BEFORE THE NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

Re. Liberty Utilities (EnergyNorth Natural Gas) Corp.

Docket DG 15-289

MOTION TO COMPEL RESPONSES TO DATA REQUESTS

Pursuant to N.H. Code Admin. Rules Puc 203.07(a) and 203.09(i), Ariel Arwen ("Arwen") respectfully moves the New Hampshire Public Utilities Commission ("the Commission") to compel Liberty Utilities (EnergyNorth Natural Gas) Corp. ("the Company") to:

(1) respond fully to Arwen's data request 3-1 (to which the entire response previously provided by the Company is "Please see response to Arwen 1-10") (see Appendix B), and

(2) supply a nonredacted Excel spreadsheet/template, as requested in the 'good faith effort' email of 12/23/15 (see Appendix A) as the spreadsheet was supplied to Staff and OCA in response to Staff 3-9 (see Appendix B). (The empty spreadsheet/template is attached after Appendix B).

Arwen received Liberty Utilities' responses to Arwen's third set of data requests on December 15, 2015. Therefore, this motion is timely filed, pursuant to Puc 203.09(i)(2). Arwen submitted a good faith communication to counsel for the Company as required by Puc 203.09(i)(4), first with a phone call to counsel on December 18, 2015, and then by email on December 23, 2015. The latter is attached as Appendix A, with the Company's response.

<u>Data Request 3-1</u>

Arwen data request 3-1 notes that the Climate Action Plan adopted by the Department of Environmental Services establishes target carbon emission reductions of 20 percent below 1990 levels by 2025 and 80 percent below those levels by 2050. The data request posed this straightforward question: "If these goals remain in place, how does Liberty Utilities expect to provide service that would comply with these goals, even after taking into consideration the lower carbon footprint (at combustion) of gas over fuel oil and coal?" The data request instructed the Company to refer specifically to both targets in its response.

The Company made no objection to this data request pursuant to Rule Puc 203.09(g) and, therefore, has waived any objection to this data request pursuant to Rule Puc 209.09(h). Nevertheless, the Company chose to provide a non-response in the form of a simple reference to its previous response to Arwen data request 1-10.

The response to data request 1-10 refers to the Climate Action plan but only in two respects that are not germane to the question posed in data request 3-1. First, the Company states that its franchise request is consistent with certain policy goals stated in the Climate Action Plan. Second, the Company states that it is "unable [to] perform a comparative analysis of the complete natural gas supply chain that would be used to serve the communities, as such an analysis is largely dependent on accurate emissions data from the specific sites where the commodity would be extracted, as well as comparable data from the propane and heating oil suppliers and wells that are currently being utilized to serve the community and anchor customers." There is no reference in this response to the specific emissions reduction targets invoked in data request 3-1 and, therefore, the Company has effectively refused to provide a response to this data request in direct violation of Rule Puc 203.09(f). If, as is implied by the manner in which the Company has chosen to reply to the data requests referring to the Climate Action plan, the Company truly has no idea what carbon impacts the granting of its franchise could have, the Company should at the very least be required to so state in forthright fashion as contemplated by the Commission's established discovery process.

In response to informal efforts via e-mail to resolve this discovery dispute, counsel for the Company stated: "[W]e still believe that the response we provided to your data request 3-1 is an appropriate response to the question, as it cites the specific recommendations of the NH Climate Action Plan that the Company believes its franchise proposal supports. Further, we believe the question is beyond the scope of this docket, overly burdensome, and seeks speculative information about compliance with a plan that has no legal effect."

In other words, it is the Company's position that it should be allowed to respond only to those aspects of the Climate Action Plan it deems favorable (the general policy goals rather than the specific targets). The references to the scope of the docket, the allegedly burdensome nature of the data request, and the fact that the Climate Action Plan lacks the force of law are all arguments the Commission cannot now entertain in light of the Company having waived any substantive objection to the data request.

<u>The Staff 3-9 Spreadsheet</u>

The Company has refused to provide me with the unredacted spreadsheet it prepared in response to Staff data request 3-9 even though Rule Puc 203.09(d) unambiguously requires the Company to furnish all parties with copies of its responses to all data requests. This is grievously unfair and ultimately implicates issues of due process.

In an e-mail received from counsel to the Company, responding to efforts to resolve this discovery dispute informally, counsel invoked Rule 203.08 as the basis for denying me access to its discovery response. But Rule 203.08 is simply a mechanism for providing the Commission with an opportunity to declare certain information its files exempt from *public* disclosure under the permissive disclosure exemptions in the Right-to-Know Law, set forth in RSA 91-A:5.

Neither RSA 91-A:5 nor Rule Puc 203.08 provides a legal basis for denying *a party* to a proceeding access to discovery materials exchanged in that proceeding.

In his e-mail, counsel for the Company further stated that, "[G]iven the fact that there are two competing applications for this franchise, that similar financial information has been kept confidential in DG 15-155, and given the language of RSA 91-A:5 and Commission precedent, we continue to believe there is a good faith basis for seeking confidential treatment of this information." Even assuming for the sake of argument that designating the spreadsheet as "confidential" under Rule Puc 203.08 could justify withholding the spreadsheet from an intervenor with full party status, the Company's position as stated in this e-mail is without merit. The issue whether similar information in Docket DG 15-155 (the competing franchise application of Valley Green Natural Gas) is entitled to confidential treatment and non-disclosure to intervenors is a matter of dispute in that docket. The reference to "Commission precedent" is unpersuasive without reference to specific orders of the Commission. And, most importantly, the information is simply not entitled to protection from public disclosure under RSA 91-A:5.

Of the permissive disclosure exemptions in RSA 91-A:5, the only one that could possibly be applicable here is the exemption for "confidential, commercial, or financial information." Interpreting that particular phrase in RSA 91-A:5, the New Hampshire Supreme Court has explained that "[t]o 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.'" *Union Leader Corp. v. New Hampshire Housing Finance Authority*, 142 N.H. 540, 554 (1997) (quoting *National Parks and Conservation Ass'n v. Kleppe,* 547 F.2d 673, 677–78, (D.C.Cir.1976) interpreting analogous provisions of the federal Freedom of Information Act).

The ability of the Commission to obtain information in the future is not implicated here; the agency has plenary access to the books and records of regulated utilities pursuant to RSA 365:6 and, obviously, petitioners seeking utility franchises will always have to provide whatever information is necessary to carry their burden of demonstrating entitlement to such a franchise. Even more importantly, petitioners competing for a utility franchise in a particular area are not business competitors in the sense contemplated by RSA 91-A:5, IV as interpreted in the *Union Leader* case -- they are simply competitors for a favorable order of the Commission. Therefore, the claim by counsel to Liberty that the proponents of "competing applications" for a franchise should not see each other's financial information does not withstand scrutiny -- indeed, one can argue that because the two petitioners are rival litigants rather than business competitors the basic fairness principles underlying discovery argue in *favor* of broad disclosure. In these circumstances, RSA 91-A:5 cannot provide the basis for withholding information from intervenors in either docket.

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For the foregoing reasons, I respectfully request that the Commission grant the motion to compel discovery and direct Liberty to provide me with a meaningful response to Arwen data request 3-1 and the entirety of Liberty's response to Staff data request 3-9.

RESPECTFULLY SUBMITTED this 7th day of January, 2016.

/s/

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CERTIFICATE OF SERVICE

I hereby certify that on January 6, 2016, I served an electronic copy of this filing with each person identified on the Commission's service list for Docket No. DG 15-289 pursuant to Rule Puc 203.02(a).

/s/

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Ariel Arwen