

February 22, 2016

TO: Commissioners

FROM: David K. Wiesner, Hearings Examiner

RE: DG 15-362, Liberty Utilities (EnergyNorth Natural Gas) Corp. d/b/a Liberty Utilities, Petition for Franchise Approval in Pelham and Windham

### **HEARINGS EXAMINER'S REPORT**

At your request, I served as the presiding officer over the supplemental prehearing conference (PHC) held in the above-referenced matter on February 17, 2016.

On August 31, 2015, Liberty Utilities (EnergyNorth Natural Gas) Corp., d/b/a Liberty Utilities (Liberty), filed a petition to provide gas utility service, as defined by RSA 362:2 and 362:4-b, in Pelham and Windham, New Hampshire. Pursuant to a Supplemental Order of Notice issued on February 4, 2016, Northern Utilities, Inc. (Northern) was made a mandatory party and a supplemental PHC was scheduled for February 17, 2016, at which Northern and Liberty were directed to present information regarding the current status of Northern's gas utility franchise, if any, in the Town of Pelham. The Supplemental Order of Notice was published in the *Union Leader* on February 9, 2016 and in the *Eagle Tribune* on February 10, 2016.

#### **Appearances**

Sarah B. Knowlton, Esq., of Rath, Young and Pignatelli, for Liberty  
Patrick H. Taylor, Esq., for Northern Utilities, Inc.

Donald M. Kreis, Esq., for Office of the Consumer Advocate (OCA)  
Alexander F. Speidel, Esq., for Commission Staff

#### **Positions of the Parties**

##### Northern:

Northern stated that it acquired a franchise in the Town of Pelham in 1998 through the purchase of the assets of a propane company, including its franchise and its customers in the so-called "Pelham Plaza." Northern asserted that, in 2002, it advised the Commission that natural gas service could not economically be extended to serve Pelham Plaza customers and that the system should no longer be regulated. In Order No. 24,689, the Commission approved the termination of regulated propane service to Pelham Plaza customers, but only addressed the termination of

customer service and not the existing utility franchise. Northern's tariff continues to identify Pelham as a town within its gas service territory.

Northern maintained that it has not provided regulated gas service to customers in Pelham since 2006, and it has no immediate plans to do so. Northern therefore "does not intend to hold itself out as still having a franchise to serve that particular area in Pelham." Northern further clarified that it "[does not] claim to continue to have a franchise in that particular area."

Northern asserted, however, that service to the eastern portion of Pelham near its existing gas facilities in Salem may become economically viable in the future, and distributed a map depicting the location of this existing infrastructure (copy attached). Northern did not specify the extent of the area in the eastern part of the Town that it might seek to serve at some future time.

Northern requested that, to the extent the Commission grants a franchise to Liberty in this docket, such a franchise should not be granted on an exclusive border-to-border basis throughout the entire Town. Northern stated its position that "it would not be in the public good to foreclose service to potential customers in the eastern portion of Pelham, if it becomes economical for Northern to do so." In support of this position, Northern cited *Appeal of PSNH*, 141 N.H. 13 (1996), for the proposition that utility franchises are not exclusive as a matter of law, rather the Commission is authorized and obligated to grant competing franchises when doing so is found to be in the public good.

Northern clarified that its interest would lie in serving otherwise unserved customers, and not being precluded from doing so by virtue of an exclusive border-to-border franchise that could have the effect of actually precluding customers from receiving service from a utility that is closer in proximity. At the very least, according to Northern, there should always be a case-by-case determination of what serves the public good when considering utility franchise proposals. Northern characterized these concerns as policy issues that the Commission should consider.

Liberty:

Liberty maintained the facts support a conclusion that Northern retains no claim to serve gas customers in Pelham, noting that Northern has no assets in the Town and has indicated no intention to serve the Town for quite some time, including in response to inquiry from representatives of the Town. Liberty referenced the support it has received for its franchise petition from the Towns of Pelham and Windham and from the Greater Londonderry Chamber of Commerce.

Liberty confirmed that it intends ultimately to develop its distribution system throughout the entire Town of Pelham, through a phased approach over 5-6 years. Liberty expressed its continuing intention to make the case to the Commission that its franchise should be granted on an exclusive basis. Liberty argued there is no legally-recognized concept of reserving a right to serve an area in the future, nor should the proximity of Northern's distribution mains on the Pelham-Salem border be determinative of whether Liberty is granted an exclusive right to provide service in Pelham.

Liberty maintained that, if Northern has a specific plan to provide service to Pelham customers at some later point in time, it can submit that plan for consideration by the Commission, and the Commission would then determine what is in the public good, in terms of which company can best provide service in a specific area. Liberty argued, however, that there should be no limitation on Liberty's proposed service in the Town based on Northern's potential future interest.

Liberty requested that, in light of Northern's position that it has no franchise in Pelham, the Commission establish a procedural schedule immediately, so that the proceeding may move forward and Liberty's petition be fully considered.

OCA:

OCA stated that the issue of franchise exclusivity is an important question in this case, and expressed the view that *Appeal of PSNH* stands for the proposition that utility franchises need not be exclusive if the public interest requires otherwise. OCA noted that the Commission's decision in this case could have significant precedential value in other parts of the state where natural gas service is expanding. In its role as representative of residential ratepayers, OCA stated its position that the Commission should do whatever provides the lowest cost service to consumers in the most reliable fashion possible.

Staff:

Staff noted its primary interest in achieving clarity as to the status of Northern in the docket, and requested that the Hearings Examiner recommend to the Commission that Northern be stricken from the discovery service list in this proceeding because it is no longer an intervenor.

Staff referenced the Commission's 1989 Order No. 19,299, pursuant to which Northern acquired the propane gas business and its franchise in Pelham. Staff noted the eventual expiration of any activity on Northern's part in the Pelham area of its service territory. Staff asserted that, although Northern's tariff continues to indicate it has a franchise area in Pelham, in fact service is not being provided and has not been provided for many years. In view of this extended period of inactivity, Staff argued that the spirit if not the letter of RSA 374:27, which provides that authority to commence business as a public utility in a franchise area may only be exercised within two years and shall not be exercised thereafter, has come into play in this case.

Staff further noted the lack of specificity in Northern's claim that it retains an interest in serving customers in the eastern portion of Pelham, both in terms of geographic scope and with respect to timing. Staff asserted that, although Northern's "participation as an intervenor in this case has reached a close," if it intends to submit comments regarding non-exclusivity in certain portions of Pelham, such comments should provide greater specificity regarding its potential future service plans. Staff confirmed that these comments also could provide a vehicle for Northern to present its policy arguments regarding franchise area non-exclusivity for the Commission's consideration.

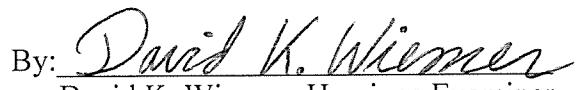
Staff further indicated its belief that Northern's tariff should be revised to confirm that it does not have an active service franchise in Pelham. Staff confirmed its interest in having the Commission provide direction to Northern to revise its tariff accordingly, arguing it is "probably best that utilities try not to have a notional tariff service territory, but rather an actual tariff service territory."

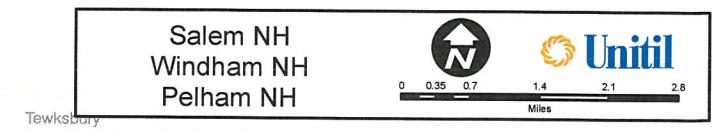
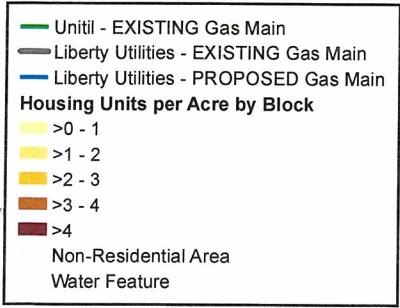
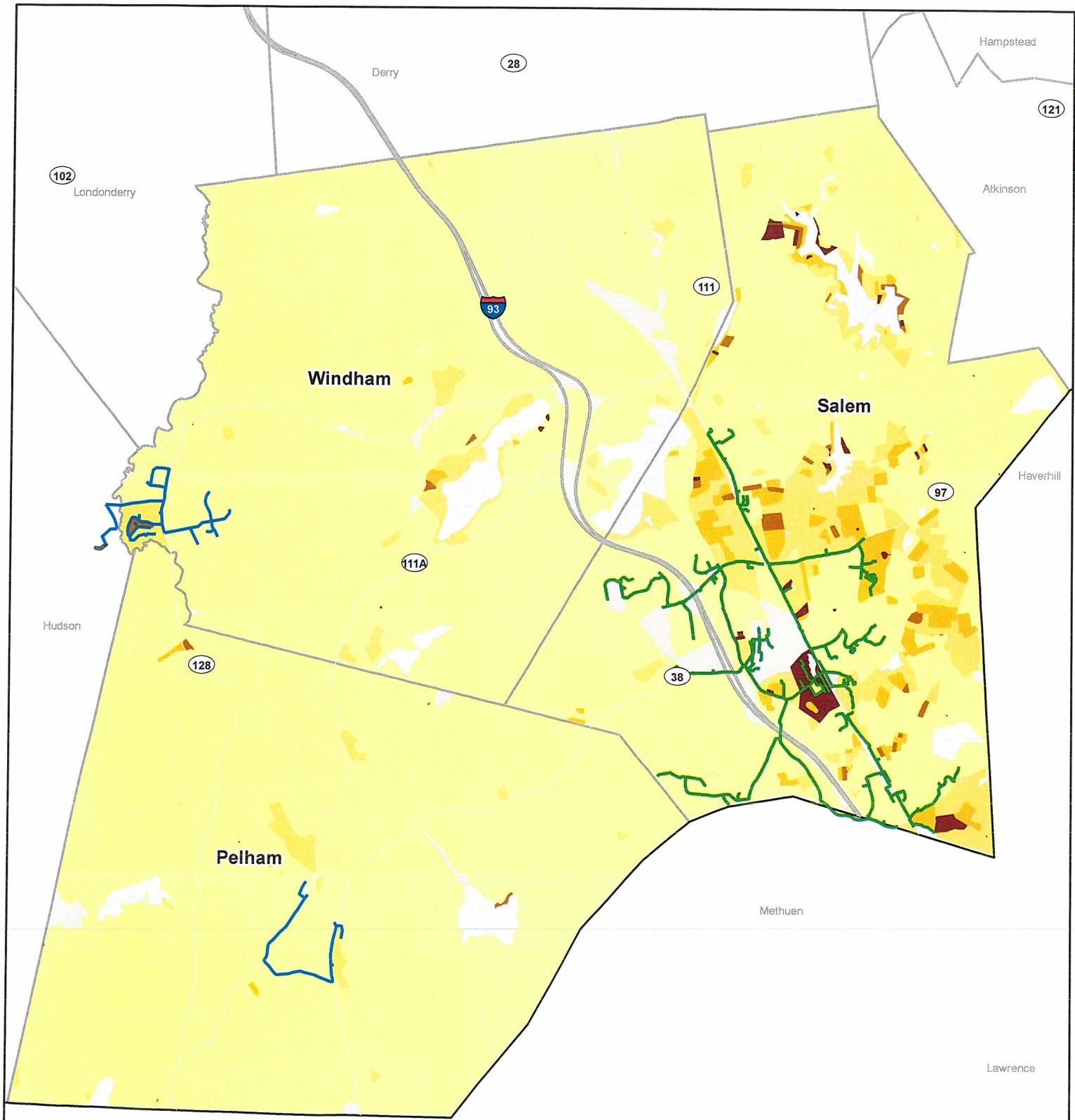
With regard to a prospective procedural schedule for the docket, Staff indicated it would work with Liberty and OCA to develop a procedural schedule that would culminate in hearings held during the first week of May.

#### **Hearings Examiner's Recommendation**

Based on the record developed during the supplemental PHC, including Northern's factual representations and concessions, I recommend the Commission issue an order that:

1. Terminates Northern's status as a party in the proceeding;
2. Terminates any franchise authority that may be retained by Northern within the Town of Pelham; and
3. Directs Northern to revise its Tariff NHPUC No. 11 - Gas to delete any reference therein to the Town of Pelham.

By:   
David K. Wiesner, Hearings Examiner



**SERVICE LIST - EMAIL ADDRESSES - DOCKET RELATED**

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**Pursuant to N.H. Admin Rule Puc 203.11 (a) (1): Serve an electronic copy on each person identified on the service list.**

Executive.Director@puc.nh.gov  
al-azad.iqbal@puc.nh.gov  
alexander.speidel@puc.nh.gov  
amanda.noonan@puc.nh.gov  
epler@unitil.com  
karen.sinville@libertyutilities.com  
mark.naylor@puc.nh.gov  
maureen.karpf@libertyutilities.com  
ocalitigation@oca.nh.gov  
pradip.chattpadhyay@oca.nh.gov  
randy.knepper@puc.nh.gov  
sbk@rathlaw.com  
selectmen@pelhamweb.com  
Stephen.Hall@libertyutilities.com  
steve.frink@puc.nh.gov  
steven.mullen@libertyutilities.com  
susan.chamberlin@oca.nh.gov  
taylorp@unitil.com

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- c) Serve a written copy on each person on the service list not able to receive electronic mail.

**PURSUANT TO N.H. ADMIN RULE PUC 203.09 (d), FILE DISCOVERY**

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**DIRECTLY WITH THE FOLLOWING STAFF**

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**RATHER THAN WITH THE EXECUTIVE DIRECTOR**

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DISCOVERY

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CONCORD NH 03301-2429

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Upon request, Staff may waive receipt of some of its multiple copies of bulk materials filed as data responses. Staff cannot waive other parties' right to receive bulk materials.

STEPHEN FRINK

NHPUC  
21 S. FRUIT ST, SUITE 10  
CONCORD NH 03301-2429

AL-AZAD IQBAL

NHPUC  
21 S. FRUIT ST, SUITE 10  
CONCORD NH 03301-2429

RANDY KNEPPER

NHPUC  
21 S. FRUIT ST, SUITE 10  
CONCORD NH 03301-2429

MARK NAYLOR

NHPUC  
21 S. FRUIT ST, SUITE 10  
CONCORD NH 03301-2429

ALEXANDER SPEIDEL

NHPUC  
21 S. FRUIT ST, SUITE 10  
CONCORD NH 03301-2429

✓ AMANDA NOONAN  
NHPUC  
21 S. FRUIT ST, SUITE 10  
CONCORD NH 03301-2429

SUSAN CHAMBERLIN  
OFFICE OF CONSUMER ADVOCATE  
21 S FRUIT ST STE 18  
CONCORD NH 03301  
[susan.chamberlin@oca.nh.gov](mailto:susan.chamberlin@oca.nh.gov)

BRIAN MCCARTHY  
TOWN OF PELHAM  
6 VILLAGE GREEN  
PELHAM NH 03076  
[selectmen@pelhamweb.com](mailto:selectmen@pelhamweb.com)

PRADIP K CHATTOPADHYAY  
OFFICE OF CONSUMER ADVOCATE  
21 S FRUIT ST STE 18  
CONCORD NH 03301  
[pradip.chattopadhyay@oca.nh.gov](mailto:pradip.chattopadhyay@oca.nh.gov)

STEVE MULLEN  
LIBERTY UTILITIES  
15 BUTTRICK RD  
LONDONDERRY NH 03053  
[steven.mullen@libertyutilities.com](mailto:steven.mullen@libertyutilities.com)

GARY EPLER  
UNITIL ENERGY SYSTEMS INC  
6 LIBERTY LANE WEST  
HAMPTON NH 03842-1720  
[epler@unitil.com](mailto:epler@unitil.com)

OCA LITIGATION  
OCA LITIGATION  
21 SOUTH FRUIT ST STE 18  
CONCORD NH 03301  
[ocalitigation@oca.nh.gov](mailto:ocalitigation@oca.nh.gov)

STEPHEN R HALL  
LIBERTY UTILITIES  
15 BUTTRICK RD  
LONDONDERRY NH 03053  
[stephen.hall@libertyutilities.com](mailto:stephen.hall@libertyutilities.com)

KAREN SINVILLE-DUPUIS  
LIBERTY UTILITIES  
[karen.sinville@libertyutilities.com](mailto:karen.sinville@libertyutilities.com)

MAUREEN KARPF  
LIBERTY UTILITIES  
15 BUTTRICK RD  
LONDONDERRY NH 03053  
[maureen.karpf@libertyutilities.com](mailto:maureen.karpf@libertyutilities.com)

PATRICK H TAYLOR  
UNITIL ENERGY SYSTEMS INC  
6 LIBERTY LANE WEST  
HAMPTON NH 03842  
[taylorp@unitil.com](mailto:taylorp@unitil.com)

SARAH B KNOWLTON  
RATH YOUNG & PIGNATELLI PC  
ONE CAPITAL PLAZA  
CONCORD NH 03302-1500  
[sbk@rathlaw.com](mailto:sbk@rathlaw.com)

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