

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

2015 TERM

DOCKET NO. _____

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

(New Hampshire Public Utilities Commission)

APPEAL BY PETITION PURSUANT TO RSA 541:6
AND NEW HAMPSHIRE SUPREME COURT RULE 10

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NOW COMES Pipe Line Awareness Network for the Northeast, Inc. ("PLAN"), by and through its attorneys, Burns & Levinson LLP, and pursuant to RSA 541:6 and N.H. Supreme Court Rule 10, respectfully appeals to this Honorable Court from the New Hampshire Public Utilities Commission's ("PUC" or the "Commission") order on reconsideration, Order No. 25,845, issued on December 2, 2015. In support of this Petition, PLAN states as follows:

I. Parties and Counsel

Party, Address and Role	Counsel of Record For Party (including name, address and NH bar number)
Pipe Line Awareness Network for the Northeast, Inc. c/o Kathryn Eiseman 17 Packard Road Cummington, MA 01026 <i>Appellant / Intervenor Before the PUC</i>	Zachary R. Gates (NH Bar No. 17454) Richard A. Kanoff (<i>pro hac vice</i> application forthcoming) Saib Hossain (<i>pro hac vice</i> application forthcoming) Burns & Levinson LLP 125 Summer Street Boston, MA 02110
Liberty Utilities (EnergyNorth Natural Gas) Corp. d/b/a Liberty Utilities 15 Buttrick Road Londonderry, NH 03053 <i>Party Which Petitioned For the PUC's Approval</i>	Sarah B. Knowlton (NH Bar No.12891) Rath Young & Pignatelli PC One Capital Plaza Concord, NH 03302-1500

Office of Consumer Advocate 21 South Fruit Street, Suite 18 Concord, NH 03301 <i>Party To the PUC Proceeding</i>	Susan Chamberlin (NH Bar No. 5517) Office of the Consumer Advocate 21 South Fruit Street, Suite 18 Concord, NH 03301
N.H. Public Utilities Commission c/o Debra A. Howland, Executive Director & Secretary 21 South Fruit Street, Suite 10 Concord, NH 03301-2429 <i>Agency From Which Appeal Taken</i>	Rorie E. Patterson (NH Bar No. 12930) N.H. Public Utilities Commission 21 South Fruit Street, Suite 10 Concord, NH 03301-2429

II. Copies Of Relevant Orders and Filings

Accompanying this petition is an appendix of relevant materials.

Order Or Filing	Location In Appendix
PUC Order of Notice, filed January 21, 2015	Appendix, at PA-00001
Condensed Public Transcript of Hearing, Day 1 (July 21, 2015)	Appendix, at PA-00007
Condensed Public Transcript of Hearing, Day 2 (July 22, 2015)	Appendix, at PA-00061
Condensed Public Transcript of Hearing, Day 3 (August 6, 2015)	Appendix, at PA-00089
PLAN's Post Hearing Brief, filed August 7, 2015 (Public Version)	Appendix, at PA-00122
PUC's Order No. 25,822, approving Stipulation and Settlement Agreement and Precedent Agreement, filed October 2, 2015	Appendix, at PA-00143
PLAN's Motion for Rehearing, Reconsideration and Clarification, filed November 2, 2015	Appendix, at PA-00175
The Office of the Consumer Advocate's letter of concurrence in PLAN's Motion for Rehearing, Reconsideration and Clarification, filed November 2, 2015	Appendix, at PA-00197

Liberty's Objection to PLAN's Motion for Rehearing, filed November 9, 2015	Appendix, at PA-00199
PUC Order No. 25,845 Denying PLAN's Motion for Rehearing (Filed December 2, 2015, as modified on December 4, 2015)	Appendix, at PA-00209

III. Questions Presented For Review

The questions presented for review, expressed in the terms and circumstances of the case, but without unnecessary detail, are specifically set forth herein. This statement of the questions presented is deemed to include within its scope every subsidiary question fairly comprised therein.

1. 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?

2. Whether the PUC erred as a matter of law, or otherwise rendered an order that was unjust or unreasonable, by:

(a) rejecting the testimony of expert witnesses for the PUC's Staff, the Office of the Consumer Advocate ("OCA"), and PLAN, who had all identified fatal discrepancies and omissions in Liberty Utilities (EnergyNorth Natural Gas) Corp. d/b/a Liberty Utilities ("EnergyNorth" or the "Company") case in chief as filed; and/or

(b) failing to require EnergyNorth to evaluate liquefied natural gas ("LNG") as a viable alternative to contracting for some or all of the capacity on the Northeast Energy Direct ("NED") pipeline; and/or

(c) permitting EnergyNorth to cancel its existing transportation contract with TGP for transportation capacity at Dracut and replace that contract wholly with capacity contracted for in the Precedent Agreement?

IV. Legal Provisions Involved In The Case

PLAN hereby specifies that the following provisions of constitutions, statutes, rules, or regulations are involved in the case. These provisions are contained in the annexed Appendix.

Authority	Location In Appendix
RSA 363:17-a	Appendix, at PA-00228
RSA 363:17-b	Appendix, at PA-00228
RSA 374:1	Appendix, at PA-00228
RSA 374:2	Appendix, at PA-00229
RSA 374:4	Appendix, at PA-00229
RSA 374:7	Appendix, at PA-00229
RSA 378:7	Appendix, at PA-00230
RSA 541:3	Appendix, at PA-00230
RSA 541:13	Appendix, at PA-00230
RSA 541-A:35	Appendix, at PA-00230
Puc 202.01(a), <i>Requests for Commission Determinations</i>	Appendix, at PA-00232
Puc 203.05(a)(3&6), <i>Pleadings</i>	Appendix, at PA-00233
Puc 203.12(a), <i>Notice of Adjudicative Proceeding</i>	Appendix, at PA-00234
Puc 203.20, <i>Settlement and Stipulation of Facts</i>	Appendix, at PA-00235
Puc 203.25, <i>Burden and Standard of Proof</i>	Appendix, at PA-00235
49 C.F.R. § 193.2051	Appendix, at PA-00236
49 C.F.R. § 193.2057	Appendix, at PA-00236
49 C.F.R. § 193.2059	Appendix, at PA-00237
75 FR 48593 (excerpt)	Appendix, at PA-00238
N.H. Constitution, Article 12	Appendix, at PA-00239
N.H. Constitution, Article 14	Appendix, at PA-00239
N.H. Constitution, Article 15	Appendix, at PA-00239
N.H. Constitution, Article 38	Appendix, at PA-00240
U.S. Constitution, Fifth Amendment	Appendix, at PA-00240
U.S. Constitution, Fourteenth Amendment, Section 1	Appendix, at PA-00240

V. Provisions Of Other Documents Involved In The Case

There are no provisions of insurance policies, contracts, or other documents involved in this case.

VI. Concise Statement Of The Case

This is an appeal from the Commission's approval of: (a) an amended 20-year transportation supply contract (the "Precedent Agreement" or "Contract") between EnergyNorth and Tennessee Gas Pipeline Company ("TGP"); (b) EnergyNorth's request for a determination that the Contract is prudent; and (c) a Stipulation and Settlement between the Commission's Staff and EnergyNorth ("Settlement"). *Order Approving Stipulation and Settlement Agreement and Precedent Agreement*, Order No. 25,882, October 2, 2015 (hereinafter "Order"), Appendix ("App.") at PA-00143-00174; *Order Denying Motion for Rehearing by Pipe Line Awareness Network for the Northeast, Inc.*, Order No. 25,845, December 2, 2015 (hereafter "Rehearing Order"), App. at PA-00209-00227.

On December 31, 2014, EnergyNorth filed a Petition for Approval of a Firm Transportation Agreement ("Precedent Agreement") with TGP. App. at PA-00123. EnergyNorth's filing sought pre-approval of a twenty-year Precedent Agreement with TGP for firm capacity on the NED pipeline project. *Id.* The transportation capacity in the Contract would be delivered via a 400 mile gas pipeline that TGP plans to construct along a route that traverses portions of Pennsylvania, New York, Massachusetts and approximately 70 miles across municipalities in the southern part of New Hampshire. *Id.* NED is comprised of the "Supply Path" and the "Market Path." App. at PA-00193, PA-00194. The NED Supply Path will transport gas from the Marcellus Shale production area in northeastern Pennsylvania to a natural gas market center location, or price point, in Wright, New York, which is in turn the necessary and

designated receipt point for the NED Market Path. *Id.* The Market Path portion of NED will transport natural gas from Wright, New York, to the market center location in Dracut, Massachusetts that serves the New England markets. App. at PA-00194. Numerous cities and towns in New Hampshire are impacted by the pipeline as ratepayers and as impacted communities and landowners. App. at PA-00123.

In support of its filing, EnergyNorth alleged that it needs the long-term firm transportation capacity from TGP “to reliably satisfy existing and future customer load requirements in its service area” and that the TGP contract is the “best-cost resource” to meet those capacity needs. App. at PA-00147, PA-00149. EnergyNorth contends that the Contract will also provide opportunities to “expand the reach of its distribution service” and “increase distribution system reliability via West Nashua, which will be a new delivery point on the west end of EnergyNorth’s distribution system.” App at PA-00147. As part of the Commission’s approval, EnergyNorth sought a determination the Company’s “decision to enter into the [Precedent Agreement] is prudent and consistent with the public interest.” App. at PA-00144.

PLAN¹ moved to intervene on February 11, 2015. App. at PA-00144. On March 6, 2015, the PUC granted PLAN status as an intervenor on behalf of its “members who are EnergyNorth customers” and limited PLAN’s participation to issues related to the interests of its EnergyNorth-customer members in the “prudence, justness and reasonableness of the [Precedent Agreement]”. App. at PA-00145.

In testimony filed on May 8, 2015, all independent expert witnesses in the case identified serious deficiencies in EnergyNorth’s petition and/or EnergyNorth’s stated justifications for the purchase of additional firm capacity under the terms of the Precedent Agreements. App. at PA-

¹ PLAN is a Massachusetts nonprofit corporation concerned with the environmental and economic impacts

00125.² All the experts unanimously opposed approval of the Precedent Agreement, and the PUC scheduled a hearing on EnergyNorth's Petition to take place on June 30, 2015. However, on June 26, 2015, Staff Counsel filed a Motion to Accept Late-Filed Settlement or Reschedule Hearing. Notably, the proposed settlement filed on June 26, 2016 did not address the issues raised by the experts, particularly with respect to significant questions about EnergyNorth's filing and methodology, the replacement of Dracut transportation capacity, and EnergyNorth's failure to consider LNG, as set forth in detail below in Section VIII. App. at PA-00127, PA-00128, PA-00131.

On October 2, 2015, the PUC issued an Order approving the Settlement and the Precedent Agreement as modified by the Settlement. App. at PA-00167, PA-00173. The PUC specifically found that EnergyNorth's acquisition of capacity from TGP, as provided for in the Settlement between Staff and EnergyNorth, was prudent and reasonable. *Id.*

On November 2, 2015, PLAN filed a motion for rehearing, reconsideration and clarification of the Order, with which the OCA concurred. App. At PA-00175-00196; PA-00197-00198. EnergyNorth filed an objection. App. at PA-00199-00208. On December 2, 2015, the PUC issued the Rehearing Order, denying PLAN's motion for rehearing, reconsideration and clarification of the Order. In denying PLAN's motion, the Commission claimed that it found the "record developed in this case sufficient to meet EnergyNorth's burden in demonstrating that its entry in the Precedent Agreement, as modified by the Settlement, was prudent." App. at PA-00213. Notwithstanding the Commission's interpretation of the record, the Rehearing Order did not reference any statute authorizing the Commission to determine the prudence of pre-

² Melissa Whitten (for Staff); Dr. Pradip Chattopadhyay (for OCA); and John A. Rosenkranz (for PLAN). App. at PA-00125.

approving a long term contract, and also did not articulate what a prudence standard entails and how it was applied in this case.

As set forth in detail below, the Commission erred as a matter of law, and/or issued an unreasonable and/or unjust order, by: (i) pre-approving the prudence of the Contract, in the absence of any statutory basis for doing so; (ii) approving the Contract, where EnergyNorth failed to meet any applicable burden of proof by submitting a wholly inadequate case in chief; (iii) failing to consider uncontroverted evidence in the record that capacity and existing supply contract at Dracut should not be replaced; and (iv) failing to require EnergyNorth to review existing and potentially expanded LNG supply resources as an possible alternative to some or all of the Contract amount as approved.

VII. Jurisdictional Basis For The Appeal

The jurisdictional bases for the appeal may be found at RSA 365:21, RSA 541:6 and New Hampshire Supreme Court Rule 10.

VIII. Direct And Concise Statement Of Reasons

A. A Substantial Basis Exists For A Difference Of Opinion On The Presented Questions

1. The PUC Did Not Have the Legal Authority to Undertake A Prudence Review

This case presents questions regarding whether the PUC has statutory authority at this time to approve the prudence and other ratemaking implications of the Precedent Agreement. Is the PUC's statutory authority to review the contract pursuant to RSA 374:1, 374:2, and 378:7, a permissible ground upon which the PUC could base its determination that the contract is prudent, for ratemaking purposes or otherwise? App. at PA-00167.

As an initial matter, an administrative regulatory agency may only exercise that authority expressly granted to it by the legislative branch of government. “An administrative agency must act within its delegated powers.” *Appeal of Concord Natural Gas Corporation* 121 N.H. 685, 689, 433 A.2d 1291 (1981) (citing *Kimball v. N.H. Bd. of Accountancy*, 118 N.H. 567, 568, 391 A.2d 888, 889 (1978)). “When the legislature so authorizes, an agency may properly promulgate rules.” *Id.* (citing *Reno v. Hopkinton*, 115 N.H. 706, 707, 349 A.2d 585, 586 (1975)). As such, any oversight authority the PUC could have exercised over EnergyNorth’s petition required a basis in a clearly expressed statutory delegation of authority.

In its Order, although the PUC acknowledged that it typically would “determine prudence and reasonableness within a context of a full rate proceeding, after EnergyNorth has incurred the costs,”³ it nonetheless pre-approved the terms of the contract and stated that the contracted capacity is prudent. App. at PA-00167, PA-00168. The PUC incorrectly ruled that it had the authority under RSA 374:1,⁴ 374:2,⁵ and 378:7⁶ to determine whether the Precedent Agreement was prudent. App. at PA-00166, PA-00167.

³ The PUC recognized that: “Prudence determinations concerning utility investments are an integral part of the Commission’s *ratemaking* process.” Rehearing Order, App. at PA-00212 (emphasis added).

⁴ “Every public utility shall furnish such service and facilities as shall be reasonably safe and adequate and in all other respects just and reasonable.”

⁵ “All charges made or demanded by any public utility for any service rendered by it or to be rendered in connection therewith, shall be just and reasonable and not more than is allowed by law or by order of the public utilities commission. Every charge that is unjust or unreasonable, or in excess of that allowed by law or by order of the commission, is prohibited.”

⁶ “Whenever the commission shall be of opinion, after a hearing had upon its own motion or upon complaint, that the rates, fares or charges demanded or collected, or proposed to be demanded or collected, by any public utility for service rendered or to be rendered are unjust or unreasonable, or that the regulations or practices of such public utility affecting such rates are unjust or unreasonable, or in any wise in violation of any provision of law, or that the maximum rates, fares or charges chargeable by any such public utility are in-sufficient, the commission shall determine the just and reasonable or lawful rates, fares and charges to be thereafter observed and in force as the maximum to be charged for the service to be performed, and shall fix the same by order to be served upon all public utilities by which such rates, fares and charges are thereafter to be observed. The

The referenced statutes do not grant the PUC any authority to undertake a ratemaking, prudency determination in this Contract approval case. The specific statute concerning rates, RSA 378:7, authorizes the Commission to fix rates pursuant to an order after hearing as part of a ratemaking case, *e.g.*, a determination of just and reasonable rates based upon schedules filed by a public utility. App. at PA-00230. In those traditional ratemaking proceedings, the Commission must balance consumer interests in paying no higher rates than required with investor's interests in obtaining a reasonable return on investment. *Appeal of Eastern Sewer Co., Inc.*, 138 N.H. 221, 225, 636 A.2d 1030 (1994).

In this case, the Commission justified its ruling, not because it undertook a specific balancing of competing interests as part of a RSA 378:7 determination, as required in a rate case, but because of the "magnitude of costs and the long term commitment" associated with the Contract. App. at PA-00167. In other words, the PUC undertook its evaluation because the utility requested pre-approval. The Commission failed to cite to specific legislation or judicial authority in its ruling.⁷

Moreover, the PUC's explanation is inapposite, because EnergyNorth's petition did not initiate or otherwise give rise to a ratemaking proceeding and its filing was not reviewed and subjected to the inquiry that would be part of a ratemaking case. In a ratemaking process, the

commission shall be under no obligation to investigate any rate matter which it has investigated within a period of 2 years, but may do so within said period at its discretion."

⁷ By conducting a prudency review without a statutory basis to do so, PUC not only acted unreasonably, but also violated PLAN's procedural due process rights and other constitutional rights of PLAN's members by conducting a proceeding without clear, delineated ground rules. *See, e.g., Appeal of N.H. Catholic Charities*, 130 N.H. 822, 828-829, 546 A.2d 1085 (1988) (RSA 541:13 determination of unreasonableness, where administrative board's change of course in the middle of certificate of need proceeding "could not have foreseen and could not have rectified" by appellant); *Appeal of Behavior Science Inst.*, 121 N.H. 928, 934-935, 436 A.2d 1329 (1981) (finding that "[t]he procedures followed were so replete with ambiguities and inconsistencies" that "remand is necessary," because the lack of rules and regulations governing the process in question "contributed in large part to the pervading confusion in the proceedings" and the "fail[ure] to clarify . . . terms . . . contributed to the unfairness caused to all the parties"). *See also* N.H. Constitution, Articles 12, 14, 15 & 38 and U.S. Constitution, 5th Amdt. and 14th Amdt., § 1.

Commission seeks to balance “...the competing interests of ratepayers who desire the lowest possible rates and investors who desire rates that are higher.” *See Appeal of Conservation Law Foundation*, 127 N.H. 606, 633, 507 A.2d 652 (1986). Furthermore, when discussing the PUC’s authority to hold a ratemaking proceeding, the Court stated, “*this* proceeding includes what is colloquially referred to as *the* prudence hearing.” *Id.* at 640 (emphasis added). Continuing, the Court explained how “as a matter of statutory law, the ratemaking proceeding is distinct from the prior proceedings at which the public good must be considered...” *Id.* Here, the PUC undertook no such evaluation and its premature determination at this juncture that the Contract was prudent was in error as a matter of law.

This case thus presents issues of statutory construction that the Court reviews *de novo*. *See Appeal of Union Telephone Co.*, 160 N.H. 309, 314, 999 A.2d 336 (2010). Words used in statutes are construed according to their plain and ordinary meaning and “in the context of the overall statutory scheme and not in isolation.” *Id.* at 317. Considering the plain meaning of RSA 374:1, 374:2, and, most particularly, 378:7, as a whole and within the statutory scheme, there is no statutory (and therefore, no regulatory) authorization for the PUC to rule, at this time and in this case, on the prudence of EnergyNorth’s long-term, expensive Precedent Agreement. The statutory language simply does not provide for the broad authority the PUC alludes to in its Rehearing Order. This is not a rate case where the PUC is being asked to evaluate whether this contract should be paid for in whole or in part by ratepayers. In this case, the issue is simply whether a long-term contract should be approved. Any determination of ratemaking implications, including whether or to what extent the contract is prudent, should be included as part of a subsequent case when EnergyNorth seeks to pass the costs of this contract to ratepayers. *Appeal of Pub. Serv. Co.*, 122 N.H. 1062, 1076, 454 A.2d 435 (1982) (“the day will come when a

properly noticed hearing will be necessary to determine what costs associated with Seabrook are to be borne by the consumers through electric rates and what costs are to be borne by the stockholders and investors. *Until that time, there can be no prudence determination because ratepayers are not now paying for Seabrook construction work in progress.*”) (emphasis added).⁸

Moreover, the Commission had no authority to assure EnergyNorth in this proceeding and at this early stage that its costs would later be recouped from ratepayers.⁹ After all, when the time comes for the cost of the Precedent Agreement to be addressed, EnergyNorth without a doubt will remind the PUC that it only invested in NED because the PUC had previously found that acquiring capacity on NED was prudent. The force of such a future argument is great – but it could well have been avoided, and the ratepayers’ interests adequately protected at this juncture, had the PUC simply followed the statutes and declined to conduct a prudence review.

Finally, even assuming that the Commission has the authority to undertake a prudence review in this case (which PLAN does not accede), the PUC’s determination regarding prudence is not accompanied by a reasoned explanation for its decision, as required by statute,¹⁰ nor does it evaluate the adequacy of the EnergyNorth’s filing with respect to proof. In its Rehearing Order, the PUC merely cited to its discretion in determining that EnergyNorth’s contract with TGP for

⁸ PLAN is not arguing that the Commission does not have the authority to set rates; just that the Commission has no rate setting authority under the statutes at issue here. If the Commission wishes to set rates to include costs associated with the Precedent Agreement, it can do so under RSA 378:7 on its own motion by requiring Liberty to file an appropriate tariff or by any other means that is subject to review consistent with ratemaking standards when the case is ripe.

⁹ The Precedent Agreement is contingent upon approval, construction and operation of the pipeline, which may not occur until 2020, if it is completed at all. App. at PA-00166.

¹⁰ “The commission shall issue a final order on all matters presented to it. . . . A final order shall include, but not be limited to: . . . A decision on each issue including the reasoning behind the decision.” RSA 363:17-b, III. *See also* RSA 541-A:35 (“A final decision shall include findings of fact and conclusions of law, separately stated. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings.”).

firm pipeline capacity is prudent and cited generally to the record, without findings of fact, to conclude that EnergyNorth demonstrated that the contract was prudent. The PUC was obligated to render *findings of fact*, not simply to restate the various positions of the parties and then conclude (without explanation or true factual determinations) what it believed the evidence did or did not establish. *See, e.g., Appeal of Kelly*, 129 N.H. 462, 467, 529 A.2d 935 (1987). An administrative agency “must furnish basic findings of fact to support the conclusions that the statute requires it to make,” by “focus[ing] on and mak[ing] explicit those basic findings drawn from the evidence that led it to decide as it ultimately did and indicat[ing] the experts or expert evidence upon which it relied.” *Soc’y for the Protection of N.H. Forests v. Site Evaluation Committee*, 115 N.H. 163, 174, 337 A.2d 778 (1975). The Court “cannot meaningfully review an agency’s determination when it provides no illumination of its conclusions” or “provide[s] no reasoning for [its] determination[s].” *Appeal of Town of Newington*, 149 N.H. 347, 352, 821 A.2d 1100 (2003).

2. The PUC’s Conclusions Are Not Supported By Sufficient Evidence

a. The PUC Ignored Clear Evidence Against Approval

The evidence presented by EnergyNorth showed that EnergyNorth had, among other things, failed to reasonably investigate its long-term supply requirements, address adequately least cost estimates, consider additional resource options, consider NED supply commitments of less than 115,000 Dths, accurately estimate the cost of upgrades to the existing Concord Lateral, evaluate how a second interconnection on the western part of EnergyNorth’s service territory would necessarily generate new customers, and evaluate supply risks at Wright, NY. App. at PA-00126-00128.

In assessing deficiencies in the record, the testimony of the Commission's expert is particularly illuminating. Staff noted, among other things, in an extensive critique that EnergyNorth failed to (i) provide an analysis based on industry best practices, (ii) evaluate feasible alternatives, (iii) undertake any cost benefit analysis, (iv) estimate least cost and needs, (v) revise its demand forecast, (vi) assess additional resource options, (vii) reevaluate its NED analysis with a lower quantity, and (viii) develop additional information regarding the cost of the Concord Lateral upgrade. App. at PA-00126-00128. Staff's witness also discussed excessive risks and cost to the Company's ratepayers: "Justification for the PA is based upon aggressive single scenario demand forecast that would leave the Company with significant excess capacity that it could not completely absorb or grow into over the life of the contract." App. at PA-00128. This results in excessive costs and risks to the Company's ratepayers. *Id.*

In short, the Company did not undertake a reasonable evaluation of whether the Precedent Agreement represented a least cost choice, given alternatives in the public interest. The PUC consistently and impermissibly viewed the evidence and drew assumptions in a light most favorable to EnergyNorth. The presumption of reasonableness afforded agency decisions by RSA 541:13 "will be overcome by a showing that no evidence was presented in the record to sustain the order." *N.H.-Vt. Hospitalization Serv. v. Whaland*, 114 N.H. 92, 96, 315 A.2d 191 (1977). Additionally, where the burden of proof rests on the petitioning party to establish all requirements to warrant its requested relief, and the petitioning party presents no evidence on that given point, it is error for the administrative agency to impose on the non-petitioning party the burden to establish the absence of a particular concern and – in the absence of that improperly imposed showing – thereafter grant the petitioning party's requested relief. *See generally Appeal of N.H. DOT*, 152 N.H. 565, 575-576, 883 A.2d 272 (2005). Even assuming,

arguendo, that EnergyNorth submitted unsubstantiated evidence to address the above referenced deficiencies, the PUC's reliance on EnergyNorth's assertions was unreasonable. *See, Appeal of Laconia*, 135 N.H. 421, 423, 605 A.2d 225 (1992) (finding made in face of contrary "additional uncontroverted testimony" was not reasonable); *Appeal of Kehoe*, 141 N.H. 412, 418-419, 686 A.2d 749 (1996) (even if board could ignore uncontroverted testimony, it nonetheless was obligated to "identify the competing evidence or the considerations supporting its decision to do so," and lack of such identification renders decision unreasonable).

b. The PUC Failed To Reasonably Consider LNG as a Viable Alternative

The PUC incorrectly determined that expansion of EnergyNorth's LNG facilities do not provide an adequate resource to meet projected growth. App. at PA-00171; App. at PA-00217. In reaching its conclusion, the PUC erroneously concluded as a matter of fact and without record support that (i) the LNG global market is unstable and may compromise the reliability of EnergyNorth's service to customers at least cost, particularly on design day or during a design season, and (ii) expansion of LNG facilities is not possible due to requirements in federal law.

The PUC committed an error of law by refusing to require EnergyNorth to meaningfully address these alternatives in this proceeding. *See, e.g., Appeal of Seacoast Anti-Pollution League*, 125 N.H. 465, 474, 482 A.2d 509 (1984). First, notwithstanding the PUC's unsupported conclusion to the contrary, the record clearly demonstrates that EnergyNorth acknowledged that LNG is a significant and important resource available to gas companies/local distribution companies generally to support peaking requirements, and in fact is including LNG in its own ongoing diversified supply portfolio. App. at PA-00134.

Additionally, the PUC unreasonably accepted EnergyNorth's mistaken interpretation that federal regulations incorporating certain National Fire Protection Agency ("NFPA")

requirements prohibited the expansion of LNG facilities. App. at PA-00135. 49 C.F.R. Part 193, Subpart B governs siting requirements for LNG facilities. 49 C.F.R. § 193.2051 provides: “Each LNG facility designed, constructed, replaced, relocated or significantly altered after March 31, 2000 must be provided with siting requirements in accordance with the requirements of this part and of NFPA 59A (incorporated by reference, see § 193.2013). In the event of a conflict between this part and NFPA 59A, this part prevails.” App. at PA-00236.

Specifically, EnergyNorth referenced the standards regarding “vapor dispersion” and “thermal radiation zones” which are set forth at 49 C.F.R. §§ 193.2057 & 193.2059. App. at PA-00135. The applicable regulation as it existed in 2007 – when EnergyNorth’s predecessor told the PUC that it planned to consider LNG facilities expansion – remained the same until 2010, when the regulation simply added select references to the portions of NFPA 59A (2006 edition, approved Aug. 18, 2005) “relating to ultrasonic inspection and seismic design requirements” of stationary LNG storage tanks. App. at PA-00238. These amendments did “not require pipeline operators to take on any significant new pipeline safety initiatives.” *Id.* There has been no material change to the aspects of the law since 2007, when EnergyNorth’s predecessor saw LNG as a viable option. There is thus no legal basis to conclude that NFPA 59A prohibits EnergyNorth (or anyone else) from developing or expanding an LNG facility in New Hampshire. In fact, the record shows that EnergyNorth has plans to expand its existing LNG network. App. at PA-00183; PA-00185-00186.

Consequently, the PUC’s reliance on EnergyNorth’s unsubstantiated assertion was unreasonable. *See Appeal of Laconia*, 135 N.H. at 423; *Appeal of Kehoe*, 141 N.H. at 418-419. In short, the PUC erred in accepting EnergyNorth’s self-serving and legally incorrect determination that federal regulations made construction in populated areas impossible.

Accordingly, LNG should have been considered as an alternative resource. The PUC erred in its failure to assess whether the otherwise required transportation capacity under the Precedent Agreement could be reduced by increased LNG capacity and whether that increased LNG capacity would constitute a lower cost resource to ratepayers than would otherwise be available via the Precedent Agreement.

c. Continued Supply At Dracut Should Have Been Considered

The Commission mistakenly determined that the “capacity cost associated with replacing the existing 50,000 Dth per day at Dracut is outweighed by the benefits associated with the capacity contracted for in the Precedent Agreement.” App. at PA-00169. The PUC ignored evidence of comparative benefit or cost to ratepayers of terminating its 50,000 Dth/day of relatively low cost market area transportation service and replacing that service with an additional 50,000 Dth/day on the NED project.

The PUC necessarily and mistakenly overlooked expert testimony that demonstrated that EnergyNorth’s customers would pay substantially more per year with the unnecessary shift in supply to Wright. App. at PA-00130-00131. The Commission did not consider record evidence that delivered costs will be higher from NED, even assuming current prices and with EnergyNorth’s current level of market area purchasers at Dracut. *Id. See Appeal of Gamas*, 158 N.H. 646, 650, 972 A.2d 1025 (2009) (finding “was contrary to the record and, therefore, unreasonable”). Furthermore, the Commission ignored the Company’s failure to undertake any specific analysis that evaluated the net cost to ratepayers that would result from changing the receipt point for 50,000 Dth/day of existing Tennessee transportation service from Dracut to Wright. App. at PA-00130-00131. Moreover, in the face of overwhelming evidence to support continued use of Dracut in its current or some modified capacity, the PUC unreasonably

accepted EnergyNorth's retrospective on an extraordinarily small sample size of recently cold winters, and specifically within those winters the "design days" of greatest demand, to apply those highest demand assumptions (and with them, their high cost of supply) as the baseline demand and corresponding price across the next 20 years. App. at PA-00181. Worse, EnergyNorth's conclusion flew in the face of all evidence showing that ratepayers would not benefit, but rather would be burdened by, 100% replacement of Dracut capacity with NED capacity. App. at PA-00190, PA-00191. In reaching its conclusions, then, the PUC did not assess the evidence as it existed, but rather as the evidence might have been. This constitutes a reversible, clear error of law. *See Comcast Phone of N.H.*, Order No. 24,938, 2009 N.H. PUC LEXIS 9, *29 (Feb. 6, 2009) ("As fact finder, the Commission must weigh the evidence *in the record before it* to determine whether factual propositions have been proved.") (emphasis added). *See also Appeal of Laconia*, 135 N.H. at 423; *Appeal of Kehoe*, 141 N.H. at 418-419.

B. This Appeal Presents the Opportunity to Decide, Modify or Clarify an Issue of General Importance in the Administration of Justice

The NED pipeline, the construction of which is a predicate to the Precedent Agreement that formed the basis for the underlying PUC proceeding, is the largest energy infrastructure project this State has considered since the Seabrook Nuclear Power Plant. This appeal is the first one to test aspects of the manner in which the NED pipeline – and its attendant impact on the public interest – are addressed by the PUC. The Court should accept this appeal to resolve issues of first impression concerning whether (and if so, under what standards and scope of analysis) the PUC may conduct prudency reviews of precedent agreements (or other contracts for capacity) related to expensive gas energy-infrastructure projects that have not yet been constructed, and whether and what extent the PUC reviewed fundamental assumptions with respect to EnergyNorth's analysis of need and alternatives. A determination of these open

questions will impact not only any review of the PUC's adherence to those standards, but more broadly energy planning in the future.

IX. The Acceptance Of The Appeal Would Protect PLAN From Substantial And Irreparable Injury

The appellant in this case is PLAN acting on behalf of its members who are EnergyNorth ratepayers. App. at PA-00145. The Commission's ruling, if not reversed, will result in these ratepayers being needlessly exposed to higher rates that will result from the Commission's decision to pre-approve prudence without any statutory authority. Moreover, a Commission ruling that disregards the higher costs associated with the change in receipt points from Dracut to Wright, NY and also declines to adequately evaluate LNG as an alternative to NED, is one that is especially detrimental to ratepayers. As set forth above, the Commission ignored its duty to fully and fairly evaluate the record and apply its statutes in a manner that protects ratepayers. The Court should accept this appeal to protect the applicants from substantial and irreparable injury associated with paying higher rates than the PUC may lawfully approve.

X. Statement Of Preservation

Every issue specifically raised has been presented to the PUC and has been properly preserved by appellate review by a contemporaneous objection or, where appropriate, by a properly filed pleading. Specifically, every issue raised in this Appeal was presented to the PUC in the Appellant's Motion for Rehearing, Reconsideration and Clarification filed on November 2, 2015. To the extent the Court finds that any issue was not explicitly raised, PLAN submits that either: (1) any remaining issues raised in this petition were implicitly raised in the motion for rehearing, *see, e.g., Appeal of Conservation Law Found.*, 127 N.H. at 628; or (2) good cause

exists to allow PLAN to specify additional grounds for appeal, *see* RSA 541:4.

Respectfully submitted on January 4, 2016,

PIPE LINE AWARENESS NETWORK FOR THE
NORTHEAST, INC.,

By its attorneys,

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N.H. SUPREME COURT R. 10(7) CERTIFICATION OF COMPLIANCE

I hereby certify that this 4th day of January, 2016, I forwarded a copy of the foregoing Appeal by Petition Pursuant To RSA 541:6 by first class mail, postage prepaid, to the counsel for the parties of record at the addresses shown *supra*, and to the Attorney General of the State of New Hampshire, 33 Capitol Street, Concord, NH 03301.



Zachary R. Gates