THE STATE OF NEW HAMPSHIRE
SUPREME COURT

NO. 2019-0629

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

REPLY BRIEF OF APPELLANT TERRY CLARK

Richard M. Husband, Esquire
N.H. Bar No. 6532
10 Mallard Court
Litchfield, NH 03052
(603) 883-1218
RMHusband@gmail.com

TABLE OF CONTENTS

TABLE OF CASES, STATUTES, RULES AND OTHER AUTHORITIES

New Hampshire Supreme Court Cases

Administrative Cases

Statutes

New Hampshire Statutes

PROVISIONS OF CONSTITUTIONS, STATUTES AND RULES INVOLVED IN CASE

RSA 4-E:1, I:

> 4-E:1 State Energy Strategy. –
> I. The office of strategic initiatives, in consultation with the state energy advisory council established in RSA 4-E:2, with assistance from an independent consultant and with input from the public and interested parties, shall prepare a 10-year energy strategy for the state. The office shall review the strategy and consider any necessary updates in consultation with the senate energy and natural resources committee and the house science, technology and energy committee, after opportunity for public comment, at least every 3 years starting in 2017 ...

See also Appendix to Clark's initial brief.

ARGUMENT

Clark supplements his opening brief (also "CB") arguments with the following reply to certain arguments made in Liberty's brief (also "LB"). Abbreviations continue from Clark's initial brief.

1. Liberty's Public Interest/RSA 378:37 Arguments are Improper and Unsupportive.

Again, Liberty's sole response to Clark's public interest/RSA 378:37 claim below was the argument that Liberty had not requested "approval" of its expansion plans, just "confirmation" of the authority to carry them out. CB at 31-32; CR at 333. On appeal, however, Liberty raises, for the first time, the 2018 New Hampshire 10-Year Energy Strategy ("Strategy") in rebuttal to the RSA 378:37 side of Clark's claim, and the Commission's consideration of the public interest in other cases in rebuttal to that aspect of the issue.

As they were not raised below, Liberty's appellate arguments must be ignored. *Bean v. Red Oak Prop. Mgmt.*, 151 N.H. 248, 250 (2004) ("It is a long-standing rule that parties may not have judicial review of matters not raised in the forum of trial.").

Neither Liberty nor the Commission made *any* mention of the Strategy below, so it cannot sustain the reasoning of the Commission's Decisions. Clark discussed the 2014 Strategy, the 2018 revision and its associated public comments as evidence generally very favorable to *his* position, CR at 234, 237, 259-261, and neither Liberty nor the Commission disputed this.

Liberty's appellate arguments are extremely unfair and prejudicial as they attempt to recreate the record with substantive (albeit unsupportive) rebuttals to Clark's claim when there was no rebuttal below, and to backfill the Commission's improper, empty analysis of the issue. This Court's charge on appeal is not to decide whether the Decisions below could have been decided differently on different evidence, but whether they are sustainable on the record.

But, should the Court disagree with Clark's position and consider Liberty's appellate arguments: analysis does *not* support the utility's position.

The 2018 Strategy is but one piece of our energy picture. New Hampshire has been a state leader in climate action and greenhouse gas emissions reduction for years, in numerous ways, beginning at least as early as its adoption of another strategy, "The New Hampshire Clean Power Strategy," in 2001, continuing with its enactment of "RGGI" in 2008, issuance of the New Hampshire Climate Action Plan in 2009, joinder in the Under2Coalition in 2015 (with a 2050 net-zero emissions commitment consistent with the IPCC report's circa 2050 deadline), CR at 232-237, and, as discussed below, with Governor Sununu's recent call for offshore wind. We are a leader because, while no "reasonable" person, viewed under either traditional legal principles or the world standard established by the Paris Climate Accord, would consider the hidden costs of climate change to be a "reasonable" price to pay for our fuel, CR at 258, there is especially strong support for environmental protection in this state. *Id*. at 236-237. Indeed, New Hampshire has a "long and proud tradition of responsible environmental stewardship." CR at 552.

Liberty claims dispositive 2018 Strategy support without identifying any specific "determinative" text. LB at 12. The 2018 Strategy does not decide the issue but, at this point in time, its guiding provisions strongly agree with Clark's position.

A "strategy" is just a means to achieve goals, and our state energy policy goals are set forth in RSA 378:37, which are clearly not tethered to the Strategy as RSA 378:37 does not mention it. Strategies have to be flexible to meet changing circumstances, as the Strategy is required to be updated every three years under RSA 4-E:1, I, and, if there is a discrepancy between a strategy and goals, the strategy must, and will, give way. But, there really is no discrepancy since, as Clark noted below, the 2018 Strategy begins and ends the discussion of natural

gas use and expansion "by deeming it an open question subject to our 'sensibilities and needs' and state determinations as to what energy options 'best protect its citizens, economy, and natural resources.'" CR at 259-260.

The 2018 Strategy issued in April, prior to the issuance of the IPCC special report in October and the 13-agency federal report in November of that year. Both scream what the state "needs" to do to meet our "sensibilities" and "best protect its citizens, economy, and natural resources": *drastically cut, not increase, emissions between now and 2030, and plan for ending them by 2050*.[1] The governor's call to pursue "one of the strongest opportunities for offshore wind production in the world," CR at 552, almost immediately after the release of the reports,[2] clearly indicates that the 2018 Strategy is already evolving to meet our heightened concerns about the climate crisis. Our Strategy better be evolving to rely less on gas going forward, as we have a *lot* of a far, far cheaper, and more actually demanded, source of energy on the way. CR at 542-543.

Liberty's RSA 378 analysis is flawed. RSA 378:38 does require the submission of "[a]n assessment of plan integration and consistency with the state energy strategy," under Section VII, but RSA 378:39 does not require consistency with the Strategy for planning approval, as Liberty contends—just consistency with RSA 378:37 ["this subdivision"], as Liberty acknowledges. LB at 12-13. Actually, RSA 378:39 approval requires planning consistent with only two express policy goals of RSA 378:37, *i.e.*, environmental and health protection, and a third concern, "economic impacts," which is subsumed within the "lowest reasonable cost" goal of the statute. For the reasons discussed in Clark's briefing below and on appeal, the inconsistency of Liberty's expansion plans with these

[1] Plainly, from both a climate and stranded costs standpoint, no new gas infrastructure should be approved for use beyond 2050 at this time. Beyond 2075 is insanity. *See* CR at 244-245.

[2] On January 2, 2019. *See* CR at 543 FN 37 (article).

RSA 378:37 goals/requirements precludes their approval, including for projects that are a part of that planning, such as the Keene project.[3] Indeed, they are facially unapprovable under RSA 378:39, the "approving" statute, on just consideration of their environmental, health and economic impacts—which analysis nearly mirrors the 2018 Strategy's guidance that the state should pursue energy options which 'best protect its citizens, economy, and natural resources.'" CR at 260.

Liberty's appellate assertion that the public interest side of Clark's argument has been considered, or is being considered, in other Commission proceedings, LB at 13-14, does not help the utility. Every case rides on its own record at the Commission level and Liberty cites no reason why the referenced proceedings should have any bearing on this Court's determination. Indeed, Liberty does not allege that the environmental, health, economic and other public interest concerns raised below were/are even at issue in the matters it cites, other than in the LCIRP case.

As for Clark's claim being considered in the LCIRP case: the Commission considers similar issues in different proceedings all of the time, as similar issues are currently being simultaneously considered in the LCIRP case and Granite Bridge Project proceeding, without objection from Liberty (or anyone else). Besides, Clark's claims will not be *properly* considered in the LCIRP case as Liberty has not even submitted the requisite RSA 378:38-39 impact and option

[3] Clark's briefing also showed why Liberty's plans are inconsistent with the fuel diversification requirement of RSA 378:37, CR at 258-259, and no other goal of the statute potentially weighs in Liberty's favor. Its call for "consideration of the financial stability of the state's utilities," requires only that, "consideration" of the issue, not consistency with the concern, and does not outweigh the inconsistency of Liberty's plans with all of the express goals/requirements of the statute.

assessments[4] for the Keene project.[5] The parties have vigorously debated the adequacy of Liberty's RSA 378:38-39 filings to date[6] and the Commission has refused to consider filing deficiencies until its final decision.[7] Thus, Clark would plainly get nothing from filing another motion on the subject in the LCIRP case, unless he is willing to pursue another appeal, and it is accepted (not mandatory). Clark should not be put in that position as his claim is properly before this Court now and, again, was unrebutted below.

2. Liberty's Waiver/Assent Claim is Untimely, Without Merit and Contradicted by Liberty on the Record.

This is another argument which must be ignored as it is first raised on appeal. *Bean v. Red Oak Prop. Mgmt.*, *supra*, 151 N.H. at 250. However, should the Court disagree and consider Liberty's argument, it should also consider the following.

Liberty's claim falls on two faulty underpinnings.

First, the utility asserts that, after filing a motion for rehearing which complained that the Keene case could only proceed under RSA 374:22 with full process rights, CR at 63-67, and restating that objection in his position on the merits at the prehearing conference, arguing that the matter (only scheduled for briefing) should be dismissed, accordingly, CR at 211, Clark agreed to exchange

[4] Including those options discussed in CB at 22 FN 14, which should, in part, read: "such as extending the current land lease or purchasing/leasing new land and/or equipment." These options present the opportunity to buy time, if necessary, to properly transition directly from propane-air to renewable energy and avoid an unnecessary, imprudent layer of transition costs.

[5] *See generally* Commission Docket No. DG 17-152.

[6] *See id*. at Tab Nos. 33-39, 45-46, 50, 65-67.

[7] *See* Commission Order No. 26,286 (Aug. 12, 2019) at 6-7; Commission Order No. 26,307 (Nov. 6, 2019) at 6.

the whole cow for a couple of discovery beans. LB at 5-6. There was no prehearing discussion of a hearing and witnesses after Clark's position statement, and Liberty does not even assert that Clark *ever* agreed to waive his claim that the matter had to proceed under the franchise statutes (which require full process), so there could not possibly have been any agreement on the broad waiver (of constitutionally and statutorily grounded rights) Liberty asserts. In fact, there was no "agreement" between Clark and the Commission on anything: Clark pushed for some limited discovery **for briefing**, CR at 217 ("I need it to make a legal argument."), based on the little information before him at the time, and the Commission rejected that request, suggesting that Clark file "a motion on something," if he wanted. *Id*. at 221. As Clark had twice clearly stated his objection to the manner of the proceedings, already filed a motion for rehearing on the matter (parties are not required to file two) and never reached any agreement with the Commission to the contrary, Clark properly preserved his due process claim.

Second, to actually provide Clark with the discovery beans supposedly received for his claim, Liberty contradicts itself on the record in asserting "For reasons that are not clear, Clark filed the discovery in Docket No. 17-152 ..." LB at 6 FN 7. There was one very clear reason: the discovery was served and received pursuant to Docket No. 17-152, the LCIRP case, not the Keene case. CR at 282-287, 583-584. Liberty did not dispute this below, but agreed that Clark received the discovery pursuant to the LCIRP case, CR at 333 ("In response to Mr. Clark's discovery requests in the IRP docket ..."), and received no discovery or other fact finding in the Keene case. CR at 572. As an intervenor in the LCIRP case, Clark had a right to the discovery, so there was plainly no consideration for the alleged waiver/assent agreement. While the procedural schedule reflects the discovery, it does not indicate that it was *not* pursuant to the

LCIRP case, or that there was any prehearing stipulation or other agreement waiving claims or issues. CR at 195.

Below, after acknowledging that Clark had raised his full process claim twice after the prehearing conference, in his briefing and in his second motion for rehearing, CR at 571-572, Liberty's only response to the claim was that process was sufficient as the case only involved a legal question—not that Clark's claim was waived. *See generally* CR at 566-572. This was the Commission's only response, too. CR at 595. Clearly, neither Liberty nor the Commission ever understood there to be any waiver or assent concerning Clark's due process claim.

Besides, Liberty's does not contend that Clark agreed to be ignored going forward, as was the case post-prehearing conference, or that he ever waived all of his other arguments as to why the Decisions are unsustainable.

3. Liberty's "No Due Process Prejudice" Argument Must Also be Rejected as Outside the Record and Unsupported.

Again, this argument must be ignored as it is raised for the first time on appeal. *Bean v. Red Oak Prop. Mgmt.*, *supra.* However, should the Court disagree, it should consider the following in relation to Liberty's argument.

At the outset, Clark complained that Liberty's petition "does not describe the proposed changes to the Keene system at all, precluding a **fair opportunity** to challenge—or even understand—the Petition." CR at 58 (emphasis added). At the end, Clark complained that the Commission would not even consider his case, denying him the judgment. CR at 535 (¶¶ 25-26). From ignoring its own rules that required more information in Liberty's petition, to the denial of all fact finding necessary to the discovery of that information and preparation of his case, to the almost complete disregard of his well-developed arguments (in violation of its own orders) and failing to hold Liberty to its burden of proof, to the denial of a final hearing, with witnesses and other evidence gleaned through discovery, where he could actually *present* his case, Clark was plainly right at the beginning

and end: he was never provided a fair "opportunity to be heard"—the fundamental right of due process. That is sufficient prejudice.

Besides, the Commission's refusal to consider the public interest issue was, alone, sufficient prejudice to constitute a denial of due process. CR at 65 (¶ 23), 249 (FN 59), 581-582; CB at 35; *Appeal of Public Service Co. of New Hampshire*, 122 N.H. 1062, 1077 (1982) (Commission finding under wrong standard violated due process).

4. Miscellaneous.

Liberty's attempt to raise and argue an alleged 1909 "reinstatement" of its original 1860 franchise grant, LB at 2, and an online article, LB at 22 FN 19, as supportive of the Decisions, for the first time on appeal, must be rejected. *Bean*, *supra*. As such "evidence" was not before the Commission, it should not be considered here. But, even if it is considered, it still does not support the determination below that technology and piping requiring "much higher operating pressures" still not "found in New Hampshire distribution systems" as of 2017 and presenting obvious significant safety concerns for even modern response measures—evidence actually considered by the Commission, CR at 45-46—may appropriately be read into the distribution rights of a 1909 grant of authority, or rebut the conclusion that the Keene project requires approval under the franchise statutes per the authority cited in Clark's brief. *See* CB at 32-34. Indeed, this Court has expressly held that "RSA 374:26 sets the standard by which the PUC may grant or withhold permission to an entity seeking to expand its existing franchise." *In re Union Telephone Co.*, 160 N.H. 309, 319 (2010).

Moreover, Liberty's briefing fails to properly rebut other reasons establishing the unsustainability of the Decisions in light of the franchise

acquisition Settlement Agreement and its approving Order No. 25,736 (Nov. 21, 2014),[8] established legal principles, and otherwise.[9] CB at 35-37.

CONCLUSION

For all of the reasons asserted herein and in his opening brief, Clark requests that this Court afford the relief discussed in the Conclusion of his opening brief, including remand to the Commission if/as appropriate to accomplish such relief. Additionally, Clark requests the following relief in response to Liberty's request for relief concerning the 18 converted customers. LB at 34-35.

Liberty knowingly assumed this risk. Nevertheless, Clark does not object to the utility's request so long as this Court expressly limits Liberty's authority under the Decisions to servicing the current 18 converted customers and precludes *any* development or other work on any phase of the Keene project or expansion of its natural gas customer base (to be limited to the current 18), facilities, other infrastructure and service in Keene (the "cap") through the parties' exhaustion of all appellate rights; at which point, should Clark prevail, Clark would not object, as an alternative to prompt reconversion, that Liberty be given the option of agreeing to bear the cost and responsibility of transitioning the 18 customers to a wind or solar source of renewable energy within such period of time as this Court deems fair and reasonable, but not to exceed such time as the utility needs to serve

[8] Which require franchise statute permission (not rate case approval, or a "declaration of authority") for the changes resulting from the Keene project, *see, e.g., id*. at 6 ("The Settlement Agreement also requires EnergyNorth to maintain the current operations of the Keene Division, satisfying Staff's concerns in the areas of safety ...").

[9] Clarifying his arguments, Clark respectfully requests that the sentence, "But, if the 2014 Commission order 'approved' the CNG/LNG authority, why did Liberty even file its declaratory judgment case in 2017?," on page 37 of his opening brief, be ignored (editing error).

the 18 customers without replacement, supplementation or relocation of the current temporary natural gas facilities serving the 18 customers, with the cap, as still applicable after the final decision, remaining in place.

STATEMENT OF RULE 26(7) COMPLIANCE

The undersigned certifies that the within brief complies with Supreme Court Rule 26(7), containing 3000 words as counted under the rule.

Respectfully submitted,

Terry Clark,

Dated: May 11, 2020

By: /s/ Richard M. Husband

Richard M. Husband, Esquire
10 Mallard Court
Litchfield, NH 03052
(603) 883-1218
RMHusband@gmail.com
N.H. Bar No. 6532

CERTIFICATE OF SERVICE

I hereby certify that, on May 11, 2020, I served copies of the foregoing on the Attorney General and all counsel and parties on the Court's service list via the electronic filing system.

/s/ Richard M. Husband
Richard M. Husband, Esquire