

THE STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION
DG 21-050

LIBERTY UTILITIES d/b/a LIBERTY, KEENE DIVISION

Summer 2021 Cost of Gas—Bifurcated- Contract Terms

STAFF’S REPLY TO LIBERTY’S OBJECTION TO MOTION TO COMPEL, AND STAFF’S
REQUEST FOR PERMISSION TO FILE SUR. REPLY

NOW COMES the Commission Staff (Staff) pursuant to New Hampshire Administrative Rule Puc 203.09 (i), and files this Reply to Liberty’s objection to Staff’s motion to compel fully responsive answers to Staff’s Technical Session Data Request Nos. TS 1-1(d) and TS 1-3 (Items 1, 2, 3, 11, 16-20, 22, 27-28) filed on April 5, 2021. By agreement of the parties, in this expedited proceeding Company responses were to have been provided on or before April 12, 2021. In support of this reply to Liberty’s objection, Staff states as follows:

1. Liberty asserts Staff has failed to show the requested information is relevant. The standard of review for a motion to compel is well established:

In a discovery dispute, the Commission applies by analogy the standard applicable to litigation in Superior Court, which requires a party seeking to compel discovery to show that the information being sought is relevant to the proceeding or is reasonably calculated to lead to the discovery of admissible evidence.

See Public Service Company of New Hampshire, Order No. 25,298 at 6 (December 7, 2011) (citations omitted); Puc 203.09.

2. As argued at hearing, in Staff’s view, the contract terms at issue are confusing, inaccurate, and contradictory. Hearing Transcript of April 19, 2021 (Tr.) at 11-35. Meaningful responses to TS 1-1(d) and TS 1-3 will illuminate *Liberty’s own views* on the meaning of relevant contract terms. The information Staff seeks is relevant because at hearing on April 19, 2020, and in subsequent Order No. 26,475 at 2, 10-11 (April 30, 2021), the Commission bifurcated non-rate matters and directed Liberty to

engage in expedited and meaningful conversation with Staff and the Office of Consumer Advocate (OCA) regarding the contract terms at issue.

3. Liberty has not provided any additional information to date, or agreed to meet with Staff to discuss CNG contract terms. Time is in short supply. The parties' discussions must now be initiated and completed and Liberty must file an amended executed contract on or before June 1, 2021, i.e. within 14 business days. Liberty must provide the information Staff identified in its Motion to Compel if Staff is to:

- understand *Liberty's view* of its own contract terms;
- assess whether *Liberty's understanding* meets Commission requirements for CNG service in Keene and approved CNG facility operations; and
- assess the merits of any amendment Liberty files, including *Liberty's understanding* of the terms in its proposed amendment, and whether the meaning has been *clarified* or *revised* with reference to the *new CNG supply contract executed in January 2021*.

4. If any justification is needed in support of relevance beyond the Commission's own oral and written directives, the information Staff seeks to compel is relevant because Liberty highlighted its new CNG contract in pre-filed testimony in this docket. Liberty thus put the new contract terms at issue. In Staff's view, the new contract is inconsistent with Puc 506.01 requirements and Commission orders in Docket No. 17-068. *See* Exh. 2 at Bates page (BP) 11-12. Liberty has agreed some contract language is inconsistent, inexplicably asserts CNG safety manuals "supersede" executed contract language yet refuses to provide the specific information requested here. *See* Liberty response to TS 1-3, Item 5 ("some language in the contract is superseded or rendered irrelevant by Liberty's CNG facility operating procedures...").

5. The information sought is also relevant because Liberty continues to argue that its current CNG contract was "approved" in prior Cost of Gas (COG) proceedings and that therefore the new CNG contract, which Liberty asserts includes essentially similar terms, is also reasonable or prudent. In its

April 29, 2021 objection, Liberty states, “Note that the Commission approved recovery of CNG costs incurred under the similar 2016 CNG contract with similar language as referenced here.” Liberty Obj. para. 30.

6. Staff disagrees with Liberty’s legal position. In Staff’s view, the Commission did not “approve” non-rate terms in the current COG contract by means of the Commission’s prior COG Orders. *See also* Order No. 26,475 at 10-11 (“The Commission notes that by approving prospective COG rates for the Summer 2021 period, we make no findings on whether the CNG contract, or the proposed new CNG contract, are reasonable overall; or prudent.”). To the extent Liberty argues that the information Staff seeks is not relevant because the new contract language has already been approved in the current contract, Liberty is mistaken.

7. In the following paragraphs, Staff responds to Liberty’s objection on a response-by-response basis to explain why Liberty’s initial responses are inadequate on their face. Staff’s TS 1-1 and TS 1-3, and the Liberty responses at issue, are already part of this docket, as attachments to *Staff’s Letter* dated April 14, 2021 requesting Liberty to produce witnesses Mullen and Roche at hearing. For administrative clarity, they have not been refiled as attachments to this motion.

TS 1-1(d)

8. As stated in Staff’s initial motion, TS 1-1 (d) is nonresponsive. Staff asked if the new contract includes services XNG is providing to Liberty other than the provision of supply, i.e. CNG itself, and demand, i.e. skid rental. *See* Docket DG 20-152, Hearing Transcript of November 18, 2020- Session 1 at 31, 77 (Supplier owns the skid). Specifically, TS 1-1(d) says:

Are there any services that XNG is offering Liberty other than a new contract that includes a demand and supply charges? If there are services please identify and list them.

Based on information and belief, for example, Liberty may be subcontracting skid-maintenance to XNG.

Staff anticipated a response listing services other than supply and skid rental. Liberty’s responded:

XNG is not providing any more or any less service than the original contract. As with the first contract, this contract includes demand and supply charges.

Staff does not have a list of all the services XNG is providing in the original contract, and did not ask about the original contract. Staff is aware the new contract includes demand and supply charges. Staff wants to know about any *other* services. Liberty's current answer is non-responsive.

TS 1-3, ITEM 1 on MARKUP TS 1-3 Attachment 1.1

9. Staff asked Liberty to identify the "delivery point" with a photograph. *See* TS 1-3 Attachment 1.1, Item 1 (handwritten notations on new contract). Liberty's objection essentially seems to assert that Staff does not need the information because Staff already knows based on Staff's past review of the CNG facility. *See, e.g.* Liberty objection paragraph 14-18 (Item 1).

10. Staff is aware of Staff's own understandings; the point of the data requests to *understand Liberty witness(es)' understanding of the contract terms as written*. In its response to TS 1-3 Item 5, Liberty admitted new contract terms are inconsistent with operations and emergency manuals, yet Liberty refuses to describe or pinpoint the inconsistencies. Staff seeks this information in order to have meaningful discussions with Liberty about whether new contract language comports with Liberty's role as a utility serving CNG.

11. In Liberty's objection, Liberty's counsel identifies photographs of the delivery point by identifying Staff's pre-marked Exhibit 21, Bates 000013 and 000014. The exhibit is not in evidence. Liberty's counsel is not a witness; he did not author Liberty's response to TS 1-3; he cannot testify. This is unhelpful and non-responsive. Mr. Mullen is the witness who authored Liberty's response to TS 1-3, and whose response Staff seeks. Mr. Mullen is the witness to explain: if the delivery point is as shown in Bates 00013 and 00014, why the new CNG contract says "Title and risk of loss shall pass from Seller to Buyer at the Delivery Point," when in Staff's view the demarcation point is the point of the transfer of responsibility given that Liberty is a utility and not an end-user. *See* Staff TS 1-3 data request Attachment Staff 1-1.1 p 2 of 9 (redacted contract and Mr. Knepper's handwritten Item 1 request).

12. Staff also asks the Commission to reject Liberty's arguments that places form over substance.

There is no PUC rule that says a handwritten attachment to a data request that asks for a photograph "does not count" as a data request. TS 1-3, Attachment 1.1, Item 1's request for a photo was clear. *Compare* Liberty Objection at para 16 (asserting Staff did not request a photograph) *with* Staff 1-3, Attachment 1.1, Item 1 ("Please confirm with photo if this is the location of delivery pt. Is it prior?")

ITEM 2

13. Staff asked Liberty to specify the flange and connection that constitute the "delivery point," as that phrase is *used in the new contract*, and to mark it on a site plan. Liberty's answer is, essentially, "Staff already knows." As with Item 1, Staff is aware of where Staff believes the delivery point for measurement should be. Staff seeks to understand *what Liberty's witness understands* the quoted contract language to mean, because, e.g., other contract language defining the delivery point as "the transfer of title and risk of loss" seems inconsistent with PUC 506.01 and operation and procedural manuals, and Liberty's status as a utility.

ITEM # 3

14. Staff's Item 3 says "Staff assumed Delivery Point and Demarcation Point of responsibilities is the same location. Please confirm." Liberty's response is "See #1 above," i.e. Liberty's answer is "Staff already knows." As with Item 1 and Item 2, Staff is aware of Staff's understanding. However, the demarcation point of responsibilities, the flange at the end of the CNG truck, is not discussed in the new contract language. Staff seeks to understand *what Liberty witness(es) understand* the new contract terms to mean, and *where Liberty witness(es) think the demarcation point is*, in relation to contract terms, and *whether Liberty witness(es) think the delivery point and the demarcation point are the same point*.

While Liberty's counsel states "The demarcation point has always been where the hose from the CNG facility connects to the truck trailer," Liberty's counsel did not answer TS 1-3, he cannot testify; his answer is not evidence. It appears Liberty's counsel does not define the demarcation point and the

delivery point as the same point. Staff seeks an answer from a Liberty witness who can testify about the terms in the new contract and resolve inconsistencies.

ITEM # 11

15. Liberty's answer is non-responsive. It does explain why the provision is not "in reverse," i.e. why the provision does not say, "Seller may witness all testing and gauging, provided however, if no representative of Seller is present, Buyer's measurement and/or determination of quantity shall be final." This goes to Staff concerns with whether XNG or Liberty is operating the CNG facility. Because Liberty is a utility, it is Staff's understanding that Liberty is operating the CNG facility.

ITEM 16

16. The contract language says "Custody transfer metering to be provided on outlet of skid." For the reasons explained above this appears to be inconsistent with Liberty's role as a utility where the demarcation point of responsibility is the flange at the end of the CNG truck. As above, Staff knows its own opinion; Staff seeks a statement from *Liberty witness(es)* as to the meaning of the phrase in the new contract.

ITEM 17

17. Liberty's answer is non-responsive for the reasons already asserted; Staff is aware of Staff's view and seeks to learn Liberty witness(es)' understanding of the phrases in the context of the new CNG supply contract. Staff wishes to know why Liberty believes executed contract language is superseded by CNG facility procedures, and why Liberty believes current contract terms are inconsistent with those procedures.

18. Liberty again repeats a legal argument Staff rejects. Liberty state, "Note the Commission approved recovery of CNG costs incurred under the similar 2016 CNG contract with similar language as referenced here." Liberty Obj. at 33. Staff disagrees with Liberty's legal position. In Staff's view, the

Commission did not “approve” non-rate terms in the current COG contract by means of the Commission’s prior COG Orders. *See also* Order No. 26,475 at 10-11

ALL REMAINING ITEMS: 18, 19, 20, 22, 27, 28,

19. Staff’s answers to Liberty’s objection are similar to the above for the remaining items listed below. Staff seeks to know *Liberty witness(es) understanding* of the phrases at issue, or marked photographs and site plans illustrating contract term locations, or all three *as used in the new contract*. *See supra*. Also, Staff seeks to learn why *Liberty witness(es)* believes phrases are inconsistent with existing procedural manuals. For example:

- Item 18. Staff wishes to know whether, in Liberty’s view, contract terms describe Liberty as in charge of operations and emergency procedures and whether Liberty’s role is primary with regard to shut-down and whether XNG ever can initiate “shut-down.” In Liberty’s view, how do Liberty and XNG divide responsibility for the “CNG Equipment” described in the contract language, pursuant to the contract language?
- Item 19. The quoted contract language in Staff’s TS 1-3, Attachment 1.1, Item 19 says “During the Delivery Period the Seller shall be responsible for all maintenance and support for the CNG Equipment.” This is inconsistent with Liberty’s counsel’s statement that “Liberty is responsible for all maintenance,” and Liberty’s counsel is not a witness. Moreover, in light of the clear contradiction in executed contract language, (new contract language say the Seller is responsible for maintenance) Liberty’s purported answer “confirming” that maintenance is Liberty’s responsibility” is contradictory, meaningless, and non-responsive.
- Item 20. Staff asked Liberty to identify what tasks are encompassed in what Liberty apparently has delegated (not sub-contracted?) to Seller. Staff is interested in more than the part of the quoted language Liberty references, i.e. tasks for which XNG and Liberty must obtain certification/qualification.” Staff’s TS 1-3 Item 20 asks about all the tasks described as “Seller shall be responsible for all maintenance and support for the CNG equipment.” Staff expected that Liberty was renting and operating the CNG equipment, and needs to know what *Liberty witnesses* understand the quoted language to mean.
- Item 22. Liberty’s “confirmation” that Liberty connected the skid to the distribution system” is in conflict with contract language that says, “Seller will be responsible for connecting the equipment to existing facilities.” Staff needs to understand *Liberty witness(es)*’ understanding of the *terms as used in the new contract*. Liberty’s answer to Staff’s Item 22, referencing the quoted language, “I thought Liberty did this? Please confirm” is, itself in conflict with the new contract language. Liberty’s answer “confirmed” is unclear and thus nonresponsive.
- Item 27. Staff asked Liberty to confirm with a photograph, the location of “Gas Piping. All piping downstream of Buyer meter to be installed per state and local code.” As with all items, Staff has its own understanding. Staff needs to know *Liberty witness(es)*’ understanding of these

phrases *as used in the new contract*, and the physical features these phrases reference. Liberty counsel's statement is unhelpful; he is not a witness; he did not execute the contract or answer TS 1-3; and some yellow piping can be seen above ground in Staff photographs in a location that is "downstream" of a meter at the end of the CNG skid. The meter may be one provided by XNG, since Liberty is renting the skid, it is unclear if that meter is "Buyer's meter." If a photograph is not possible, a Liberty witness could mark the location on an approved site plan instead.

- Item 28. Staff asked Liberty to confirm that Liberty is operating decompression equipment, not XNG. Given the many contradictions, and uncertainty (due to no *Liberty witness*' responses) about the location of the demarcation point, the delivery point, whether those locations are different, where ownership and title responsibilities lie and even the location of "the Buyer's meter," *as described in the new contract*, (see above) Liberty's statement "confirmed," is non-responsive and meaningless.

NO STAFF DISCUSSIONS WITH LIBERTY TO DATE; NO ADDITIONAL INFORMATION PROVIDED

20. In its objection, Liberty stated that the Company "is following the Commission's directive to renegotiate the XNG contract to address Staff's concerns, to include a conversation with Staff and the OCA to discuss and address those concerns, all of which essentially renders [the motion to compel] moot." Liberty Objection at 2. Liberty's conclusion that the motion to compel is "on track" to become moot is misguided. To date, Liberty has not provided any additional information, or agreed to dates for discussion. Moreover, without responsive answers to the data requests described above - including marked photographs and marked site plans-- Staff cannot meaningfully participate in discussion or assess whatever Liberty files on June 1, 2021.¹

WHEREFORE, given that the June 1, 2021 date is 14 business days away, Staff respectfully request that this honorable Commission:

- A. GRANT Staff permission to file this sur-reply, to explain why, in addition to the provision of discovery being consistent with Commission Orders in this docket, and Company responses

¹ On April 28, 2021, Staff invited OCA and Liberty to considering meeting two-four Fridays before June 1, 2021 regarding bifurcated matters. Staff again requested marked photographs and cite plans before a proposed May 7, 2021 meeting. OCA responded with possible dates and times. Liberty's same-day response stated the proposed meeting(s) are premature. Liberty intends to meet only after Liberty has an agreement in principle with XNG. Regarding discovery requested, Liberty indicated it first had to object to the motion to compel. No meetings have been scheduled or held thus far.

being non-responsive on their face, *see* Staff Motion to Compel, Staff is entitled to discovery requested in this expedited docket. Staff needs to answer Liberty's superficial objection and demonstrate why this discovery is essential to prompt resolution of concerns regarding non-rate CNG supply contract terms:

- B. COMPEL Liberty to immediately and fully respond to TS 1-1(d) and TS 1-3 Items 1, 2, 3, 11, 16-20 and 22, 27-28, by providing responsive supplemental narrative answers, and annotated photographs and cite plans as requested; and
- C. DIRECT Liberty to meet with Staff and the OCA to discuss the contract terms at issue and provide an update on the status of the forthcoming amendment no later than Wednesday, May 26, 2021; and
- D. GRANT such other relief as may be just and equitable.

Respectfully submitted,

/s/ Mary E. Schwarzer

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CERTIFICATE OF SERVICE

I hereby certify that this 10 day of May, 2021, an electronic copy of the foregoing motion is being sent to the entire Service List, consistent with the Commission's Temporary Changes in Filing Requirements (March 17, 2020) due to the COVID -19 state of emergency.

/s/ Mary E. Schwarzer

Mary E. Schwarzer, Staff Attorney