THE STATE OF NEW HAMPSHIRE
SUPREME COURT

NO. _____

LIBERTY UTILITIES (ENERGYNORTH NATURAL GAS) CORP.
d/b/a LIBERTY UTILITIES – KEENE DIVISION
PUBLIC UTILITIES COMMISSION CASE DG-17-068

_____

APPEAL OF TERRY CLARK BY PETITION
PURSUANT TO R.S.A. 541:6 AND SUPREME COURT RULE 10

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Terry Clark ("Clark"), pursuant to R.S.A. 541:6, R.S.A. 365:21 and Supreme Court Rule 10, hereby appeals to this Court from Commission Order No. 26,065 dated October 20, 2017, the initial declaratory judgment ruling ("Declaratory Ruling"), Commission Order No. 26,274 dated July 26, 2019, the decision confirming that ruling ("Confirming Decision"), and Commission Order No. 26,294 dated September 25, 2019, the order denying Clark's motion for rehearing or reconsideration of the prior orders ("Final Order") of the New Hampshire Public Utilities Commission ("Commission"), issued in the Commission proceeding captioned *Liberty Utilities (EnergyNorth Natural Gas) Corp. d/b/a Liberty Utilities – Keene Division ("Liberty Utilities")*, *Petition for Declaratory Ruling*, and assigned Commission Docket No. DG 17-068 (the "Keene case").

In support of his appeal, Clark states as follows:

NAMES OF THE PARTIES AND COUNSEL

The parties and counsel identified on the Commission's service list for the Keene case are as follows:

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SUPREME COURT RULE 10(b) DOCUMENTS

Pursuant to Supreme Court Rule 10(b), copies of the following documents are contained in the appendix ("App.") accompanying this appeal:

1. Commission Order No. 26,274 dated July 26, 2019, order sought to be reviewed, App. at 1

2. Commission Order No. 26,294 dated September 25, 2019, the order denying the petitioner's motion for a rehearing on the above decision and order sought to be reviewed, App. at 17
3. Commission Order No. 26,087 dated December 18, 2017, the order granting the petitioner's motion for a rehearing in part (allowing briefing), App. at 34
4. Commission Order No. 26,065 dated October 20, 2017, the initial declaratory judgment decision and order sought to be reviewed, App. at 41
5. Joint Motion for Rehearing Under R.S.A. 541 dated November 16, 2017 (with exhibits), App. at 47
6. Notice of Joint Request to Amend Prayers for Relief in Motion for Rehearing dated November 20, 2017, App. at 156
7. Objection to Motion for Rehearing dated November 27, 2017 filed by Liberty Utilities, App. at 158
8. Clark's Motion for Rehearing or Reconsideration Pursuant to R.S.A. 541, and Clarification dated August 26, 2019 (with exhibit), App. at 167
9. Objection to Clark's Motion for Rehearing dated September 5, 2019 filed by Liberty Utilities, App. at 200
10. Clark's Reply to Liberty Utilities' Objection dated September 11, 2019, App. at 208
11. Clark's Initial Brief dated May 1, 2018 (with exhibits), App. at 220
12. Liberty Utilities' Initial Brief dated May 1, 2018, App. at 302
13. Clark's Reply Brief dated May 15, 2018, App. at 311
14. Liberty Utilities' Reply Brief dated May 15, 2018 (with exhibit), App. at 321

15. Staff Adequacy Assessment of Compressed Natural Gas Installation (October 5, 2018) excerpt, App. at 325

16. Transcript excerpt from hearing held on April 6, 2018, App. at 328

17. Liberty Utilities' request for prompt resolution of motion for rehearing dated July 24, 2019 (with attachment), App. at 335

18. Liberty Utilities' (revised) petition for declaratory judgment (with exhibits), App. at 339

19. Commission Order of Notice dated March 1, 2018, App. at 358

20. Commission secretarial letter approving schedule dated April 11, 2018, App. at 362

QUESTIONS PRESENTED FOR REVIEW

1. Clark contends that the Commission's orders, which allow Liberty Utilities to expand its natural gas business in Keene with resulting greenhouse gas and other harmful emissions, are against the public interest and inconsistent with the state's official energy policy under R.S.A. 378:37 due to climate, health and other concerns which were well-developed and supported by Clark, but not considered by the Commission. Are the Commission's orders unlawful and unreasonable?

2. In deciding the matter, the Commission rejected, without explanation, Staff's well-reasoned recommendation and Clark's well-developed arguments, violated or ignored statutes, its own rules and orders, and due process, then ignored the burden of proof. Should the Commission's orders be vacated as unlawfully and unreasonably grounded, accordingly?

PROVISIONS OF CONSTITUTIONS, STATUTES AND RULES INVOLVED IN CASE

Statutes

New Hampshire Statutes

Rules

STATEMENT OF THE CASE AND FACTS

This is an administrative appeal pursuant to R.S.A. 541:6, R.S.A. 365:21 and Supreme Court Rule 10 of three Commission decisions *i.e.*, the Declaratory Ruling, Confirming Decision and Final Order (collectively, the "Decisions"), whereby Clark, an intervenor in the subject proceeding, contends that the Commission unlawfully and unreasonably (a) granted Liberty Utilities expansion rights which are against the public interest and inconsistent with the state's official energy policy under R.S.A. 378:37 due to the climate crisis, health, safety and other concerns, and (b) failed to even consider the issue. App. at 62-68, 173, 181-182, 222. Clark further contends that the rights were unlawfully and unreasonably granted by a petition for declaratory judgment which was first not even noticed to the public, then confirmed, after notice,

through proceedings which allowed only briefing—although the requested relief was required to be decided by a full adjudicative proceeding under R.S.A. 374:22 and R.S.A. 374:26 and the public interest standard of the latter statute, with notice, discovery and the opportunity for parties to present their cases through witnesses, other evidence and cross-examination, at a hearing—and that the Commission, again, failed to properly address Clark's well-developed arguments on the issue. *Id.* at 48-49, 60-62, 167-169, 174-175, 178-181, 332. Moreover, the Commission ignored that Liberty Utilities failed to meet its burden of proof. *Id*. at 192-193, 262-264. It is Clark's position that the Decisions violated R.S.A. 374:22 and R.S.A. 374:26, the Commission's own rules and orders, and due process, and must be vacated, if not reversed on the public interest/R.S.A. 378:37 issue, accordingly, *id*. at 60-62, 167-169, 174-175, 178-181, 214-215—particularly as they provide horrific potential precedent. *Id*. at 48, 52, 195-197, 222. Moreover, acceptance of this appeal will afford the Court the opportunity to provide much needed confirmation of the Commission's duty to recognize and respond to the climate crisis as, particularly in light of last year's IPCC special report and its circa 2030 and 2050 deadlines, discussed below, the Commission must be brought on board in addressing the crisis as soon as possible.

This proceeding results from Liberty Utilities' ongoing, aggressive expansion of its natural gas infrastructure, supply commitments and customer base throughout the state, as is reflected in the Commission approvals it has obtained over the past several years for Keene, as discussed below, Concord, *see* Order No. 25,965 (Nov. 10, 2016)(approving settlement agreement and transfer of assets between Concord Steam and Liberty Utilities to convert Concord Steam customers to Liberty Utilities gas service), Pelham/Windham, *see* Order No. 25,987 (Feb. 8, 2017)(approving settlement agreement and Liberty Utilities' franchise petition

for Pelham and Windham) and Lebanon/Hanover, *see* Order No. 26,109 (Mar. 5, 2018)(approving settlement agreement and a Liberty Utilities' franchise extension to expand its natural gas services in Hanover and Lebanon to include CNG and LNG through a new pipeline distribution system), and the approvals it is seeking under Commission Docket No. DG 17-198 (request to approve over $400 billion in infrastructure for use beyond 2060, including 2 billion cubic feet LNG facility proposed for Epping) for the Granite Bridge Project, and in Commission Docket No. DG 17-152, the lead case for the utility's expansion plans, wherein the company is seeking approval for its "least cost integrated resource plan" ("LCIRP") for the forecast period 2017/2018 - 2021/2022 (the "LCIRP case"). App. at 172-173, 223. Liberty Utilities forecasts and is planning for continuing, substantial growth—connecting and committing current non-natural gas customer to natural gas—not only through the end of the LCIRP, but through at least 2037/2038, to be fueled by the Granite Bridge Project, with corresponding emissions, for potentially decades thereafter. *Id.* at 224, 234-237. On information and belief, much, if not the vast majority, of the natural gas that Liberty Utilities is currently distributing and will distribute under its expansion plans is, and will be, hydraulically fractured ("fracked") natural gas. *Id.* at 223-224.

Clark is an approximately 40-year resident of Keene and city councilor (intervening solely in his individual capacity) who opposes the utility's expansion plans, not only in the Keene case, but as an intervenor in the LCIRP case, as well, with pleadings that mirror each other on the public interest/R.S.A. 378:37 issue. App. at 177 (including Footnote 20), 224. Clark believes that a rapid transition to sustainable energy sources is necessary to address the climate crisis, is working with many citizens from within and outside of his ward who are concerned with climate change and/or the health and safety concerns related to fracked gas use to

make solar and other sustainable energy sources available to the city, and is concerned that Liberty Utilities' continued expansion will likely impede the development and availability of sustainable alternatives in Keene and the entire state of New Hampshire for at least another generation. *Id*. at 48-49, 224 It is Clark's position that, additionally given the health and safety concerns of fracked gas use, but due to the climate crisis alone, a moratorium on expansion—not increasing and extending our fracked gas fuel commitment for decades—is called for as a matter of the public interest and under the state's official energy policy codified in R.S.A. 378:37. *Id.* at 62-68, 173, 222. Clark sees the public interest standard and R.S.A. 378:37 as powerful tools available to the Commission to address such a crisis and rein in Liberty Utilities' expansion, by providing the Commission with the authority (and obligation) to impose a moratorium on the utility's infrastructure and customer growth,[1] or to deny specific emissions increasing requests, such as in the Keene case—but which are being ignored.

Keene currently only receives propane-air from Liberty Utilities, through a system that stores the gas in above-ground tanks and distributes it via approximately 30 miles of existing underground pipe, as described in the Safety Division's assessment of the project filed in the Keene case. App. at 220, 326. The Decisions issued on a revised petition for declaratory ruling ("petition" or "declaratory judgment petition"), that Liberty Utilities filed on April 26, 2017, solely pursuant to Puc 203 and Puc 207, requesting a determination that the utility is not required to obtain permission from the Commission under R.S.A. 374:22, App. at 364, and R.S.A. 374:26, *id*., to offer compressed natural gas ("CNG") and liquid natural gas ("LNG") services to its Keene franchise customers, *in addition* to its existing propane-air services, under the original 1860 Keene "gas" franchise granted to the utility's predecessor-in-interest. *Id.* at 339-357. The

[1] Or emissions limits or mandatory mitigation requirements, among other responsive measures.

filing responded to Commission Staff's determination and recommendation to the utility that a filing under R.S.A. 374 was, indeed, necessary because the utility's plans[2] constituted a "change in the character of service" requiring Commission permission and approval under R.S.A. 374:22. *Id*. at 41-42, 340. In relevant part, that statute provides:

> "I. **No person or business entity**, including any person or business entity that qualifies as an excepted local exchange carrier, shall commence business as a public utility within this state, or **shall engage in such business, or begin the construction of a plant, line, main, or other apparatus or appliance to be used therein, in any town in which it shall not already be engaged in such business, or shall exercise any right or privilege under any franchise not theretofore actually exercised in such town, without first having obtained the permission and approval of the commission** …

Id. (emphasis added); App. at 364.

But, again, Liberty Utilities' petition was filed solely pursuant to Puc 203 and Puc 207. App. at 1, 17, 339, 358, 366-367. Still, those rules have requirements, and the filing was subject to other PUC rules. Puc 203 sets forth the rules for adjudicative proceedings, which the petition was compelled to acknowledge that the proceeding would be, as Puc 207.01, which governs declaratory rulings, provides that declaratory judgment petitions must be processed in accordance with Puc 203:

> "Puc 207.01 Declaratory Rulings. (a) A person seeking a declaratory ruling on any matter within the jurisdiction of the commission shall request such ruling by submitting a petition **pursuant to Puc 203** …"

Puc 207.01 (emphasis added), App. at 61, 68, 366-368.

In turn, Puc 203.12, App. at 366, requires published notice of, and a hearing on, all adjudicative proceedings:

> "Puc 203.12 Notice of Adjudicative Proceeding. (a) The commission shall give notice of a pre-hearing conference, or of a hearing in a case for which no pre-hearing conference has been scheduled, which shall contain the

[2] Largely touted as just converting existing propane-air customers but including natural gas expansion to new customers, as well, as discussed below.

> information required by RSA 541- A:31, III … (b) The commission shall direct the petitioner or other party to the docket to disseminate a notice issued pursuant to this section to the general public by causing the notice to be published in a newspaper of general circulation serving the area affected by the petition or by such other method as the commission deems appropriate and advisable in order to ensure reasonable notification to interested parties …"

App. at 61, 168, 366-368. Puc 102.07, App. at 366, makes clear that the "hearing" required by the above "means **a properly noticed session** … **which provides for opportunity for any party, intervenor or commission staff to present evidence and conduct cross-examination**." *Id*. at 61, 168 (emphasis added); *see also 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)). Puc 203.18 additionally makes clear that interested persons are to be afforded a public comment session at the hearing (or prehearing conference, if scheduled). *Id.*, App. at 367.

However, notwithstanding the clear requirements of its own rules, Puc 203 and Puc 207—the very rules under which the utility's declaratory judgment petition was brought—the Commission granted the utility's petition (subject to continuing safety supervision and conditions) by the Declaratory Ruling, issued October 20, 2017, without notice, hearing, discovery, any of the other requirements of adjudicative proceedings, or even the opportunity for public comment. *See generally* Declaratory Ruling, App. at 41-46. Moreover, because the utility's petition was decided only under declaratory judgment standards, not those of a petition brought under R.S.A. 374:26, the Declaratory Ruling did not address the express "public interest" requirement of the statute. App. at 60, 218.

The Declaratory Ruling accepted Liberty Utilities' argument that today's gas is of "the same character" as the gas approved under the 1860 franchise the utility's predecessor-in-interest

was granted, citing three prior Commission decisions it considered supportive,[3] *id*. at 3; App. at 43, and held that Liberty Utilities "has the authority to offer compressed natural gas and liquefied natural gas service to customers in Keene." *Id*. at 1; App. at 41. While the Declaratory Ruling acknowledged Staff's determination that a change in the Keene gas system from propane-air to CNG/LNG would constitute a "change in the character of *service*" (emphasis added) requiring the utility to file a petition under R.S.A. 374:22 and R.S.A. 374:26, *see id.* at 1, App. at 41, it never discussed why it considered Staff's conclusion to be wrong—as, whether or not natural gas is "the same character" as propane-air, the utility's plans could still result in a change in a "change in the character of service," as Staff contended, *see* id. at 1-5, App. at 41-45, 171-172; and, indeed, this is clearly the case from the record.

Although the difference is not disclosed in Liberty Utilities' petition, the Declaratory Ruling acknowledged "that CNG/LNG installations of the type contemplated by the Company include technology and piping that requires much higher operating pressures than are found in New Hampshire gas distribution systems." Declaratory Ruling at 3; App. at 43. Although not discussed in the Declaratory Ruling, the subsequent Confirming Decision acknowledged that the utility's plans will

> "require the construction, operation, and maintenance of decompression skids that will depressurize CNG delivered by truck to permit its introduction into Liberty's existing distribution system. The conversion will also require the adjustment of all customer meters and certain behind-the-meter changes to customer appliances inside their homes and commercial premises. Liberty has also indicated its intent to construct, operate, and maintain LNG facilities to serve Keene."

Id. at 7; App. at 7. The proposed new LNG facilities will include a 100,000 gallon LNG storage tank, App. at 292, 313, and gas compression and injection equipment, *id*. at 9—changes which

[3] *Gas Service, Inc.*, 58 NH PUC 48 (July 24, 1973); *Manchester Gas Company*, 58 NH PUC 71 (October 2, 1973); *Concord Natural Gas Corp.*, 58 NH PUC 78 (October 16, 1973).

are also not discussed in Liberty Utilities' petition for declaratory judgment or the Declaratory Ruling. *Id*. at 41-46, 339-357. Additionally, the Confirming Decision acknowledged that the utility's plans not only call for replacing "much of the existing system pipelines that currently provide propane-air gas to customers," *id*. at 10, App. at 10, but for an "extensive whole-system" change, *id*. at 8, App. at 8, resulting in an all new "separate and distinct" natural gas system. *Id*. at 13, App. at 13, 171.

The all new "separate and distinct" natural gas system will not be used just to convert existing propane-air customer to natural gas, as the utility's declaratory judgment petition and the Declaratory Ruling suggest: it will be used for a new, expanding natural gas business, as well, for all proposed five phases of the Keene "conversion" project. App. at 170-171.

Thus, following the Declaratory Ruling, Clark, together with seven members of the NH Pipeline Health Study Group, an unincorporated association of New Hampshire citizens concerned with the harms of fracked gas use, filed a timely joint motion for rehearing and reconsideration, App. at 47-155, of the decision under R.S.A. 541:3, *id*. at 35, 49, 366, which argued, *inter alia*, that:

(a) the Declaratory Ruling did not meet Puc 203 and Puc 207 rule requirements, and R.S.A. 374:22 and R.S.A. 374:26 statutory requirements, including those mandating notice, a hearing, public comment period, *etc*. in declaratory and other adjudicative proceedings, and thus violated due process and should be vacated;

(b) the Commission should have deferred to Site Evaluation Committee ("SEC") jurisdiction over the matter;

(c) the relief Liberty Utilities requested could only be afforded under a petition filed pursuant to R.S.A. 374:22 and R.S.A. 374:26; and

(d) it could not be afforded because the utility's plans are contrary to the public interest and violate R.S.A. 378:37.

App. at 47-69, 172.

On December 18, 2017, over Liberty Utilities' objection, App. at 158-166, the Commission granted the joint motion for rehearing and reconsideration, in part, pursuant to Commission Order No. 26,087 dated December 18, 2017, App. at 34-39. This order afforded Clark some additional "opportunity to be heard" by ordering the reopening of the record, briefing, and the issuance of an order of notice for a conference, which would include establishing a briefing schedule. *Id.* at 5, App. at 38.

An Order of Notice issued March 1, 2018, App. at 358-360, for a prehearing conference on April 6, 2018,

> "at which each party will provide a preliminary statement of its position with regard to the petition and any of the issues set forth in N.H. Code Admin. Rules Puc 203.15. Parties should be prepared to present argument regarding interventions and regarding the status and conduct of the docket"[4]

and Clark petitioned to intervene on April 4, 2018.[5] Clark's petition was granted, with Liberty Utilities stating that it had no objection to the intervention at the April 6, 2018 prehearing conference, App. at 329-330, which also resulted in a May 1, 2018 deadline for initial briefs and a May 15, 2018 deadline for reply briefs. App. at 2.

[4] *Id*. at 2-3, App. at 359-360.

[5] Clark was the only one of the original movants under the joint motion for rehearing and reconsideration found to have standing under Commission Order No. 26,087 dated December 18, 2017. App. at 37-38.

Clark opened the discussion of his position on Liberty's petition and Puc 203.15, App. at 367, issues, and "the status and conduct of the docket," at the April 6, 2018 prehearing conference, by referring the Commission to his filings for all of his concerns, *id.* at 331, and closed with a reminder of his position that the case must receive the full process afforded adjudicative proceedings:

> "And finally, I would say that the Commission could only hear the request pursuant to 374:22, and as such, it would have to be a proceeding -- a full, you know, a full adjudicative proceeding, with a final hearing at the end, witnesses, discovery, and all of that. But it's not scheduled for that, so it has to be dismissed."

Id. at 332. Clark subsequently closed his initial brief with a reminder of the consequences of violating statutory and procedural requirements: resulting decisions are void, a nullity, of no force and effect, and should be vacated (or expunged). App. at 268 Footnote 59. But, the Commission never allowed more than briefing, App. at 2, 333-334, although Clark did obtain some limited discovery through the LCIRP case. *Id*. at 215-217.[6]

Clark timely filed his initial brief, App. at 220-301, and reply brief, App. at 311-320, as did Liberty Utilities. App. at 302-310, 321-324. Despite the discovery and other procedural impediments, Clark offered substantial evidence in support of his positions. App. at 220-301, 311-320.[7] Liberty Utilities' briefing did not even address Clark's environmental, health, safety

[6] In the Commission Secretarial Letter dated April 11, 2018 approving the procedural schedule, App. at 362, it is reflected that the April 6, 2018 (unrecorded) technical session following the prehearing conference resulted in a three-day discovery period for Clark, from the date of the conference, April 6, 2018, to April 9, 2018. *Id*. This actually refers to the limited discovery Clark obtained in the LCIRP case, see, e.g., App. at 292, at the suggestion of Commission Staff and/or the OCA during the technical session, not discovery that was allowed in the Keene case. *Id*. at 215-217.

[7] The Commission does not follow the rules of evidence: evidence need only be relevant, material and not "unduly repetitious" to be admitted—hearsay, for example, is not an impediment. Puc 203.23, App. at 367.

and public interest/R.S.A. 378:37 arguments, App. at 302-310, 321-324, although they were plainly at issue as Clark had raised them in filings, including in his (joint) motion for rehearing, *id*. at 47-52, 62-68, and in his position statement at the April 6, 2018 prehearing conference. *Id*. at 331. Indeed, Liberty Utilities never substantively addressed Clark's arguments on these issues. *Id*. at 200-207, 302-310, 321-324. Nor, for that matter, did the utility ever meet its burden of proof. *Id*. at 262-264, 319.

After Safety Division, Staff and further Liberty input and submissions, App. at 2-3, the Confirming Decision, *id*. at 1-16, issued July 26, 2019, two days after Liberty Utilities filed a request for the Commission to promptly resolve Clark's motion for rehearing. *Id*. at 335-338. The Confirming Decision not only confirmed (and clarified) the scope of the Declaratory Ruling, as indicated in the order, but additionally set forth requirements and conditions for Liberty Utilities to meet in installing the five phases of its new natural gas system—without the opportunity for Clark or anyone outside of the Commission, to review, object to, comment on or otherwise provide input with respect to the utility's submissions and compliance, App. at 10-14, except by public comment (as confirmed by the Commission's subsequent Final Order at 10, App. at 26). Clark contends that this results in a continuing violation of the due process rights of Clark and the public. App. at 191. Moreover, incredibly, the Confirming Decision acknowledged for the first time that the settlement agreement ("Settlement Agreement") and Commission Order No. 25,736 (Nov. 21, 2014) in Commission Docket No. DG 14-155, under which Liberty Utilities acquired the Keene franchise, required the utility to maintain the Keene air-propane service "as is" absent further Commission approval. Confirming Decision at 8-9, App. at 8-9. Thus, as such approval clearly had not been granted at the time Liberty Utilities

filed its declaratory judgment, the utility plainly **did not have the authority** at the time it filed its petition requesting a declaratory ruling that it did. App. at 192-193.

In his subsequent timely motion for rehearing, under R.S.A. 541:3, Clark asserted numerous grounds supporting rehearing of the Confirming Decision and Decisions, including not only those already asserted in his initial (joint) motion for rehearing, and briefing, but additional specific reasons he believed that the Decisions were unlawful and unreasonable. App. at 167-199. Clark noted among these grounds the Confirming Decision's failure to address a number of Clark's well-developed arguments against the correctness, lawfulness and reasonableness of the proceedings and the Decision's rulings,[8] and Clark's position that the utility's plans were precluded as against the public interest and violative of R.S.A. 378:37. App. at 181-182, 191-195. This was contrary to Commission Order No. 24,442 (March 11, 2005) at 49, as explained and confirmed by Commission Order No. 26,291 (Sep. 5, 2019) at 24 (Commission must address well-developed issues). With respect to the public interest/R.S.A. 378:37 issue, Clark contended that, in supplementation of the arguments in his briefing, the Commission should have

[8] Including Clark's position that they fail to address, or, at least, adequately and reasonably address, Clark's meritorious arguments against a finding of authority under the original Keene franchise, including the arguments that (a) Liberty's original franchise rights were fixed by the four corners of the grant under *State v. Hutchins*, 79 N.H. 132, 139 (1919) and related relevant decisions, and could not be changed, regardless of the business actually conducted, except by further legislative permission granted under R.S.A. 374:22 and R.S.A. 374:26, (b) CNG and LNG cannot be considered the same "gas" that was authorized under the Keene franchise grant as CNG and LNG, and even natural gas, were still unknown as of the time of the franchise grant in 1860 and cannot be considered to be included within the intent of the grant under *Allied New Hampshire Gas Co. v. Tri-State Gas & Supply Co.*, 107 N.H. 306, 308 (1966), (c) Liberty has not established that the natural gas it proposes to use for its new system is of the "same character" as that authorized under the franchise grant—in fact, it claims that it does not even know what is in its "natural" gas, but admits that it is a new fuel compared to propane-air—and (d) even if such authority could be read into the original grant, it was never "theretofore actually exercised" and thus lost, requiring new permission under R.S.A. 374:22 and R.S.A. 374:26. App. at 192-193, 260-268.

considered three well-publicized, important matters which occurred subsequent to the final May 15, 2018 briefing deadline in issuing the Confirming Decision—and/or that the Commission should consider them now as new evidence on the motion for rehearing—as all strongly repudiate the lawfulness and reasonableness of the Declaratory Ruling and Confirming Decision:

(1) the Merrimack Valley gas disaster on September 13, 2018, caused by a high-pressure natural gas incident, which resulted in "a series of explosions and fires" that damaged 131 structures, including destroying five homes, killed one individual and injured 28 others;[9]

(2) the release of a 13-agency federal government report, "The Fourth National Climate Assessment," Vol. 2,[10] by the Trump Administration in November, 2018, which finds, in part, that:

> "In the absence of significant global mitigation action and regional adaptation efforts, rising temperatures, sea level rise, and changes in extreme events are expected to increasingly disrupt and damage critical infrastructure and property, labor productivity, and the vitality of our communities. Regional economies and industries that depend on natural resources and favorable climate conditions, such as agriculture, tourism, and fisheries, are vulnerable to the growing impacts of climate change. Rising temperatures are projected to reduce the efficiency of power generation while increasing energy demands, resulting in higher electricity costs. The impacts of climate change beyond our borders are expected to increasingly affect our trade and economy, including import and export prices and U.S. businesses with overseas operations and supply chains. Some aspects of our economy may see slight nearterm improvements in a modestly warmer world. However, the continued warming that is projected to

[9] *See* National Safety Transportation Board "Preliminary Report Pipeline: Over-pressure of a Columbia Gas of Massachusetts Low-pressure Natural Gas Distribution System, Executive Summary" online at https://www.ntsb.gov/investigations/AccidentReports/Pages/PLD18MR003-preliminary-report.aspx. *See also* https://en.wikipedia.org/wiki/Merrimack_Valley_gas_explosions.

[10] "The Fourth National Climate Assessment," Vol. 2, cited as USGCRP, 2018: Impacts, Risks, and Adaptation in the United States: Fourth National Climate Assessment, Volume II [Reidmiller, D.R., C.W. Avery, D.R. Easterling, K.E. Kunkel, K.L.M. Lewis, T.K. Maycock, and B.C. Stewart (eds.)]. U.S. Global Change Research Program, Washington, DC, USA, 1515 pp. doi: 10.7930/NCA4.2018.

> occur without substantial and sustained reductions in global greenhouse gas emissions is expected to cause substantial net damage to the U.S. economy throughout this century, especially in the absence of increased adaptation efforts. With continued growth in emissions at historic rates, annual losses in some economic sectors are projected to reach hundreds of billions of dollars by the end of the century— more than the current gross domestic product (GDP) of many U.S. states."

Id. at 25-26; and

(3) the issuance of the Intergovernmental Panel on Climate Change ("IPCC") special report[11] in October, 2018.

App. at 183-184.

The IPCC special report has caused tremendous concern. App. at 185. In this report, the IPCC, a United Nations intergovernmental body tasked with assessing climate change and the world's leading international authority on the matter,[12] warns that:

-- We are in desperate straits with climate change. Currently at only 1°C global warming, we are on a path for 3°C warming by 2100, with continuing warming afterwards;

-- We will be much worse at even 1.5°C warming, with substantial increases in climate-related harms to health, food and water supplies, livelihoods, economic growth and human security;

[11] IPCC, 2018: *Global Warming of 1.5°C.An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty [Masson-Delmotte, V., P. Zhai, H.-O. Pörtner, D. Roberts, J. Skea, P.R. Shukla, A. Pirani, W. Moufouma-Okia, C. Péan, R. Pidcock, S. Connors, J.B.R. Matthews, Y. Chen, X. Zhou, M.I. Gomis, E. Lonnoy, T. Maycock, M. Tignor, and T. Waterfield (eds.)]. In Press*. The entire report may be downloaded at https://www.ipcc.ch/site/assets/uploads/sites/2/2019/06/SR15_Full_Report_High_Res.pdf or from https://www.ipcc.ch/sr15/download/.

[12] *See* IPCC website https://archive.ipcc.ch/organization/organization.shtml.

-- Just a half of a degree increase from 1.5℃ to 2℃ global warming will significantly increase the risks and harms of droughts, floods, extreme heat and other climate-related events;

-- We have only until about 2030 to reduce emissions sufficiently to limit global warming to 1.5℃, and only then if we cut emissions by about 45% from 2010 rates (which have gone up since then), which will require an incredibly ambitious, united, sustained worldwide effort. Even then, to limit global warming to 1.5℃, we will have to achieve net-zero in human-caused emissions by about 2050;

-- Everything we do to mitigate, or increase, warming matters as every fraction of a degree will make a difference.[13]

App. at 185-186.

[13] Again, the entire report may be downloaded at https://www.ipcc.ch/site/assets/uploads/sites/2/2019/06/SR15_Full_Report_High_Res.pdf or from https://www.ipcc.ch/sr15/download/. A "Summary for Policymakers" should be available at https://www.ipcc.ch/sr15/chapter/spm/. In any event, the "Summary for Policymakers" should be locatable by its citation: IPCC, 2018: Summary for Policymakers. In: Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty [Masson-Delmotte, V., P. Zhai, H.-O. Pörtner, D. Roberts, J. Skea, P.R. Shukla, A. Pirani, W. Moufouma-Okia, C. Péan, R. Pidcock, S. Connors, J.B.R. Matthews, Y. Chen, X. Zhou, M.I. Gomis, E. Lonnoy, T. Maycock, M. Tignor, and T. Waterfield (eds.)]. In Press. *See also* "IPCC Press Release" dated October 8, 2018 available at file:///C:/Users/RMHus/Desktop/Pipeline/PUC%20Docket%20DG%2017152%20(LCIRP)/Testimony/Attachments/pr_181008_P48_spm_en.pdf ("'Every extra bit of warming matters, especially since warming of 1.5ºC or higher increases the risk associated with long-lasting or irreversible changes, such as the loss of some ecosystems,' said Hans-Otto Pörtner, Co-Chair of IPCC Working Group II.").

Clark argued that, had the aforementioned reports and Merrimack Valley gas disaster been properly considered under the Confirming Decision, no lawful, reasonable decision could have been reached, particularly in light of the circa 2030 and 2050 deadlines under the IPCC special report and its admonition that "everything matters," but that Liberty Utilities' plans are contrary to the public interest and R.S.A. 378:37. App. at 186. At a minimum, though, Clark contends, the public interest/R.S.A. 378:37 analysis was required to be part of the Commission's decision-making, and it was unlawful and unreasonable of the Commission not to even address it. *Id.* at 182.

The Commission issued the Final Order, on September 25, 2019, which denied not only Clark's motion for rehearing (and clarification), but one Liberty Utilities timely filed, as well (essentially seeking clarification), although the order did clarify certain requirements imposed on the utility by the Confirming Decision. App. at 17-33. Again, the Final Order failed to properly address all of Clark's well-developed arguments concerning the correctness, lawfulness and reasonableness of the proceedings and the Decision's rulings, and Clark's position that the utility's expansion plans were precluded as against the public interest and violative of R.S.A. 378:37. *Id*. at 17-33, 180-181, 191-195. Instead, the Commission dismissed them without adequate and/or with incorrect analysis:

> "… We are not required to vacate our decisions regarding the proposed conversion of the Keene gas system from propane-air to natural gas in the form of CNG or LNG for a violation of due process because the process afforded the parties was commensurate with the requirements of due process under the circumstances. Given that the primary issue addressed in this proceeding was purely legal in nature, and not a question of fact, it was not necessary to provide for any additional process. Mr. Clark was granted intervention and was permitted to participate as a full party. He filed an initial brief and a reply brief addressing the franchise authority issue.
>
> Based on our resolution of that legal issue on the record presented, there was no need for discovery, testimony, or an evidentiary hearing in this matter. We note that administrative agencies are granted some flexibility in fashioning

> appropriate procedures for adjudications. See Mathews v. Eldridge, 424 U.S. 319, 334 (1976). Nor was it necessary for Liberty to file a DG 17-068 10 petition under RSA 374:22 and RSA 374:26 as a result of our determination of the franchise authority issue. In this context, therefore, Mr. Clark's due process arguments are unavailing.
>
> With respect to the Keene Acquisition Settlement, approved by the Commission in Order No. 25,736, the settlement by its terms "shall remain in effect until the Commission approves otherwise." In DG 17-048, we allowed Liberty to consolidate the Keene Division into the rest of the Liberty gas system. See Order No. 26,122 at 37-38. As a result, to the extent that the Keene Acquisition Settlement had limited Liberty's existing franchise rights to the distribution of propane-air, that order "approve[d] otherwise."
>
> In addition, we decline to dismiss this matter on the merits as contrary to the public interest under the LCIRP statute, RSA 378:37-39, or out of deference to the jurisdiction of the SEC, as requested by Mr. Clark. Liberty's LCIRP has been filed and will be evaluated in DG 17-152; and any application submitted to the SEC with respect to the proposed Keene system conversion facilities, if required, will be addressed by that committee subject to its separate rules and procedures. We therefore deny Mr. Clark's request for rehearing or reconsideration …"

Final Order at 9-10, App. at 25-26.

As explained below, the Commission and Liberty Utilities could not eliminate the statutory, Commission rule, prior order and procedural due process requirements for a full evidentiary hearing with discovery, *etc.* under the circumstances, the Declaratory Ruling could not have "approved" the CNG/LNG rights as required by Commission Order No. 25,736 (Nov. 21, 2014) by both declaring Liberty Utilities to have that authority at the time it filed its petition and granting the authority under another (subsequent) ruling, and the public interest/R.S.A. 378:37 issue should have been considered in the Keene proceeding whether or not it has also been raised in pending Commission Docket No. DG 17-152 (the LCIRP case).[14] Any moratorium, expansion restrictions or other emissions mitigation measures resulting from the final outcome of the public interest/R.S.A. 378:37 issue in the LCIRP case should be reflected in

[14] Clark is not pursuing the SEC jurisdictional issue in this appeal, App. at 179 Footnote 24, but otherwise reserves his rights on the issue.

the Keene case, as well, though. App. at 188, 197, 222-223, 269. As the Final Order at 10 confirms: the Keene franchise is part of the Liberty Utilities gas system under Commission Order No. 26,122 (April 27, 2018) at 37-38. App. at 26. Thus, there is no rational reason, should it be the result of the LCIRP case, that expansion and emissions prohibited in the rest of New Hampshire as against the public interest and/or R.S.A. 378:37, should be permitted in Keene. *Id.* at 188.

Within 30 days of the Final Order, pursuant to R.S.A. 541:6, App. at 366, Clark filed this appeal of the Decisions.

JURISDICTIONAL BASIS FOR APPEAL

R.S.A. 541:6 and R.S.A. 365:21, App. at 364, provide the jurisdictional basis for this appeal.

A SUBSTANTIAL BASIS EXISTS FOR A DIFFERENCE OF OPINION ON THE COMMISSION'S AUTHORITY AND OBLIGATIONS VIS-À-VIS THE PUBLIC INTEREST, R.S.A. 378:37, THE CLIMATE CRISIS, R.S.A 374:22 AND R.S.A. 374:26, AND THE COMMISSION'S OWN RULES AND ORDERS. ACCEPTANCE OF THE APPEAL WOULD AFFORD THE COURT THE OPPORTUNITY TO CORRECT PLAIN ERRORS BY THE COMMISSION, DECIDE MATTERS OF GREAT IMPORTANCE TO THE CITIZENS OF NEW HAMPSHIRE, AND ADDRESS ISSUES OF GENERAL IMPORTANCE IN THE ADMINISTRATION OF JUSTICE.

1. The Decisions are Unlawful and Unreasonable as Contrary to the Public Interest and Official State Energy Policy Under R.S.A. 378:37

This case presents the opportunity for the Court to provide the Commission with clear guidance on a matter of great public importance, and to correct an error that probably would not have been made had the Commission been aware of the three matters (IPCC and 13-agency reports, and Merrimack Valley natural gas disaster) at the time of its initial Declaratory Ruling.

The Commission is plainly undecided on the public interest/R.S.A. 378:37 issue. This Court can and, particularly given the urgency in addressing the climate crisis, should provide direction. In his briefing, Clark argued:

> "The Commission must act consistent with the public interest and has broad discretion in carrying out this obligation. *See, e.g., Waste Control Systems, Inc. v. State*, 114 N.H. 21, 24 (1974); *Boston & Maine R.R. v. State*, 102 N.H. 9, 10 (1959); *Harry K. Shepard, Inc. v. State*, 115 N.H. 184, 185 (1975); *Browning-Ferris Industries of New Hampshire, Inc. v. State*, 115 N.H. 190, 191 (1975). This requires consideration of not only the needs of the persons and utility directly involved, but also 'the needs of the public at large.' *See Waste Control Systems, Inc. v. State, supra*, 114 N.H. at 24)(citing *Boston & Maine R.R. v. State, supra*, 102 N.H. at 10). To meet its charge, the Commission must weigh asserted public benefits against actual costs, including environmental costs. *See Public Service Company of New Hampshire d/b/a Eversource Energy*, Commission Docket No. DE 16-241, Order of Notice, at 3-4 …
>
> … The Commission cannot stand idly by, holding the button on the breaks to a runaway train, blaming the job description or lack of clarity in orders for not doing the obviously **only** right thing—not when it must act in the public interest and the button is in its hand. *See, e.g., Waste Control Systems, Inc*. at 24; *Boston & Maine R.R., supra*, 102 N.H. at 10; *Harry K. Shepard, Inc. v. State*, *supra*, 115 N.H. at 185; *Browning-Ferris Industries of New Hampshire, Inc. v. State*, *supra*, 115 N.H. at 191. Besides, again, to meet its charge, the Commission must weigh asserted public benefits against actual costs, including environmental costs, *see Public Service Company of New Hampshire d/b/a Eversource Energy*, Commission Docket No. DE 16-241, Order of Notice, at 3-4, and climate change is a well-established environmental cost of methane use."

App. at 225, 238-239.

Clark explained that climate change is a "well-established environmental cost of methane use" because methane, the primary component of natural gas, is a potent greenhouse gas which warms the planet roughly 86 times as much for the first couple of decades after its use, and 34 times as much for a century after use, that there is no greater current public interest concern than climate change, and there is great demand for responsive action, especially in New Hampshire and, within the state, particularly in Keene, which has adopted the emissions reduction goals of the Paris Climate Accord. App. at 225-234.

Clark further explained that Liberty Utilities' expansion plans, calling for a substantial increase in natural gas use, will result in a corresponding substantial increase in methane emissions, contributing to the exacerbation of climate change while also bringing serious health and safety concerns. App. at. 233-243. Natural gas is not the "bridge fuel" to lead us to clean, sustainable energy that everyone had hoped it would be. *Id.* at 65, 233. Fracked natural gas use, especially, comes at anything but "the lowest **reasonable** cost" to the citizens and businesses of New Hampshire, as R.S.A. 378:37 requires for our fuel choices; rather, it comes at enormous, largely hidden, costs not associated with sustainable energy, including losses suffered by our tourism, sugar, agriculture and dairy industries, as well as seacoast homeowners and towns, increased health costs, and the rising remedial costs of addressing storms, droughts and other weather events associated with climate change—with one study determining that it will cost between $1.9 million and $2.9 million to address the climate impacts to just three New Hampshire coastal towns. *Id*. at 243-251.

In a nutshell, Clark explained, we must be substantially decreasing, not substantially increasing, methane emissions at this time,[15] and thus *must* reject Liberty Utilities' expansion plans as against the public interest—and the same result is reached on consideration of the concerns of R.S.A. 378:37. App. at 233, 243-251. Moreover, it is supported by R.S.A. 378:38, VI , which requires utilities to submit short- and long-term environmental impact assessments in support of their LCIRPs. *Id.* at 238. Thus, the Commission should use its broad authority, discretion and *duty* to act in the public interest, *see Waste Control Systems, Inc*., 114 N.H. at 24; *Boston & Maine R.R.*, 102 N.H. at 10; *Harry K. Shepard, Inc. v. State*, 115 N.H. at 185;

[15] A 45% reduction from 2010 levels is required by circa 2030 to avoid the worst of climate change under the IPCC special report, *see* discussion, *supra*.

Browning-Ferris Industries of New Hampshire, Inc. v. State, 115 N.H. at 191, and the authority it has under R.S.A. 378:37, to *do* something responsible in response to the crisis. As discussed, the Commission certainly has the responsive authority—and obligation—to impose a moratorium on the utility's infrastructure and customer growth, emissions limits or mandatory mitigation requirements, or to deny specific emissions increasing requests, such as in the Keene case, *etc*.

The issue is not close from Clark's vantage, given the harm New Hampshire will suffer from climate change, especially as everything the Commission does is in the public interest: the Commission will not approve a utility franchise, *see* R.S.A. 374:26, will not approve a settlement agreement, *see* Puc 203.20,[16] will not approve a *schedule*,[17] App. at 362, unless it finds that it is in the public interest. So, particularly in light of the IPCC special report and its circa 2030 and 2050 deadlines for, respectively, drastically reducing, and essentially eliminating, greenhouse gas emissions, how can the Commission *not* consider whether approvals which increase and indefinitely extend such emissions for decades, are in the public interest? Moreover, again, R.S.A. 374:26, under which the Keene case should have been decided, incorporates the public interest standard, such that it is fair and reasonable to not only read the requirement into the Keene case approval, but into all approvals relating to franchise operations—or, at least those negatively impacting a *crisis*; and if R.S.A. 378:37 is to be considered serious legislation, it must

[16] In relevant part, Puc 203.20 provides:

> "Puc 203.20 Settlement and Stipulation of Facts.
> …
> (b) The commission shall approve a disposition of any contested case by stipulation, settlement, consent order or default, if it determines that the result is just and reasonable and serves the public interest …"

Id.

[17] *See* Commission secretarial letter approving schedule dated April 11, 2018 entered in the Keene case.

be similarly read to be protective of our environment and citizens and thus responsive to the crisis, not disinterested.

But, again, the Commission never addressed Clark's public interest/R.S.A. 378:37 arguments. Nor did Liberty Utilities ever rebut them.

As the public interest/R.S.A. 378:37 issue was well-developed and Clark's position amply supported in his briefing, Clark was and is entitled to a decision on the merits of the issue in his favor, or at least a determination which recognizes the Commission's obligation to undertake the analysis and includes it in its decision-making.

2. If the Commission Could Afford the Relief that Liberty Utilities Seeks, it Would Have to be Pursuant to R.S.A. 374:22 and R.S.A. 374:26, and the Decisions Must be Vacated, Accordingly

The relief sought in the Keene case was required to be requested by a petition brought under R.S.A. 374:22 and R.S.A. 374:26, as Staff originally urged. Given this, and all the other unlawful, unreasonable errors in the conduct of the proceedings, the Decisions must be vacated. This result is mandated for several reasons.

First and foremost, as was raised in Clark's initial, joint motion for rehearing and reconsideration, App. at 60-62, again at the April 6, 2018 prehearing conference, *id*. at 231-232, and finally, again, in Clark's initial brief, *id*. at 268 (including Footnote 59), the determination Liberty Utilities seeks can only result from a full adjudicative proceeding, with notice, discovery, a hearing, testimony and other evidence, public comment period, *etc.* This is required under the Commission's own rules for declaratory rulings, *see* Puc 207.01, Puc 203.12, Puc 102.07 and Puc 203.18, and in cases brought under R.S.A. 374:22 and R.S.A. 374:26. *See* discussion, *supra*. The Commission's failure to decide the matter under the proper (public interest) statutory standard mandated by R.S.A. 374:26, alone, was fatal. *See Appeal of Public Service Co. of New*

Hampshire, 122 N.H. 1062, 1077 (1982)(Commission imprudency finding, improperly made in financing hearing under wrong standard, violated due process and ordered expunged); App. at 9-10.

Second, while Staff rightfully took the position that Liberty Utilities' plans constitute "a change in the character of the utility's service" requiring the submission of a petition under R.S.A. 374:22 and R.S.A. 374:26 for approval, the Declaratory Ruling unreasonably rejected this position over the utility's argument that CNG, LNG and propane-air all are gas "of the same character." The Decisions' unsustainable errors in this respect include:

(a) failing to address why an "extensive whole-system" change, resulting in an all new "separate and distinct" natural gas system, using a whole new fuel, and a permanent LNG gas plant with a 100,000 gallon storage tank, compression and ejection equipment and CNG facilities, *etc.*, *etc.* would not constitute "a change in the character of service," and the exercise of rights and privileges "not theretofore actually exercised in [Keene]," or otherwise require approval under that portion of R.S.A. 374:22 which expressly provides that no utility

> " … shall commence business as a public utility within this state, or shall engage in such business, or begin the construction of a plant, line, main, or other apparatus or appliance to be used therein, in any town in which it shall not already be engaged in such business, or shall exercise any right or privilege under any franchise not theretofore actually exercised in such town, without first having obtained the permission and approval of the commission."

Id. App. at 191-192. Including in its analysis, the Commission needed to explain why, even if the CNG/LNG service authority it found could be read into the original grant, the authority was not lost because it was never

"theretofore actually exercised," requiring new permission under R.S.A. 374:22 and R.S.A. 374:26. *Id*. at 193.

(b) failing to address Clark's other well-developed arguments on the issue discussed in Footnote 8, *supra*, App. at 192-193. Again, this was contrary to Commission Order No. 24,442 (March 11, 2005) at 49, as explained and confirmed by Commission Order No. 26,291 (Sep. 5, 2019) at 24 (Commission must address well-developed issues);

(c) relying on three decisions for its "same character" determination in the Declaratory Ruling, *id*. at 3, App. at 43, identified in Footnote 3, *supra*, which Clark argued to be inapposite in opposing that order, App. at 267, then acknowledging that the decisions were inapposite in its Confirming Decision at 8, App. at 8, without appropriately reviewing and revising its reasoning and outcome. App. at 193.

Third, the Confirming Decision acknowledges that, by the Settlement Agreement and Commission Order No. 25,736 (Nov. 21, 2014) approving that agreement in Commission Docket No. DG 14-155, Liberty Utilities was required to accept the Keene franchise "as is," and to obtain prior permission from the Commission before making any changes to the Keene franchise, *see* Confirming Decision at 8-9, App. at 8-9, and thus clearly did not have the authority found under the Decisions, but had to petition for it under R.S.A. 374:22 and R.S.A. 374:26. The Decisions overlooked or misconceived the legal significance of the Settlement Agreement and Commission Order No. 25,736 (Nov. 21, 2014) approving that agreement, despite having clear knowledge of both by its discussion of both in support of the Decisions. App. at 193. The Decisions even expressly recognized that Liberty's authority is "as approved in its acquisition of

New Hampshire Gas Corp. in Docket No. DG 14-155," *see* Confirming Decision at 8, App. at 8, yet ruled to the contrary, in violation of the Settlement Agreement and its own Commission Order No. 25,736 (Nov. 21, 2014) approving the agreement's terms. App. at 194.

Fourth, the Commission blatantly ignored established declaratory judgment principles, some of which are recognized under its own Confirming Decision, which clearly require dismissal of Liberty Utilities' petition. App. at 6-7, 56-57, 194-195, 212-213. Clark informed the Commission in his initial joint motion for rehearing and reconsideration that a petition for declaratory judgment cannot be maintained, and must be dismissed under Puc 207.01 and New Hampshire law as too speculative and failing to claim a present justiciable right, 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," citing 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) and *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). App. at 56-57. Similarly, the Confirming Decision's analysis begins by recognizing that "[a] party seeking a declaratory ruling must 'show that the facts are sufficiently complete, mature, proximate, and ripe … to warrant the grant of … relief," citing *Merchants Mutual Casualty Co. v. Kennett*, 90 N.H. 253, 255, 7 A.2d 249, 250–51 (1939)(citations omitted), and "[a] petition for declaratory ruling 'cannot be based on a set of hypothetical facts," citing *Silver Brothers, Inc. v. Wallin*, 122 N.H. 1138, 1140, 455 A.2d 1011, 1013 (1982)(citing *Salem Coalition for Caution v. Town of Salem*, 121 N.H. 694, 433 A.2d 1297 (1981)) and Puc 207.01. App. at 6-7. Consequently, it was especially egregious of

the Confirming Decision to then find that Liberty Utilities was already authorized, without any additional approval or authority from the Commission, to install and operate entirely new CNG and LNG systems when the Settlement Agreement and Commission order approving that agreement make clear that the utility is not authorized to do anything new without further Commission approval: decisions cannot find existing authority in their grant of it. App. at 194-195. 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; *Carbonneau v. Hoosiers Engineering Co.*, *supra*, 96 N.H. 240. *Id.* at 56-57, 213. The Commission apparently overlooked or misconceived these controlling declaratory judgment principles. *Id.* at 193-194.

As a result, the Decisions are unsustainably contradictory. The Declaratory Ruling and Confirming Decision determined that Liberty Utilities was authorized to provide CNG/LNG services since the inception of the 1860 "gas" franchise, under the original grant of authority. The Final Order, on the other hand, likely in response to Clark's argument that such a determination was precluded by the Confirming Decision's recognition of the "as is" condition of the Settlement Agreement and approving Commission order, found that the authority derives from Commission Order No. 26,122 (April 27, 2018) entered in Commission Docket No. DG 17-048, involving a rate case, *id.* at 10, App. at 26, more than six months after the Declaratory Ruling was handed down on October 20, 2017.

As the Decisions were grounded in a petition for declaratory judgment first not even noticed to the public, then confirmed, after notice, through proceedings which allowed only briefing, did not apply the correct (R.S.A. 374:26 public interest) standard or meet requisite statutory and Commission rule requirements, including the burden of proof, and violated the

Commission's own orders and due process, the law mandates that the Decisions must be vacated. *See 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); *Clark v. New Hampshire Dept. of Health and Welfare*, 114 N.H. 99, 104 (1974)(NH Department of Health and Welfare regulations contrary to statutory requirements held void); *Appeal of Gallant*, 125 N.H. 832, 834 (1984)(NH Department of Employment Security regulations void for conflicting with statutory requirement); *WorldWide Volkwagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980)(a judgment rendered in violation of due process is void)(citing *Pennoyer v. Neff*, 95 U.S. 714, 732733 (1878)); *see also id.* at § 31 (1994)("... All proceedings founded on the void judgment are themselves regarded as invalid and ineffective for any purpose."). App. at 180-181. This is paramount: the Decisions not only decided the rights *sub judice* wrongly and unfairly, but may be relied on in Commission gas utility proceedings going forward for horrible precedent from a health, safety, citizens' rights and climate standpoint. As discussed in Clark's initial brief:

> "As it is extremely broadly worded and not limited to the subject Keene franchise, or even petitioning utility, 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. Thus, the [Declaratory Ruling] has the potential to dramatically increase gas use, and dependency, statewide, as it allows CNG/LNG to be transported to service areas that are unreachable by current pipeline constrained gas systems. See Testimony of William J. Clark in Commission Docket No. DG 16- 852 at 9:3-6. Moreover, as it suggests no parameters as to what will be considered 'gas' going forward, the [Declaratory Ruling] stands for 'gas is gas' precedent that allows the industry to essentially sell whatever it wants for the fuel, without public scrutiny, so long as it continues to call it 'natural.'"

App. at 221-222.[18]

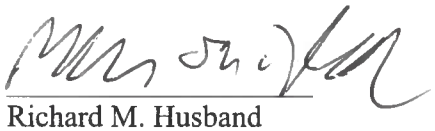
The Court should accept Clark's appeal to correct the Commission's errors and unlawful and unreasonable Decisions, and to provide guidance for future Commission decision-making.

STATEMENT OF PRESERVATION OF ISSUES

Pursuant to Supreme Court Rule 10(1)(i), the petitioner hereby states that "[e]very issue specifically raised has been presented to the administrative agency and has been properly preserved for appellate review by a contemporaneous objection or, where appropriate, by a properly filed pleading."

CERTIFICATE OF COMPLIANCE

Clark hereby certifies that copies of the foregoing appeal and accompanying appendix have, on this 25th day of October, 2019, been either hand delivered or sent by first class mail, postage prepaid, to the parties of record, and the Attorney General of the State of New Hampshire.



Richard M. Husband

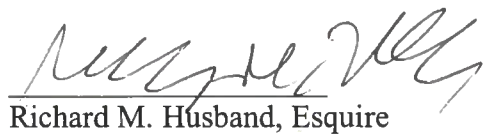
Respectfully submitted,

The Appellant,

Terry Clark,

Dated: October 25, 2019

[18] The Commission's attempt to rein in the Declaratory Ruling under the Confirming Decision falls short of the mark, minimally, because it still does not require R.S.A. 374:22 approval for the type of changes allowed by the Decisions, and thus still allows for changes without notice, hearing or other rights afforded the public under R.S.A. 374:22 and R.S.A. 374:26 and full adjudicative proceedings. App. at 196. "[R]egulatory oversight," *see* Confirming Decision at 8, App. at 8, is not a substitute for statutory requirements and the public's rights to notice and be heard. App. at 196.

By: 

Richard M. Husband, Esquire
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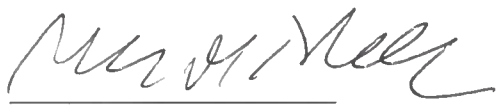
CERTIFICATE OF SERVICE

I, Richard M. Husband, Esquire, hereby certify that on the 25th day of October, 2019, I served copies of the foregoing and accompanying appendix on all of the counsel and parties of record identified on pages 1-2 of this appeal, and on the Attorney General of the State of New Hampshire, either by depositing the same in the United States mails, first class, postage prepaid, or by hand delivery.



Richard M. Husband