

BEFORE THE NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

Re: Liberty Utilities (EnergyNorth Natural Gas) Corp.

d/b/a Liberty Utilities - Keene Division

Docket No. DG 17-068

**TERRY CLARK'S REPLY TO LIBERTY'S
OBJECTION TO TERRY CLARK'S MOTION FOR REHEARING**

Intervenor, Terry Clark, replies to Liberty's Objection to Terry Clark's Motion for Rehearing ("Liberty's Objection"), to address material misstatements of law and fact made therein, as follows:

1. Liberty's Objection is untimely. The objection was filed in response to Terry Clark's Motion for Rehearing or Reconsideration Pursuant to R.S.A 541, and Clarification ("Motion for Rehearing, etc."), which was filed on August 26, 2019. Pursuant to Puc 203.07(f):

"Objections to a motion for rehearing pursuant to RSA 541:3 **shall** be filed within 5 days of the date on which the motion for rehearing is filed."

Id. (emphasis added). Pursuant to Puc 202.03(c), which requires the exclusion of Saturdays, Sundays and holidays from the computation for prescribed times of less than six days, the objection deadline was therefore September 3, 2019. The objection, filed on September 5, 2019, was thus two days late. However, Clark does not object to the late filing, so long as Liberty does not contest the filing of this reply, which is necessary to prevent the Commission's analysis of Clark's Motion for Rehearing, *etc.* from being led astray by assertions in Liberty's Objection. Conversely, if Liberty does contest this reply, Clark objects to the untimeliness of Liberty's Objection, as it should not be read without the

information provided herein.

2. Liberty's Objection begins with the amazing argument that "the scope of possible issues for rehearing" is limited to the "single narrow issue Liberty raised in this proceeding." *See* Liberty's Objection at ¶¶ 3, 5. This argument, of course, is not the law and only furthers the flawed reasoning that led us to this point. Liberty does not get to "limit" the scope of challenges to relief afforded it by pursuing that relief in the most procedurally-limited way in violation of the law. When the law and the Commission's own rules clearly require one procedural avenue for relief, in this case the procedure followed under R.S.A. 374:22 and R.S.A. 374:26, with a full adjudicative proceeding (including notice, discovery, public comment, witnesses, a hearing, *etc.*) under Puc 203,¹ a utility cannot circumvent that legal requirement and issues that can be raised in not following it by presenting and pursuing a "single narrow issue" under the wrong standards and procedures—as clearly happened in this case, with all of the resulting harms and appealable issues Clark detailed in his motion for rehearing. Liberty's argument essentially means that a utility can pursue every form of relief it seeks through an expedited petition without notice and other procedural requirements mandated under our statutes and the Commission's own rules, and then contend that the resulting order cannot be challenged because any challenge goes beyond the "single narrow issue"—*i.e.*, request for approval without following statutorily mandated procedures and due process—presented by the utility's petition. An aggrieved party may challenge a

¹ Again, even as a declaratory judgment proceeding, all rights afforded the parties and public under Puc 203 should have been provided from the outset in this case pursuant to Puc 207.01(d) ("Except for a petition dismissed pursuant to subsection (c), the commission shall conduct an adjudicative proceeding on a petition for declaratory ruling in accordance with Puc 203.").

ruling or rulings, as Clark does the Decisions in this case, for any and all reasons that cause the Decisions to be unlawful, unreasonable or otherwise unsustainable, and is not limited to another party's limited and incorrect framing of the issues.

3. Similarly, Liberty's Objection mischaracterizes the law and facts in suggesting that the arguments in Clark's Motion for Rehearing, *etc.* should be ignored or dismissed because:

“Nearly every argument in Mr. Clark's motion for rehearing are issues that he previously argued and for which he now seeks a different outcome, and/or are issues simply outside the narrow scope of this docket and thus not relevant.”

Liberty's Objection at ¶ 7.

4. First of all, again, Liberty is not “the decider” of challenges that can be raised to the Commission's Decisions: the law and facts decide the challenges that may be raised, and the Motion for Rehearing, *etc.* thoroughly explains the propriety of its challenges.
5. Second, just because “[a] successful motion does not *merely* reassert prior arguments and request a different outcome,” *Verizon New Hampshire*, Order No. 24,629 at 7 (June 1, 2006)(emphasis added), *see* Liberty's Objection at ¶ 6, does not mean that a successful motion for rehearing should not include all prior arguments and request a different outcome—indeed, again, this is a mandatory statutory requirement. R.S.A. 541:4 expressly provides that a motion for rehearing:

“... shall set forth fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable. No appeal from any order or decision of the commission shall be taken unless the appellant shall have made application for rehearing as herein provided, and when such application shall have been made, **no ground not set forth**

therein shall be urged, relied on, or given any consideration by the court, unless the court for good cause shown shall allow the appellant to specify additional grounds.”

Id. (emphasis added). Obviously, a “successful” motion for rehearing will not just rehash the same arguments already made by the movant that have already been rejected by the decisionmaker, but the arguments must be made to be appealed, and cannot properly be ignored or dismissed if well-grounded, as the whole purpose of the motion for rehearing is to afford an agency the opportunity to correct its mistakes. *See Appeal of Conservation Law Foundation*, 127 N.H. 606, 632 (1986)(“This requirement is grounded in the sound policy that ‘[a]dministrative agencies ... have a chance to correct their own alleged mistakes before time is spent appealing from them.’”)(citation omitted). The Motion for Rehearing, *etc.* properly presents the Commission with that opportunity now, in the manner required by R.S.A. 541:4.

6. Clark will not go through all of the additional misstatements of law and fact in Liberty’s Objection, as most are disposed of on their face by Clark’s prior arguments, but Clark will note several such issues that should be considered by the Commission.
7. On page 4, Liberty’s Objection contends that the declaratory ruling entered here was not precluded by the Settlement Agreement approved in Docket No. DG 14-155, under Order No. 25,736 (Nov. 21, 2014):

“However, the settlement agreement, which PUC approved in Order No. 25,736 (Nov. 21, 2014), says its terms ‘shall remain in effect until the Commission approves otherwise.’ In Docket DG 17-048, the Commission ‘approve[d] otherwise’ and allowed Liberty to consolidate the Keene Division into the rest of the Liberty system. Order No. 26,122 at 37-38 (Apr. 27, 2018). Similarly, to the extent the settlement agreement in

DG 14-155 limited the Company's existing franchise rights to propane, the Order has now 'approve[d] otherwise' and modified the DG 14-155 settlement agreement to allow for the distribution of natural gas."

Id. at. 4 (footnote omitted). Obviously, the Commission did not "approve" the service changes and additional business at issue in this proceeding under Order No. 26,122 (Apr. 27, 2018) in Docket No. DG 17-048, most plainly because Order No. 26,274 (Jul. 26, 2019) would not have entered in this matter, and we would not still be debating the issue over a year later, if the Commission intended and considered that to be the case. Moreover, if Order No. 26,274 (Jul. 26, 2019) "approved" Liberty's proposed service changes and additional business, the entire foundation on which the order rests, *i.e.*, Liberty's declaratory petition requesting that the Commission find that it has supposedly *always* had the right under its original 1860 franchise grant, collapses.²

8. Liberty ignores declaratory judgment law. In paragraph 41 of his Motion for Rehearing, Clark notes that the discussion in paragraphs 16-17 of his previously-filed [joint motion for rehearing and reconsideration](#) "should have been instructive, requiring dismissal of this proceeding under [Puc 207.01](#) as speculative and failing to claim a present justiciable right." Of particular import, Clark's referenced discussion provides:

"The Commission looks to declaratory judgment decisions under R.S.A. 491:22 as providing analogous decisions for the requirements of exercising its own declaratory judgment authority. *See Public Service Company of New Hampshire, Petition of 5 Way Realty Trust for*

² In its petition, Liberty requests "a declaratory ruling that it need not seek permission under RSA 374:22 and 374:26 to distribute natural gas in the City of Keene, New Hampshire, because Liberty's existing franchise to distribute 'gas' **already includes** 'natural gas.'" *Id.* at [preamble](#) (emphasis added). *See also Liberty's Reply Memorandum* at 2 ("... Liberty's petition for declaratory ruling ... merely asks the Commission to confirm that Liberty **has always had the franchise right** to distribute natural gas.")(emphasis added).

Declaratory Ruling, Commission Docket No. DE 01-088, Order No. 24,137 dated March 14, 2003 at 28. As such, **the petition cannot be maintained unless it claims ‘a present legal or equitable right or title’ at both the time of filing of the petition and the Commission’s ruling on it.** See R.S.A. 491:22; *Conway v. Water Resources Bd.*, 89 N.H. 346 (1938)(petition dismissed when petitioner waived claim of right in open court); *Carbonneau v. Hoosiers Engineering Co.*, 96 N.H. 240 (1950)(wife’s declaratory judgment petition on damages available for her living husband’s injuries could not be maintained due to the lack of a present legal right or title against which an adverse claim could be made, as her only claim would arise on her husband’s decease for wrongful death).”

Id. (emphasis added). Given the Settlement Agreement, the highlighted legal principle above is inconsonant with the declaratory judgment rendered here both in terms of the position Liberty takes under its petition (authority arises from the original franchise grant), and the position it now takes under Liberty’s Objection (authority arises from a subsequent order). As the Settlement Agreement approved under Order No. 25,736 (Nov. 21, 2014) plainly limits Liberty’s authority to the propane-air service of the Keene operations at the time the agreement was approved (Liberty assumed the business “as is”), which limitation was to “remain in effect until the Commission approves otherwise,” it cannot be found that the original franchise grant, or any subsequent Commission decision to date, supports the requested declaratory ruling. Under both Liberty positions as to where the authority it claims arises, the right was not “‘a present legal or equitable right or title’ at both the time of filing of the petition and the Commission’s ruling on it.”” See R.S.A. 491:22; *Conway v. Water Resources Bd.*, *supra*, 89 N.H. 346.

9. On page 5, Liberty’s Objection states:

“Mr. Clark also complains, apparently for the first time, that the Order infringed towns’ and cities’ ‘right to choose if it wants LNG and/or CNG services.’ Clark Motion at 29.”

Id. at 5. However, this was not an argument put forth by Clark “for the first time.” In the initial motion for rehearing filed in this matter (responding to the Commission’s declaratory ruling), Clark and the other movants expressly argued:

“In fact, the rights of all citizens of the more than 50 gas-franchised towns in New Hampshire which are subject to the Order, to have any input on whether a whole new type of gas and gas system with higher pressure piping are coming to their neighborhoods, are lost if this motion is not granted.”

See [Joint Motion for Rehearing Under R.S.A. 541 of Terry Clark, One Movant, and Beverly Edwards, Elizabeth Fletch, Douglas Whitbeck, Gwen Whitbeck, Susan Durling, Julia Steed Mawson and Marilyn Learner, as They Collectively Comprise the NH Pipeline Health Study Group, and Individually](#) at ¶ 8. In his initial brief filed after the declaratory ruling, Clark similarly argued that:

“... the [Declaratory Ruling] facially allows for Liberty and Unitil to ‘supplement’ their current gas services in the more than 50 New Hampshire municipalities they hold franchises for to include LNG and/or CNG, and build associated gas plants in every franchise, if they want, without having to seek further Commission or Site Evaluation Committee (‘SEC’) approval. Such services could be implemented, virtually overnight, again, without notice or a hearing, or the opportunity for any public challenge or even input respecting any of them ...”

See [Initial Brief of Intervenor, Terry Clark](#) at 2-3. To the extent that this argument is a separate issue from the issues otherwise raised by Clark, it was clearly properly presented and preserved.

10. On page 7, with respect to Clark’s due process arguments, Liberty’s Objection states:

“Other than conclusory statements, however, Mr. Clark does not explain how the process afforded to him was deficient.”

Id. The Motion for Rehearing, *etc.* (as well as Clark’s prior briefing) notes several times what was required of due process in these proceedings: that process afforded proceedings under R.S.A. 374:22 and R.S.A. 374:26 and full adjudicative proceedings under the Commission’s own rules, *i.e.*, proper notice and a hearing, with the opportunity to present evidence and cross-examine witnesses, discovery (to allow such opportunity) and a public comment period. See [Terry Clark’s Motion for Rehearing or Reconsideration Under R.S.A. 541, and Clarification](#) at ¶¶ 3, 4, 8, 18, 20-22. Additionally, Clark provided ample case law confirming that the Commission must process cases as required by statutes, its own rules and applicable standards, or resulting decisions will be void for violation of due process. See *id.* at ¶¶ 3, 23. It is hard, frankly, hard to understand what Liberty claims not to understand: it is clear on the record that there was never an evidentiary hearing in this matter of any kind, let alone as the Commission’s own rules define one; *i.e.*, there was never a “properly noticed session ... which provides for the opportunity ... to present evidence and cross-examination.” Puc 102.07. These were *minimal* due process requirements. See *Appeal of Morin*, 140 N.H. 515, 519 (1995)(due process requires “the opportunity to present one’s case”)(citing *Appeal of Lathrop*, 122 N.H. 262, 265 (1982)). Clark was never afforded any discovery in this proceeding; rather, the Commission adopted the incorrect position at the prehearing conference that Clark was not entitled to discovery because the proceeding was brought as a declaratory judgment case, such that, once Liberty’s petition was signed (which it has not been to this day), the Commission should “rely on the facts as alleged.”

See [Transcript of April 6, 2018 prehearing conference](#) at 24-25. Again, this is not in conformity with the Commission’s own rules, requiring full adjudicative proceedings for declaratory judgment cases, including discovery as a “right.” See Puc 207.01(d)(“Except for a petition dismissed pursuant to subsection (c), the commission shall conduct an adjudicative proceeding on a petition for declaratory ruling in accordance with Puc 203.”) and Puc 203.09.

11. Although the Commission noted that Clark might file a motion on the discovery issue, see [Transcript of April 6, 2018 prehearing conference](#) at 24, there was not time, as Liberty’s Objection argues, for Clark “to file a motion with regard to the Commission’s decision to resolve this case via briefings” Liberty’s Objection at 7, given that the deadline for the parties’ initial briefs was set for May 1, 2019 at the April 6, 2019 technical session following the prehearing conference. As the April 6th prehearing conference/technical session was on a Friday, Clark would not have been able to file a motion until the following Monday, April 9th, at the earliest, meaning, with the 10 days that Liberty would have to object to the motion under Puc 203.07(e), Clark could not count on the Commission even ruling on the motion before April 19th—just 12 days before the initial brief filing deadline. As it is unreasonable to expect a Commission decision on motions so quickly,³ the Commission had already indicated that it was opposed to discovery, and Clark had a lot of material to cover in his brief, see generally [Initial Brief of Intervenor, Terry Clark](#), such a motion would not have helped Clark, and was thus, understandably, not pursued.

³ And the experience of undersigned counsel had been that the Commission, understandably, does not act so quickly absent an emergency or more compelling circumstances.

12. At the suggestion of Staff and/or OCA at the April 6, 2019 technical conference, Clark did serve one quick round of discovery on Liberty in another case (DG 17-152), before the May 1, 2018 briefing deadline in this matter, which resulted in some information relevant to Clark's case, but discovery was never allowed in this proceeding—the only “case” the parties were allowed to pursue and present was “briefing.” Again, this was not in conformity with due process. *Appeal of Morin, supra*, 140 N.H. at 518 (due process requires “the opportunity to present one's case.”). Especially in light of the bare bones, completely uninformative [petition](#) filed by Liberty in this proceeding, the Commission should have afforded at least some limited discovery: two rounds, at a minimum, which does seem to be the usual Commission allotment for adjudicative proceedings. *See, e.g.*, [procedural schedule for Docket No. DG 16-852](#) and [procedural schedule for Docket No. DW 18-099](#).
13. While Clark appreciated the Commission's attempt to afford fairness according to the Commission's view of its requirements under the circumstances, and necessarily had to work with what the Commission was willing to grant him for adjudicative rights, Clark made plain at the prehearing conference in this matter that the Commission was not affording due process in this proceeding. *See* [Transcript of April 6, 2018 prehearing conference](#) at 15:10-17. So, Clark is not bound by whatever “due process” may be found to have been afforded him in this proceeding.

14. Besides, again, Liberty’s argument that Clark received sufficient due process ignores the unlawfulness of the proceedings—conducted in violation of statutory and Commission rule requirements, and governing standards—as to all members of the public, which renders them void, period. *See* cases cited in [Terry Clark’s Motion for Rehearing or Reconsideration Under R.S.A. 541, and Clarification](#) at ¶¶ 23. Beyond the lack of notice, hearing, discovery, the opportunity for witnesses, *etc.* afforded in this proceeding, just the case cited by Clark on the need to adhere to the appropriate standards, *Appeal of Public Service Co. of New Hampshire, supra*, 122 N.H. at 1077 (Commission imprudency finding, improperly made in financing hearing under wrong standard, violated due process and ordered expunged),⁴ is enough to establish Clark’s due process claim here, as the Commission never applied the appropriate “public interest”/“public good” standard to Liberty’s petition—but that is precisely why, of course, Liberty chose the declaratory avenue to begin with.
15. Moreover, again, the Decisions are unlawful and/or unreasonable for the numerous other reasons cited in Clark’s Motion for Rehearing, *etc.* that Liberty’s Objection does not begin to address.
16. Again, Clark files this pleading to address Liberty’s misstatements and ensure that they will not lead the Commission astray and thereby prevent it from correcting its own errors in its Decisions. *See Appeal of Conservation Law Foundation, supra*, 127 N.H. at 632 (1986)(“This requirement is grounded in the sound policy

⁴ Cited in paragraph 5 of the Motion for Rehearing, *etc.*

that “[a]dministrative agencies ... have a chance to correct their own alleged mistakes before time is spent appealing from them.”)(citation omitted).

Respectfully submitted,

Dated: September 11, 2019

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CERTIFICATE OF SERVICE

I hereby certify that I have, on this 11th day of September, 2019, submitted an original and six copies of this pleading to the Commission by hand delivery, with copies e-mailed to the petitioner and the Consumer Advocate. I further certify that I have, on this 11th day of September, 2019, served an electronic copy of this pleading on every other person/party identified on the Commission’s service list for this docket by delivering it to the e-mail address identified on the Commission’s service list for the docket.

//s//Richard M. Husband