

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

2016 TERM

No. 2016-0002

APPEAL OF PIPE LINE AWARENESS NETWORK FOR THE NORTHEAST, INC.

PETITIONER'S MOTION FOR REMAND

NOW COMES Pipe Line Awareness Network for the Northeast, Inc. ("PLAN"), by and through its attorneys, Burns & Levinson LLP, and pursuant to Sup. Ct. R. 7-A(2)¹ and RSA 541:14, respectfully submits this motion seeking an order of the Court remanding the case to the Public Utilities Commission ("Commission") for further consideration and requesting a stay of the appeal. The Commission should consider, as a material changed circumstance, the notification dated May 2, 2016 submitted by Liberty Utilities (EnergyNorth Natural Gas) Corp. d/b/a Liberty Utilities (hereinafter "EnergyNorth"), which stated that the Precedent Agreement at issue in this case "has been terminated." In support of this motion, PLAN states as follows:

I. Facts

1. On October 2, 2015, the Commission issued Order No. 25,822, which "approve[d] the Stipulation and Settlement Agreement between [EnergyNorth] and the Commission Staff, and approve[d] a 20-year contract for long-term, firm natural gas pipeline capacity on the proposed Northeast Energy Direct pipeline." *Id.* at 1. The Commission determined "that EnergyNorth's

¹ "A motion for remand or partial remand shall be accompanied by a copy of the pleading(s) that the movant intends to file with the lower tribunal if the motion is granted. Unless the court orders otherwise, the grant of a partial remand shall not stay the proceedings in this court."

proposed acquisition of the capacity contracted for in the Precedent Agreement is prudent and reasonable.” *Id.* at 31. The Commission’s finding was explicitly conditional, stating: “Our finding that the contracted capacity is prudent, however, assumes that EnergyNorth manages its business and operates in a manner consistent with good utility practice *and its plans outlined in this filing.*” *Id.* (emphasis added).

2. On December 2, 2015, the Commission denied PLAN’s motion for rehearing. *See* Order No. 25,845 (finding that “none of the issues raised by PLAN is grounds for us to rehear or reconsider Order No. 25,822”).

3. On January 4, 2016, PLAN filed its Appeal by Petition with the Court. On January 21, 2016, EnergyNorth filed with the Court a motion for summary disposition, which PLAN opposed. The Court denied that motion on February 18, 2016, and accepted PLAN’s appeal.

4. On May 2, 2016, EnergyNorth submitted a notice to the Commission (“Notice”), stating that “the Market Path Precedent Agreement has been terminated given that Tennessee Gas Pipeline Company, LLC [“Tennessee”] will not be pursuing the Northeast Energy Direct project.” A copy of that Notice is attached hereto as **Exhibit A**. As a result of Tennessee’s termination of the Precedent Agreement for capacity on the Market Path of the Northeast Energy Direct project, EnergyNorth’s plans and the basis for its filing have fundamentally and irrevocably changed. Consequently, there has been a material change of circumstances warranting the Court’s remand and the Commission’s rescission of its orders. This additional evidence requires further consideration by the Court and the Commission and the record will be incomplete in the absence of this consideration.

II. Legal Authority For Remand

5. “[I]n any case, . . . if the court shall be of the opinion that justice requires the reception of evidence of facts which have occurred since the hearing, . . . it shall remand the case to the commission to receive and consider such additional evidence.” RSA 541:14. “Upon receipt of such evidence, the commission shall consider the same and may alter, modify, amend, or rescind the order or decision appealed from, and shall report its action thereon to the court within said twenty days.” RSA 541:15. “If the commission shall rescind the order appealed from the appeal shall be dismissed[.]” RSA 541:16.

III. Discussion

A. The Commission Currently Cannot Consider The Notice Absent Remand

6. “[P]erfection of an appeal vests exclusive jurisdiction in this court over those matters arising out of, and directly related to, the issues presented by the appeal.” *Appeal of Pub. Serv. Co.*, 130 N.H. 285, 297 (1988) (citing *Rautenberg v. Munnis*, 107 N.H. 446, 448 (1966)).

7. In the present appeal, PLAN has identified a number of errors in the Commission’s determination. Consequently, the Commission is without jurisdiction to pass, in the first instance, on the effect that the Notice may have on the continued viability of its earlier orders, which orders PLAN has appealed.

B. Remand By The Court Is Appropriate

1. The Current Circumstances Meet The Standard As Developed In The Court’s Precedent

8. Although the Commission could not in the first instance consider and (if advisable) act in light of the Notice, it could do so if the Court formally remands the case so that the Commission might “receive and consider such additional evidence.” *See* RSA 541:14.

9. The Court has in the past remanded cases to the Commission for the consideration of information that developed after the Commission's initial review. *See, e.g., Appeal of Easton*, 125 N.H. 205, 213-214 (1984) (remanding case to the Commission after finding that "much has occurred to qualify this case for remand under RSA 541:14," where changed circumstances made it "seem[] futile to decide an appeal based upon premises not borne out by current reality"); *Pub. Serv. Co. v. State*, 113 N.H. 497, 503 (1973) (ordering remand for the Commission to "reconsider its decision and order in the light of this opinion and of later information on the actual results of the company's operations").

10. The decision with facts closest to this case is *Appeal of Vicon Recovery Sys.*, 130 N.H. 801 (1988). In that case, Vicon had petitioned the Commission for a long-term rate for electricity that the Public Service Company of New Hampshire (PSNH) would purchase from Vicon. The Court granted PSNH's motion for remand of its appeal under RSA 541:14 and the Commission ultimately rescinded its prior long-term rate order, which had the effect of mooting PSNH's appeal, which appeal the Court then dismissed. *Id.* at 804, 809.

11. Like Vicon, EnergyNorth was the party that originally petitioned the Commission for approval. Moreover, like Vicon, EnergyNorth, after obtaining the Commission's approval, found itself unable to move forward with the proposal it had previously described to the Commission.

2. A Remand Will Allow For Efficient Resolution Of Issues On Appeal

12. Under the Court's current scheduling order, PLAN's opening brief is due on June 10, 2016. Opposing briefs are due by July 11, 2016.²

² An Assented-to Notice of Automatic Extension of Time is being filed contemporaneously with this motion and these dates will be extended accordingly.

13. In the absence of a remand, the Court and both parties to the appeal will be required unnecessarily to address issues in brief that will be specifically resolved by remand and Commission action as requested herein. This would result in the Court and both parties expending significant time and resources on preparing and evaluating not only reasoned arguments on the appellate issues, but also an additional collateral briefing about whether the Notice renders PLAN's appeal moot.³ Going forward without a remand as requested herein would be inefficient and needlessly require the Court's attention.

14. PLAN submits that it would be most efficient to allow the Commission, following remand as requested herein, to formally consider the Notice terminating EnergyNorth's contract with Tennessee, as part of its determination in this case. In the interim, further action in this Court should be stayed.

15. PLAN anticipates that the Commission will treat the Notice as an effective withdrawal by EnergyNorth of EnergyNorth's December 31, 2014 "Petition for Approval of a Firm Transportation Agreement with Tennessee Gas Pipeline Company, LLC" ("Petition"), which initiated the underlying proceeding (DG 14-380).

16. If the Commission does deem the Petition to have been withdrawn, it will then rescind its Order Nos. 25,822 and 25,845, *see* RSA 541:15, and dismiss EnergyNorth's Petition as moot. At that point, with the underlying order on appeal rescinded, the appeal before the Court should be dismissed. *See* RSA 541:16.

³ Short of a complete rescission of the Commission's underlying orders approving the Precedent Agreement, PLAN's first question presented for review – a question of law – remains ripe. *See* Petition for Appeal at 3 ("Whether the PUC's determination to conduct a prudence review under either RSA 374 or RSA 378 of a public utility's gas transportation contract in a proceeding to approve the contract was unlawful, unjust and/or unreasonable?").

17. PLAN's submission to the Commission will be limited to the Notice and its effect on the continued viability of EnergyNorth's Petition. Pursuant to Sup. Ct. R. 7-A(2), PLAN submits herewith a copy of the pleading that PLAN intends to file with the Commission if the motion is granted. See Exhibit B, attached.

IV. Conclusion

18. As it was in *Appeal of Easton*, changed circumstances may make it "futile to decide an appeal based upon premises not borne out by current reality." *Id.* at 214. Rather than require the Court's attention to unnecessarily protracted briefing and argument in this Court, a remand to the Commission is appropriate in order for the Commission itself to determine whether any basis remains for its prior orders to stand.

WHEREFORE, PLAN respectfully requests that the Court:

- (A) Grant this motion, and remand the case to the Commission for consideration of the Notice and relevant facts concerning EnergyNorth's termination of the Precedent Agreement with Tennessee; AND
- (B) Stay the proceedings in this Court pending the Commission's order following remand; AND
- (C) Grant PLAN such other and further relief as the Court deems just and equitable under the circumstances.

Respectfully submitted on June 2, 2016,

PIPE LINE AWARENESS NETWORK FOR THE
NORTHEAST, INC.,

By its attorneys,

BURNS & LEVINSON LLP



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N.H. SUPREME COURT R. 26(7) CERTIFICATION OF COMPLIANCE

I hereby certify that this 2nd day of June, 2016, I forwarded a copy of the foregoing Motion for Remand by first class mail, postage prepaid, to the counsel for the parties of record at their addresses of record, and to the Attorney General of the State of New Hampshire, 33 Capitol Street, Concord, NH 03301.



Zachary R. Gates



Liberty Utilities

EXHIBIT A

Sarah B. Knowlton
Senior Director, Regulatory Counsel
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Email: sarah.knowlton@libertyutilities.com

May 2, 2016

Via First Class and Electronic Mail

Debra A. Howland
Executive Director
New Hampshire Public Utilities Commission
21 South Fruit Street, Suite 10
Concord, NH 03301-2429

NEPUC 3MAY16AM8:26

Re: DG 14-380: Liberty Utilities (EnergyNorth Natural Gas) Corp. d/b/a Liberty Utilities; Market Path Precedent Agreement

Dear Ms. Howland:

On behalf of Liberty Utilities (EnergyNorth Natural Gas) Corp. d/b/a Liberty Utilities (the "Company"), I am writing to notify the Commission that the Market Path Precedent Agreement has been terminated given that Tennessee Gas Pipeline Company, LLC will not be pursuing the Northeast Energy Direct project.

Thank you for your assistance with this matter. Please do not hesitate to contact me should you have any questions.

Very truly yours,

A handwritten signature in cursive script that reads "Sarah B. Knowlton".

Sarah B. Knowlton

cc: Service List