

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DG 18-092

**LIBERTY UTILITIES (ENERGYNORTH NATURAL GAS) CORP.
d/b/a LIBERTY UTILITIES**

**Petition for a License to Construct and Maintain a Natural Gas Pipeline
Beneath the Ashuelot River in Keene**

Order on Motion for Reconsideration, Clarification and/or *In Limine*

ORDER NO. 26,193

November 20, 2018

In this order, the Commission denies Terry Clark's Motion for Reconsideration of the Commission's October 11, 2018, secretarial letter limiting the scope of this proceeding and his related Motion *In Limine*. The Commission grants Mr. Clark's Motion for Clarification regarding the determination of necessity required under RSA 371:17.

I. PROCEDURAL HISTORY

On May 31, 2018, Liberty Utilities (EnergyNorth Natural Gas) Corp. d/b/a Liberty Utilities (Liberty) filed a petition pursuant to RSA 371:17 (Petition) for a license to construct and maintain a natural gas pipeline under the Ashuelot River in Keene, New Hampshire. The Order of Notice (August 1, 2018) stated the primary issues raised in Liberty's petition and established September 3, 2018, as the deadline for filing requests to intervene.

Terry Clark, a resident of Keene, and the Ashuelot River Local Advisory Committee (ARLAC) filed unopposed petitions to intervene. The Commission granted both intervention requests.

At the September 5, 2018 pre-hearing conference, the Commission indicated that the scope of this proceeding would be limited in accordance with *Northern Pass Transmission LLC*,

Order No. 25,910 (June 28, 2016) (NPT Order). The Commission confirmed that limitation in a secretarial letter issued on October 11, 2018, stating:

Under RSA 371:20, the Commission examines whether the license requested by a utility “may be exercised without substantially affecting the public rights in said waters.” Such examination focuses on the “functional use and safety of the proposed crossings.” *Northern Pass Transmission LLC*, Order No. 25,910 (June 28, 2016) at 11. [T]he Commission will not adjudicate environmental concerns that are appropriately decided by other agencies.

Mr. Clark moved for reconsideration and clarification and requested a hearing on his motion. Liberty filed a late objection to Mr. Clark’s motion.

II. POSITIONS

A. Terry Clark

Mr. Clark asserted that the Commission’s October 11 secretarial letter could be interpreted to erroneously limit the scope of this proceeding to consideration of only one issue: the functional use and safety of the proposed crossing under RSA 371:20. He argued that the NPT Order requires the Commission to determine whether the proposed crossing is actually necessary under RSA 371:17 and to consider related environmental concerns, such as potential pollution of the Ashuelot River.

B. Liberty

In its objection, Liberty contended, that, when determining the threshold issue of necessity under RSA 371:17, the NPT Order requires the Commission consider only whether the proposed crossing will allow the petitioner to provide a service that a public utility has historically provided. Liberty maintained that any environmental concerns relating to the proposed crossing are properly raised before a more appropriate agency, such as the New Hampshire Department of Environmental Services (NHDES). According to Liberty, NHDES has issued a Shoreland Permit by Notification with respect to the proposed river crossing.

III. COMMISSION ANALYSIS

The Commission may grant a motion for reconsideration for “good reason” if the movant shows that the decision in question is unlawful or unreasonable. *See Public Service Co. of N.H.*, Order No. 26,008 at 4 (April 20, 2017) (citing RSA 541:3 and :4). The movant may establish “good reason” by demonstrating that there were matters the Commission either overlooked or misapprehended, or by presenting new evidence that was unavailable before the decision issued. *Id.* The Commission may grant a motion for clarification if the Commission’s intent was not made sufficiently clear in the original decision, and “evidence exists in the record to support the Commission’s intent.” *Liberty Utilities (EnergyNorth Natural Gas) Corp.*, Order No. 26,156 at 6 (July 10, 2018).

We deny Mr. Clark’s Motion for Reconsideration because we find that he failed to meet his burden of showing the Commission overlooked or misapprehended any matters addressed in the October 11 secretarial letter. We grant, however, Mr. Clark’s Motion for Clarification with respect to the issue of necessity for the crossing under RSA 371:17.

Mr. Clark argues that environmental concerns regarding the proposed crossing are within the scope of this proceeding because, in contrast to the NPT Order, the New Hampshire Site Evaluation Committee (NHSEC) will not be reviewing the project. That argument represents an overly narrow reading of the NPT Order. The Commission does not have specialized environmental expertise. The NHDES has such expertise and broad authority over environmental matters. In this instance, Liberty has submitted a Shoreland Permit by Notification to the NHDES with respect to the Ashuelot River crossing. This proceeding therefore will not address any environmental issues associated with the proposed crossing.

Instead, as stated in the October 11 secretarial letter, this matter will focus on whether Liberty will be able to exercise the proposed crossing license “without substantially affecting the public rights” in the Ashuelot River, as required by RSA 371:20. *See* NPT Order at 10. The scope of our review under RSA 371:20 therefore will be limited to “license issues of public safety and public functional use” of the Ashuelot River, and “not environmental impacts associated with the crossing.” *See EnergyNorth Natural Gas, Inc.*, Order No. 23,601 at 12-13 (December 12, 2000).

Under RSA 371:17, a petitioner may be granted a crossing license only if the crossing is “necessary, in order to meet the reasonable requirements of service to the public.” Such “necessity” has been characterized by the Commission as a “threshold eligibility requirement.” NPT Order at 9. In the NPT Order, the Commission considered arguments by two intervenors which focused on the “service to the public” aspect of that threshold requirement. Those parties asserted that Northern Pass, as an elective or “merchant” transmission project as opposed to a reliability-based project, could not be found to meet the necessity requirement. The Commission disagreed, finding it most relevant that the proposed “electric transmission service ... is clearly a type of public utility service.” *Id.* at 9-10. Notably, in that case no party contested on factual grounds the necessity for Northern Pass to use the crossings to provide the proposed electric transmission service; rather, the intervenors focused on the character of the service itself.

In this proceeding, by contrast, Mr. Clark wishes to contest the necessity for Liberty to use the proposed crossing to provide service to its customers. In its petition, Liberty represented that the proposed Ashuelot River crossing is “necessary ... to meet the reasonable requirements of reliable service” to its customers, citing a number of factors supporting that conclusion. Petition at 2-3. That representation is sufficient as a threshold matter for the crossing license

petition to be processed by the Commission, but it is not irrebuttable. Mr. Clark will be permitted to introduce evidence at hearing to contest Liberty's representation that the proposed crossing is necessary to meet its reasonable requirements of service to the public within its authorized franchise area. *EnergyNorth Natural Gas, Inc.*, Order No. 23,657 at 29 (March 22, 2001). As noted above, however, environmental concerns related to the necessity inquiry fall outside the scope of this proceeding and will not be permitted.

Having granted Mr. Clark's Motion for Clarification, we do not rule on Mr. Clark's Motion *in Limine*.

Based upon the foregoing, it is hereby

ORDERED, that Terry Clark's Motion for Reconsideration and/or *in Limine* is hereby DENIED; and it is

FURTHER ORDERED, that Terry Clark's Motion for Clarification is GRANTED to the extent that he shall be entitled to introduce evidence at the hearing on the merits to counter Liberty's representation that the proposed crossing is necessary under RSA 371:17, as provided in this order.

By order of the Public Utilities Commission of New Hampshire this twentieth day of November, 2018.

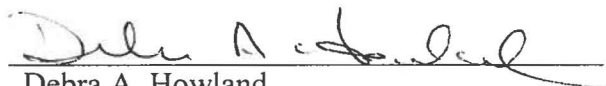


Martin P. Honigberg
Chairman



Michael S. Giaimo
Commissioner

Attested by:



Debra A. Howland
Executive Director

SERVICE LIST - EMAIL ADDRESSES- DOCKET RELATED

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

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FILING INSTRUCTIONS:

- a) Pursuant to N.H. Admin Rule Puc 203.02 (a), with the exception of Discovery, file 7 copies, as well as an electronic copy, of all documents including cover letter with:**
- DEBRA A HOWLAND
EXEC DIRECTOR
NHPUC
21 S. FRUIT ST, SUITE 10
CONCORD NH 03301-2429
- b) Serve an electronic copy with each person identified on the Commission's service list and with the Office of Consumer Advocate.**
- c) Serve a written copy on each person on the service list not able to receive electronic mail.**