

BEFORE THE NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION

Re. Liberty Utilities (EnergyNorth Natural Gas) Corp.

Docket No. DG 15-289

REPLY OF INTERVENOR ARIEL ARWEN TO LIBERTY UTILITIES' OPPOSITION TO
MOTION TO COMPEL AND OPPOSITION OF INTERVENOR ARIEL ARWEN TO
LIBERTY UTILITIES' MOTION FOR CONFIDENTIAL TREATMENT

Now comes Ariel Arwen, having been granted intervenor status by the Commission and therefore acting as a full party to this proceeding, and responds as follows to the January 13, 2016 pleading of Liberty Utilities opposing my Motion to Compel Discovery Responses and moving for confidential treatment of certain discovery materials:

1. In essence, Liberty's objection to my motion to compel a response to my data request 3-1 is that the request is "unreasonable, unduly burdensome and overly broad." This objection is untimely and the rules of the Commission unambiguously state that Liberty has waived any opportunity to make this argument. *See* Rule Puc 203.09(h).
2. Even if objection on this basis were timely, the argument is unpersuasive. Essentially, Liberty contends that because the New Hampshire Climate Action plan lacks the force of law, the extent to which the Liberty petition would, if granted, be consistent with the Plan is beyond the scope of this proceeding. If the Commission were to adopt this view, the "public interest" standard by which the Commission must review the petition pursuant to RSA 374:26 would be nothing but a rote exercise.
3. Further, Liberty's arguments about the onerousness of data request 3-1 are inconsistent with the facts. Paragraph 5 of the Liberty pleading states that it is not "possible to accurately calculate anticipated reductions in carbon emissions as a result

of the proposed project” and, even if it were possible, “such analysis could not be done with any degree of integrity” because “there is no baseline data from which a numerical analysis could be done and essentially no means to measure specific progress toward the Plan’s targets.” This is incorrect. The baseline data for New Hampshire carbon dioxide emissions for 1980 through 2013 are published by the U.S. Energy Information Administration (EIA) at <http://www.eia.gov/environment/emissions/state/excel/new%20hampshire.xlsx>.

(See graphical representation in Appendix 1, attached.) Moreover, Liberty can easily convert its projected sales to expected carbon dioxide emissions. This is a trivial matter, using the conversion coefficients that Liberty cites in its response to Staff 2-2. Liberty is obviously aware of the data published by EIA, since it makes a citation in response to Arwen 2-6.

(<http://www.eia.gov/state/data.cfm?sid=NH#ConsumptionExpenditures>) By following the links at the cited page, one can view and download consumption data, by fuel, for New Hampshire, from 1989 through October 2015, which makes it possible to “measure specific progress” for anyone who cares to do so. Liberty Utilities provides a “disclosure label”, as a bill insert and online, which shows emissions of three greenhouse gases (GHGs), including carbon dioxide, associated with its electricity service. It is apparently within Liberty’s ability to provide information when it is required. Liberty has provided an estimate of the potential market/load in Hanover and Lebanon of “on the order of 1.3 to 1.6 billion cubic feet (Bcf) of annual load.” Direct Testimony of William J. Clark, page 7 line 16 through page 8 line 5. I am left wondering what additional information

Liberty might conceivably need that it does not own or have ready access to. I note that the ability to meet the Climate Action Plan's targets is affected cumulatively by all energy projects in the state and therefore Liberty's contribution to GHG emissions from the proposed franchise can not viewed in isolation to its other activities. As of the summer of 2015, "Liberty has firm capacity on various pipelines to receive up to 107,883 decatherms per day." NH PUC docket DG 15-091, Order number 25,781.) In addition Liberty has signed contracts to purchase natural gas from the Northeast Energy Direct pipeline project of 115,000 dekatherms per day and 78,000 dekatherms per day, respectively. (NH PUC dockets DG 14-380 and DG 15-494, respectively.) Despite Liberty's protests to the contrary, it owns or has ready access to the information required to provide a full answer to data request Arwen 3-1.

4. Liberty's arguments about confidentiality are especially troubling. In paragraph 8 of its pleading, Liberty argues that although I am a full party to this proceeding I should not be allowed to see certain information that other parties see because I did not "cite any interest in or any expertise associated with analyzing financial information." Liberty cites no authority for the proposition that my entitlement to discovery materials turns on such things and, indeed, there is no such authority. Ultimately, my interest in this proceeding is to subject the Liberty petition to the skeptical scrutiny it deserves and to assist the Commission in making the appropriate public interest determination. Although Liberty apparently believes that lay people have no place at the table when such important questions are under deliberation, the constitutional guarantee of due process suggests otherwise.

5. In paragraph 7 of its pleading, Liberty implies that the Commission should deny my discovery motion because I did not “offer[] to sign an agreement precluding any further disclosure” of information that Liberty self-servingly deems confidential. This is absurd. Nothing in the Commission’s rules requires me to make such an offer and at no time has Liberty proposed that I enter into such an agreement. Moreover, requiring intervenors to agree to keep information secret, without knowing beforehand exactly what information they are agreeing to treat as confidential, is to put such intervenors in an unconscionable position. How ironic, then, that the entire system under which parties can provisionally designate certain material as confidential is premised on good faith. *See* Rule Puc 203.08(d)(1) (requiring “a good faith basis for seeking confidential treatment”).
6. For this reason, the Commission should deny the motion for confidential treatment Liberty included in its January 13 pleading. I am a party to this proceeding and, as such, have a right to make a full and fair argument against Liberty’s motion. How can I possibly do so when Liberty has unilaterally denied me access to the information it now claims should be treated as secret forever?
7. Alternatively, the Commission should reject the confidentiality motion on the ground that it makes no real effort to meet the applicable standard. Rule Puc 203.08(b)(3) requires a motion for confidential treatment to include “a detailed statement of the harm that would result from disclosure and any other facts relevant to the request for confidential treatment.” There is no such detailed statement in Liberty’s motion. Instead, there is a vague and self-serving claim that disclosure would put Liberty “at a

competitive disadvantage” because, if Liberty obtains the requested franchise, its service would compete with those of other energy providers in the franchise territory. *See* Liberty Pleading at paragraph 11. This is a dubious claim. To the extent Liberty, as a provider of regulated natural gas to customers in Lebanon and Hanover, would compete with other providers, it would be on terms set forth in publicly filed tariffs as approved by the Commission in public proceedings. Other firms, offering sources of energy with different cost components, would either beat Liberty’s rates or they would not; their ability to do so would not turn in any way on their access to the sort of information that is relevant to this proceeding or any ensuing rate cases.

8. The requirement in Puc 203.08(b)(3) for a detailed explanation of the basis for confidential treatment is obviously designed to further the Commission’s need to follow the instructions of the New Hampshire Supreme Court to interpret applicable provisions of RSA 91-A, the Right-to-Know Law, “with a view to providing the utmost information in order to best effectuate the statutory and constitutional objective of facilitating access to all public documents.” *Professional Firefighters of New Hampshire v. New Hampshire Local Government Center*, 163 N.H. 613, 614 (2012). “The burden of proving whether information is confidential rests with the party seeking to avoid disclosure.” *Id.* Self-serving “because we said so” claims of competitive harm do not meet this burden – particularly, when the question is whether the information in question qualifies for the RSA 91-A:5, IV disclosure exemption for “confidential, commercial or financial information.” *See Union Leader Corp. v. New Hampshire Housing Finance Authority*, 142 N.H. 540, 552-53 (1997) (“An expansive

construction of these terms must be avoided, since to do otherwise would allow[] the exemption to swallow the rule and is inconsistent with the purposes and objectives of [RSA chapter 91-A.]”(citations omitted).

9. The other asserted basis for Liberty’s request for confidential treatment of financial information is that it is competing against Valley Green’s request for the same franchise. As I have previously explained in a pleading submitted in the Valley Green docket, the competition between these two companies for a utility franchise is not the sort of “competitive harm” RSA 91-A:5, IV is intended to prevent. *See id.* at 554 (“To show that information is sufficiently “confidential” to justify nondisclosure, the party resisting disclosure must prove that disclosure “is likely: (1) to impair the [State's] ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.”) (citing *National Parks and Conservation Ass'n v. Kleppe*, 547 F.2d 673, 677–78, (D.C.Cir.1976)). One could plausibly argue that the respective positions of the competing franchise applicants supports rather than undermines the notion that each should have access to the other’s financial information so that each can assist the Commission with making the best possible decision.
10. Finally, even assuming (1) that it is fair and consistent with due process for the Commission to entertain Liberty’s motion for confidential treatment in these circumstances, and (2) that Liberty has stated a privacy interest that falls within RSA 91-A:5, IV, the Commission must in making its decision ultimately balance the asserted privacy interest against the public’s interest in disclosure. *See id.* at 555.

Liberty seeks to minimize the public's interest in reviewing the financial information at issue in this docket on the ground that this is not a rate case. *See* Liberty Pleading at paragraph 10. To the contrary, even though this is not a rate case, much of Liberty's case here turns on the financial information that will become of record, whether the Commission is confining its review under RSA 374:26 to the petitioners "managerial, technical, and *financial* abilities," *Hamstead Area Water Co.*, Order No. 25,803 (Docket No. DW 15-254, Aug. 24, 2015) (emphasis added), or whether, as here, the Commission is called upon to nest those considerations within broader questions of RSA 374:26 "public interest" and the petitioner is basing its request for a franchise in no small part on claims that its service will be a better deal financially than what would otherwise be available to the consuming public. Yes, the Commission could keep Liberty's financial data a secret until the petition is granted and the next rate case is pending – but, by then, it will be too late for the public to scrutinize whether this franchise was a good deal for energy consumers. In these circumstances, the public's interest in disclosure of the financial information at issue vastly outweighs the imaginary competitive harms that are so amorphously described in the Liberty motion.

For the foregoing reasons, the Commission should grant my pending discovery motion and deny Liberty's motion for confidential treatment.

Respectfully submitted this 18th day of January 2016,

Ariel Arwen

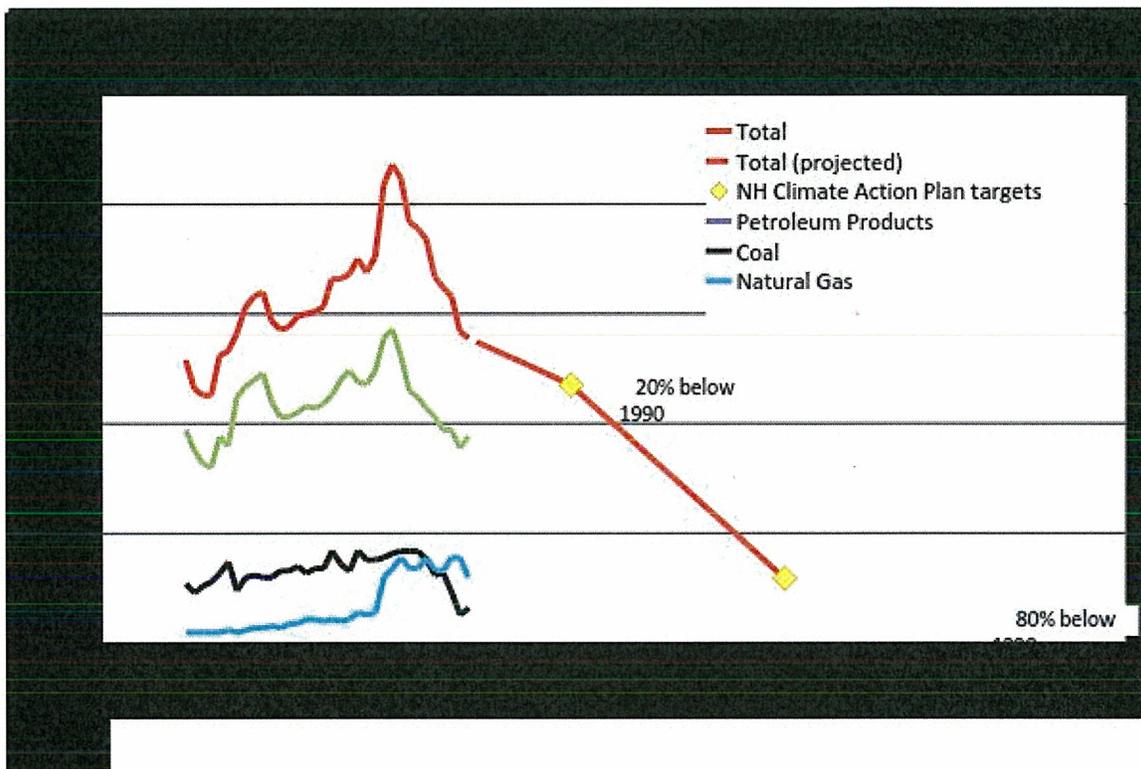
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An electronic copy has been submitted to the Service List.

Appendix 1.



Sources:

- U.S. Energy Information Agency, *NH CO2 Emissions from Fossil Fuel Consumption (1980-2013)*
<http://www.eia.gov/environment/emissions/state/excel/new%20hampshire.xlsx>
- New Hampshire Climate Action Plan, 2009
http://des.nh.gov/organization/divisions/air/tsb/tps/climate/action_plan/documents/nhcap_final.pdf