Corp. d/b/a Liberty Utilities ("Liberty") and Tennessee Gas Pipeline (referred to herein as the "TGP Agreement"), as well as a Settlement Agreement entered into between Liberty, the OCA, and the Department of Energy. As set forth in its Notice of Appeal, this matter involves substantial questions about whether the PUC violated important energy laws – RSA 378:37 and RSA 378:40 – when it approved the TGP Agreement and Settlement Agreement.

2. OCA's arguments are largely grounded in equity and ignore the legal issues raised by CLF in its Notice of Appeal. For example, OCA notes that the contract price for the agreement between Liberty and Tennessee Gas Pipeline is at 14 cents per dekatherm, which OCA characterizes as favorable from the standpoint of customers, that the TGP Agreement replaced a more expensive and controversial project, and that CLF "challenges none of this." Motion at ¶¶ 3-4. The OCA appears to assume that because the TGP Agreement may be favorable from a ratepayer standpoint, the Commission was free to ignore the requirements of New Hampshire's Least Cost Integrated Resource Planning

statutes, RSA 378:37-40. However, this argument is primarily based on equitable concerns and fails to address the substantial questions of law raised in CLF's appeal.

3. The OCA further claims that RSA 378:40 is inapposite because the Commission did not approve a rate change within the meaning of RSA 378:40, which allows the Commission to approve a rate change only where a utility has filed a least cost integrated resource plan ("LCIRP") that has been approved by the Commission, or the utility has filed an LCIRP and the Commission's review of that plan is proceeding in the "ordinary course." RSA 378:40. However, the OCA overlooks the fact that the Settlement Agreement, which was entered into by both Liberty and the OCA and approved by the Commission, allows Liberty to recover the costs of the TGP Agreement through its cost-of-gas tariff. CLF NOA Appendix at 46 (Settlement Agreement at 5). The OCA fails to explain why Liberty's recovery of the costs of the TGP Agreement in its tariff should not be considered a "rate change" under RSA 378:40, or to otherwise distinguish the Commission's decision to allow Liberty to recover the costs of the TGP Agreement from a "rate change" within the meaning of the statute. A substantial question of law exists regarding whether the Commission followed RSA 378:40 in approving the TGP Agreement.

4. The OCA also appears to argue that the other key statute raised in CLF's appeal, RSA 378:37, is irrelevant to the Commission's review of the TGP Agreement under the "just and reasonable" standard. Motion at ¶ 5. As explained in CLF's Notice of Appeal, New Hampshire's legislature has unambiguously established that it is the energy policy of the 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 [and] to maximize the use of cost effective energy efficiency and other demand side resources." RSA 378:37. RSA 378:37 does not state that it applies only to the Commission's review of utilities' LCIRPs; rather, it establishes the state energy policy that guides Commission decision-making in proceedings like the one at issue. Accordingly, the OCA is incorrect that RSA 378:37 had no bearing on the Commission's approval of the TGP Agreement.

5. Moreover, in approving the TGP Agreement, the Commission concluded that the TGP Agreement was "a prudent, lesser-cost option" than other alternatives and that "the contracted capacity represents the most viable, reasonably available alternative for Liberty to meet its current and forecasted customer requirements in an adequate and reliable manner." CLF NOA Appendix at 7-8 (Commission Final Order (Nov. 12, 2021) at 7-8).[1] Thus, in approving the TGP Agreement, the Commission assessed whether the TGP Agreement was the "least cost option" and provided energy needs reliably. The Commission, however, did *not* assess whether Liberty had evaluated cost-effective energy efficiency and other demand-side resources as alternatives to the TGP Agreement. As set forth in CLF's Notice of Appeal, the Commission erred as a matter of law in applying RSA 378:37 by focusing only on whether the TGP Agreement was the least cost option without requiring Liberty to also demonstrate that it had explored energy efficiency and other demand-side resources as alternatives to the agreement. The OCA fails to explain why the extent to which the TGP Agreement was the least cost option, pursuant to RSA 378:37, was a relevant consideration for the Commission to make when reviewing the agreement, but that the remaining language in RSA 378:37 regarding energy efficiency and demand side resources was inapplicable to the Commission's review of the agreement.

6. The OCA also argues that RSA 378:37 does not stand in the way of this utility implementing a pipeline capacity agreement with favorable terms. Motion at ¶ 9. Again, the OCA makes an argument grounded in equity that fails to address the crux of CLF's argument, *i.e.*, whether Liberty was required to evaluate cost-effective energy efficiency and other demand-side alternatives to the TGP Agreement as part of the Commission's review and approval of the agreement. The OCA attempts to obscure CLF's arguments by arguing that because, in the OCA's view, the TGP Agreement contains favorable terms, the Commission is somehow absolved of its responsibilities to follow RSA 378:37 in reviewing the TGP Agreement. In other words, the OCA alleges that because the

[1] Additionally, throughout the proceedings Liberty sought approval of the TGP Agreement based on its allegation that it was the "least cost option to meet capacity needs." *See* CLF NOA Appendix at 4 (Commission Final Order at 4).

TGP Agreement contains favorable terms, it would be unfair if the TGP Agreement were not approved and, therefore, the Commission, and by extension this Court, may ignore the requirements of RSA 378:37.[2] However, the OCA's arguments are simply irrelevant to whether the Commission violated RSA 378:37 in approving the TGP Agreement.[3]

7. For the reasons set forth herein, CLF's Notice of Appeal presents substantial questions of law.

WHEREFORE, CLF respectfully requests that the Court deny the OCA's Motion for Summary Affirmance.

Respectfully submitted,

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[2] Although the OCA alleges that the terms of the TGP Agreement are favorable, because the Commission did not require Liberty to adequately analyze energy efficiency and other demand-side alternatives, we cannot know whether such alternatives might have been even more favorable than the agreement approved by the Commission.

CERTIFICATE OF SERVICE

I hereby certify that consistent with Supreme Court Rule 26 and Supplemental Supreme Court Rule 18, on March 7, 2022, I served the foregoing Notice of Appeal electronically or conventionally to those parties listed in the Court's E-Filing system.

/s/ Nicholas A. Krakoff,
Nicholas A. Krakoff