

**BEFORE THE STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DG 17-152

Liberty Utilities (EnergyNorth Natural Gas) Corp. dba Liberty Utilities

Least Cost Integrated Resource Plan

NOTICE OF COUNSEL CONCERNS

Richard M. Husband, Esquire, counsel for Intervenor Terry M. Clark (“Clark”) in the above referenced proceeding, on behalf of himself only and not his client, hereby provides notice of his following concerns with respect to the proposed “Settlement Agreement” of three of the seven parties to this proceeding referenced in Friday’s July 15, 2022, 4:42 p.m. filing by Liberty Utilities (EnergyNorth Natural Gas) Corp. d/b/a Liberty Utilities (“Liberty”):

1. This [docket](#), commenced October 2, 2017, concerns a request for approval of Liberty’s [“Least Cost Integrated Resource Plan” \(“LCIRP”\)](#) for the planning period 2017/2018 through 2021/2022. *See id.* at 1 (Bates No. 5). Clark, a long-time resident of Keene, is concerned with Liberty’s “fracked” “natural” gas use for two reasons: emissions and emissions, first with respect to climate, second because Keene has a pollution/particulate problem. *See, e.g.*, Clark’s [motion to dismiss and for a moratorium](#) at ¶¶ 6-7, 17-24. In August 20, 2020, Clark’s concerns turned to a recently launched Liberty advertising and marketing campaign discussed below, challenging Liberty to prove its veracity in a [motion](#), *id.* at ¶¶ 12, 14, filed nearly two years ago, that is still pending. The case fell inactive after this filing and I did not pick it up in earnest again until after the Commission’s [March 16, 2022 procedural order](#) required a position statement by June 1, 2022, which led me to the following fraud and other concerns, not discerned until I recently connected the dots between (1) filings made in another proceeding, [Docket No.](#)

[DG 21-008](#), during the period of this case was inactive, (2) Liberty’s advertising and marketing, and (3) emissions information provided through discovery in this matter, discussed now.

2. On August 23, 2019, Liberty served its response to Clark’s fifth set of data requests, request number nine (“Liberty’s response to Clark DR 5-9”) in this proceeding, accompanying as “**Attachment A.**” This response shows that Liberty was aware as of that date that its planning only provides, by its own estimation, under a proper [Intergovernmental Panel on Climate Change \(“IPCC”\)](#) analysis,¹ roughly an 11% decrease in carbon dioxide equivalent emissions over a 20-year period of time. This is reflected in the comparison between projected “status quo” emissions during that period of time and two planning options, the Granite Bridge Project, and a “Concord Lateral Option.” *See id.* at p. 3, Sensitivity Figure 3, Sensitivity Table 2 (the 11% reduction estimation is derived from the figures in this table). Projected “status quo” emissions are essentially defined as emissions “but for” Liberty’s natural gas planning, with the rate of use of all other energy alternatives, including renewables, projected to hold constant over the 20-year period of the analysis. *See* discussion and references in [Clark's testimony](#) at 14:16–15:6. While the projections only concern emissions impacts from two specific project options, the projections establish reasonably representative impacts for all expansion.² Even before the Ukraine reality check, it was highly unlikely from the increasing urgency of the climate crisis and pricing volatility of natural gas, as well as the likely availability of wind power and other cheaper renewable alternatives well before then, that renewable energy use will only continue at

¹ Using a Global Warming Potential (GWP) of 84 GWP for methane/natural gas. *See* [Direct Testimony of Terry Michael Clark dated September 6, 2019](#) (“Clark’s testimony”) in the case beginning at 18:13.

² *See* accompanying Attachment A, p.3, Sensitivity Figure 3, and [Transcript of Status Conference held on June 21, 2022](#) at 72:15-73:2 (“Maybe the numbers would have wiggled a little.”)

today's current low rate into the late 2030s. The projection is patently unreasonable and, as discussed below, self-serving.

3. Moreover, if you consider the advertising/marketing issue discussed below, there also seems a good argument that Liberty's 20-year emission impact analysis would likely include more non-emissions or lower emissions users in the "status quo" column, lowering the projected "status quo" emissions and positive methane impact, if such users were not improperly misdirected to Liberty natural gas by its advertising and marketing. Thus, the 11% positive emissions impact is quite likely too high—although it does establish the general ceiling of emissions "benefit" proved—and **it seems reasonably likely that proper calculations under an IPCC analysis would show that there will be no substantial positive, and even potentially a negative, climate impact from natural gas use over the next 20 years.**

4. For over four years, through two proceedings, this and [Docket No. DG 17-068](#), Clark has tried to get the Commission to consider this issue: whether Liberty's planning is even legal, as it is not consistent with [RSA 378:37](#), as required under [RSA 378:39](#)³ and acknowledged under the [LCIRP](#), *see id.* at Bates No. 059 ("The Commission's charge in this docket, therefore, is to evaluate whether EnergyNorth's LCIRP is consistent with the State's energy policy as articulated in RSA 378:37"), and is plainly not in the public interest. *See generally* Clark's [motion to dismiss and for a moratorium](#) and [Clark's testimony](#); [Clark's position statement](#) at 7-9. The concern is exacerbated by the fact that Liberty is pursuing aggressive expansion plans which are not being reviewed and approved under 378:37-39, a clear prerequisite, in my opinion, to any

³ I believe that there is a Commission or New Hampshire Supreme Court opinion that I cannot put my hands on now which makes clear that "the consistency of each utility's plan with this subdivision" language of [RSA 378:39](#) refers to [RSA 378:37](#)).

development. See [Clark's position statement](#) at 1-6, 22-23. Keene is one of these unapproved projects that has moved forward to development within the [LCIRP](#) planning period. Four over four years, the Commission has delayed consideration of Clark's issue while Liberty expanded, promising to consider it at the conclusion of this case. See [Clark's position statement](#) at 6. It is irresponsible to move into the next planning period, which covers from roughly the end of this year until circa 2028, critical years for emission concerns with respect to the climate crisis, without resolving this issue and other concerns about Liberty's improper practices, *see generally* [Clark's position statement](#), as that will only enable more unauthorized expansion until circa 2028. But, the Commission may be afforded the opportunity yet, again, should it resolve this matter through a settlement or other final order which does not properly address and resolve Clark's concerns.

5. In late July 2020, Liberty abandoned its Option 1 Granite Bridge Project, marking the event with a press release included in an online marketing and advertising campaign, continuing two years later, to this date, which may only reasonably be read as a new Liberty commitment to immediate, deep emissions reductions by 2030 and "green" planning consistent with complete ("net-zero") decarbonization of its operations by 2050 in support of [IPCC](#) decarbonization/emission reduction goals.⁴ See <https://new-hampshire.libertyutilities.com/concord/liberty-utilities-announces-new-solution-to-preserve-energy-choices-for-nh-consumers.html>. This press release was included in Liberty's online advertising and marketing by August 31, 2020, as is established by the date of Clark's pending [motion](#) raising the matter, which references most of the advertising and marketing at issue in its

⁴ The [Paris Climate Accord \(Paris Agreement\)](#) was informed by and follows the IPCC Fifth Assessment Report (AR.5) and emission goals. See <https://www.ipcc.ch/sr15/faq/faq-chapter-1/>.

paragraph 14. A copy of this advertising/marketing also accompanies this submission as “**Attachment B**” in case it is not available at the time of the reader’s review. Also as of August 31, 2020, Liberty advertised and marketed that its commitments were “regardless of the regulations,” as was noted in Clark’s [motion](#), *id.* at ¶ 14, but this representation was removed from the utility’s website after the issue was raised, as is shown by attempting to access the material by the link provided in paragraph 14.

6. Several months into the period of this case’s inactivity and five months into Liberty’s new online “green” campaign, Liberty appeared before the Commission, on January 20, 2021, under [Docket No. DG 21-008](#), with its new “green” planning solution. Unfortunately, it was just the old one, repackaged: a new 20-year 40,000 Dth per day natural gas supply contract that Liberty plans to utilize with certain “on-system distribution enhancement projects” in the areas of Manchester, Nashua, Londonderry and/or Merrimack. See [petition](#), ¶1; [Testimony of Francisco C. DaFonte and William R. Killeen](#) dated January 20, 2021 at Bates Nos. 7:13-15, 11:13-16. Liberty has equated this project to the “Concord Lateral Option” discussed in the [LCIRP](#) and analyzed in Liberty’s response to Clark DR 5-19, accompanying;⁵ and, again, as noted above, claims that the 20-year emissions impact shown therein is reasonably representative of all Liberty planning, including that under [Docket No. DG 21-008](#). Moreover, Liberty’s January 20, 2021 DG 21-008 filings indicate that the utility also intends to seek approval for another 27,000 Dth per day supply of natural gas by 2025/2026, and that all of its planning was pursuant to an intention to increase its gas supply demands and use, and resulting emissions, until at least 2038/2039. See [Testimony of Francisco C. DaFonte and William R. Killeen](#) at 31-

⁵ See [Transcript of hearing held 10/06/201 Morning session](#) filed in Docket No. DG 21-008 at 11:17-20 (“We finally learned that Tennessee was going to offer capacity on the Concord Lateral. We paused Granite Bridge, we negotiated this contract, and we signed it.”).

32 (including Table 3). Liberty’s January 20, 2021 filings were during the planning period of the [LCIRP](#) sought to be approved in this case, and were plainly made with knowledge of or complete, reckless disregard for the fact that its planning was completely contrary to its advertising and marketing—which was clearly intended to target, surely successfully reached and will continue to successfully reach for the life of the harm, not only customer support for its increasing demand need projections for the DG 21-008 approval, but customer support for the next “new” 27,000 Dth or so fracked gas “green solution” for the five year period covered by its next LCIRP.

7. Although the 40,000 Dth per day natural gas supply contract has been approved under [Docket No. DG 21-008](#), Liberty’s proposed “on-system distribution enhancement projects” and use of the approved natural gas supply have not been reviewed and approved under RSA 378:37-39 in any proceeding and lawfully must be approved under the [LCIRP](#) or Liberty’s next LCIRP to proceed (again, under my interpretation of the statutes). The supply use and infrastructure associated with the DG 21-008 contract may still be planned in a manner that has fewer emission impacts than Liberty’s normal, unapproved expansion; for example by using as much of the contract supply as possible to replace more expensive supplies subject to termination, which would result in not only fewer “baked in” emissions, but less gas dependency going forward (such potential replacement use was discussed somewhere in the proceedings, but I cannot locate the discussion now). Approval of the [LCIRP](#) under any terms not requiring the imposition of such corrective/remedial condition(s) precludes them. Moreover, approval would be tantamount, in my opinion, to approval of Liberty’s improper projections, including the irresponsible increasing future supply demands in [Table 3](#), false/fraudulent advertising and marketing, and patently unreasonable continued low, flatline future renewable energy use into

the late 2030s, that wrongfully support the DG 21-008 projects and gas demand under the next LCIRP with the result of reducing competitive development and likely increasing rates for ratepayers over time; all, of course, for profit.

8. Liberty does not have a plan to decarbonize its operations—by 2050, or any other time. At least, such a plan is certainly not reflected in accompanying Attachment A and Liberty’s demand planning projections through 2038/2039 (per [Table 3](#)), Liberty has not produced such a plan of record in DG 17-152 or otherwise publicly (to my knowledge), and it would certainly be advantageous to its “green” campaign to disclose one. Two years into advertising and marketing suggesting planning for substantial decarbonization by 2030 and complete decarbonization of its operations by 2050 (IPCC goals), such inaction is inexcusable and contrary to any reasonable, good faith effort to achieve the objective.

9. Liberty’s planning clearly does not come close to its advertising and marketing, certainly not with regard to support for IPCC goals, decarbonization at any time, or any “work toward a sustainable future for New Hampshire.” *See* accompanying Attachment B. At the current rate of planning, its current approximately 97,000 natural gas customer business will balloon to well over 100,000 such customers in the next 20 years. Thus, as Liberty essentially only projects oil and natural gas users in the next 20 years, with very low, flat line renewable development as a whole—none utilized by Liberty—Liberty is planning for a New Hampshire energy future with well over 100,000 Liberty natural gas customers, all the Unitil natural gas customers, still a whole lot of other fossil fuel use, and very little renewable use needed to transition to sustainability—only 7-8 years from 2050. That is way too many emissions, way too much fossil fuel dependency to be planning for 20 years from now, and nothing close to

Liberty's "new" "green" world. ["New Hampshire is leading the nation in holding these polluting companies accountable."](#) We cannot let this go.

10. Given its knowledge of the actual results, Liberty's planning in relation to its "green" advertising and marketing campaign might well be determined to be fraud. Certainly, its planning is not consistent with any reasonable interpretation of its representations, unless you live in the Bizarro World. Claims raising this issue are called "greenwashing complaints," which (based on my limited research to date) generally include a claim for violation(s) of the FTC's "Revised Green Guides," as well as any other applicable law. "The basic principles of the FTC's Revised Green Guides are that an advertisement should be truthful, not misleading or deceptive, and have adequate substantiation to support all reasonably interpreted claims, and the Guides follow the FTC Act's truth-in-advertising principles." *See* <https://connect.michbar.org/blogs/environmental-law-journal/2020/05/14/environmental-marketing-claims-and-the-ftcs-revise>. Depending upon whether FTC "Green Guide" violations are considered fraud and the applicability of any other federal and state laws (not currently known to me), "greenwashing" harms may certainly be perceived as fraud. *See, e.g.,* <https://attorneygeneral.delaware.gov/wp-content/uploads/sites/50/2020/09/2020-09-09-Final-Complaint.pdf>. The discussion of "greenwashing" in the preceding linked complaint are helpful; plainly, many of its concerns and elements are present here:

“165. These misleading ‘greenwashing’ campaigns are intended to capitalize on consumers’ concerns for climate change and lead Delaware consumers to believe that Defendants are actually substantially diversified energy companies making meaningful investments in low carbon energy compatible with avoiding catastrophic climate change ...

...
172. Exxon is currently running a series of full-page advertisements in print editions and posts in the electronic edition of the New York Times, as well as on Exxon's YouTube channel, in which Exxon misleadingly promotes its

efforts to develop energy from alternative sources such as algae and plant waste—efforts that are vanishingly small in relation to the investments Exxon continues to make in fossil fuel production.

173. For example, an online advertisement in the New York Times, accessible to and marketed toward Delaware consumers, promotes the company's development of algae biofuels, but omits that it is extremely resource intensive to produce algae for biofuel on a large scale due to the massive amounts of land and fertilizer needed. The advertisement also misleadingly tells consumers that Exxon is “working to decrease [its] overall carbon footprint,” and that the company's “sustainable and environmentally friendly” biodiesel fuel could reduce “carbon emissions from transportation” by greater than 50%.

174. Exxon's advertisements promoting its investments in “sustainable and environmentally friendly” energy sources further fail to mention that the company's investment in alternative energy is miniscule compared to its ongoing “business as usual” ramp-up in global fossil fuel exploration, development, and production activities. From 2010 to 2018, Exxon spent only 0.2% of its capital expenditures on low-carbon energy systems, with nearly the totality of its spending (99.8%) focused on maintaining and expanding fossil fuel production. The company has simultaneously invested billions of dollars into development of Canadian tar sands projects, some of the most carbon intensive oil extraction projects in the world.¹⁶⁸

175. Exxon's investment is not nearly enough to produce alternative energy on the scale falsely implied and touted by Exxon in its advertisements ...”

11. Substantial corrective/remedial measures must be included, by agreement or otherwise, in any final order in this proceeding. Energy decisions are important, costly decisions for ratepayers, and Liberty has unconscionably misled them about a critical choice issue. Moreover, the misinformation conveyed in Liberty's “greenwashing” campaign over the past two years (if not longer, through other similar representations—all of its advertising and marketing should be examined) has not only injured targeted ratepayers and members of the general public concerned with emissions reduction and responsible climate action during that period of time. Together with other such industry misinformation out there, it has misinformed energy decisionmaking and policies at the worst possible time for real responsible emissions reduction, climate action and forward energy thinking, perhaps dooming the state at this point to far too many emissions from its use than we should rightfully expect and far too great a

dependency on a finite fuel. As well as climate harm, emissions contribute to respiratory and other health issues. "New Hampshire's asthma rate is among the highest in the nation. Approximately 110,000 NH adults and 25,000 NH children have asthma."⁶ The unreasonable increasing gas dependency projected in Liberty's plans is enabled by its misinformation campaign.

12. As the advertising/marketing and DG 21-008 filings at issue occurred within the period covered by the current [LCIRP](#), appropriate corrective/remedial relief may and must be afforded in this proceeding or approval of the [LCIRP](#) and the utility's planning conduct thereunder, including related advertising/marketing and filings with respect to the same in Docket No. DG 21-008, would allow completion of the fraud and fruits of the fraud and thus may be deemed to approve the fraud or be tantamount to consummation of it. The relief available in such cases seems flexible, as provided under state, FTC and other applicable law, and the relief that may be afforded in this proceeding, particularly under a settlement agreement which must be "just and reasonable and [serve] the public interest," [Puc 203.20\(b\)](#), is broad enough to afford—and should afford—such relief, to address the harm that must be addressed under the circumstances. Liberty's false advertising and marketing has helped support Liberty's expansion increase and an irresponsible increasing dependency on natural gas which is wholly inconsistent with any reasonable expectation from the advertising/marketing, under this [LCIRP](#). This was clearly not for any intended public good, as Liberty admits that possibility to be false on the face of its advertising and marketing; again, it was for profit. As Liberty's wrongs, harms and fruits are essentially up for approval under the current [LCIRP](#), they should be corrected, to

⁶ See page 22 of "Greater Manchester, New Hampshire Health Improvement Plan" at <https://www.manchesternh.gov/Portals/2/Departments/health/GManCHIP.pdf>.

the extent possible, through this proceeding, to avoid a great injustice and continuing misrepresentation on ratepayers and the general public—if not a past and continuing fraud. Indeed, as discussed below, failing to properly address the harms curable through this proceeding may shut the door on the only opportunity for such relief.

13. The difference generally between a mere misrepresentation and a fraudulent one, that appears to draw this case into the actionable fraud category, is knowledge—which seems more than sufficiently established here. Indeed, all of the other boxes appear boldly checked:

“To establish fraud, a plaintiff must prove that the defendant made a representation with knowledge of its falsity or with conscious indifference to its truth with the intention to cause another to rely upon it. *Patch v. Arsenault*, 139 N.H. 313, 319, 653 A.2d 1079, 1083–84 (1995). In addition, a plaintiff must demonstrate justifiable reliance. *Gray v. First NH Banks*, 138 N.H. 279, 283, 640 A.2d 276, 279 (1994). A plaintiff cannot allege fraud in general terms, but must specifically allege the essential details of the fraud and the facts of the defendants' fraudulent conduct. *Proctor v. Bank of N.H.*, 123 N.H. 395, 399, 464 A.2d 263, 265 (1983).”

Snierson v. Scruton, 761 A.2d 1046, 145 N.H. 73 (N.H. 2000). “Justifiable reliance” should be deemed demonstrated because, as noted above, such advertising and marketing preys on a targeted audience with a justified concern promised to be addressed: “These misleading ‘greenwashing’ campaigns are intended to capitalize on consumers’ concerns for climate change ...” Maybe, as a regulated utility, there is some regulation or legal principle that precludes actionability of the otherwise apparent fraud here. I cannot imagine such broad immunity from wrongful conduct and am not going to assume it. If a recipient of this notice is aware of some reason a common law, FTC “Green Guide” violation or other facially applicable federal or state claim which includes the fraudulent elements found here cannot be alleged to be fraud, please inform me immediately, with sufficient support for your position. Otherwise, based on the above, absent a correction of my knowledge of the facts and law, I believe that there is a good

faith basis to allege fraud and some or all of the terrible implications discussed herein, and I will recommend to my client that such allegations be made in response to any proposed settlement terms or the terms of any final order in this proceeding which do not provide the necessary remedial measures to prevent or correct seemingly actionable fraud and its harm, past and future. I do not have the knowledge of the subject matter or resources that most of the recipients may have to perhaps make the call otherwise, especially if there is an expedited processing of the matter to a final conclusion, which would normally likely result from a request for hearing by letter rather than motion. There are harms here too great for me, as a citizen and attorney, to not pursue and preserve from possible extinguishment, by claim or issue preclusion or other legal principles applicable to a Commission final order, until I am at least sure that the state has properly considered and responded to them. They may extend beyond the fraud issue into statutes, agency rules and issues that I am not aware of and likely will not have the time to properly research and consider. For this purpose, I am notifying Consumer Protection and the Environmental Protection Bureau of the New Hampshire Department of Justice (“NHDOJ”) of my concerns by electronic mail transmission of the filing of this pleading to ensure that the interests of New Hampshire citizens are protected by their consideration of the matter. I respectfully suggest that the NHDOJ be included on the service list until and unless the NHDOJ informs that it has no interest in the matter.

14. Whether the Commission considers emissions or climate change its concern or not, it cannot condone the practices and resultant harm described herein, and certainly may not issue any approval or other order that, albeit completely unintentionally, would be tantamount to approval of unlawful acts, complete a fraud and/or perpetuate it and the reaping of its unlawful fruits. Again, even if involved attorneys are acting in complete good faith, those dealing with

subject matter and results that meet allegations of fraud, particularly with regard to its possible consummation/completion through adjudicative proceedings, may innocently bump into the New Hampshire Rules of Professional Conduct if they have not had sufficient time to digest the issues before proceeding. I claim no improprieties to date, I am aware of no attorney acting in bad faith, but I certainly feel that I am obligated to disclose possible ethical implications.

15. For the above concerns and reasons, the proper path forward here would be for the Commission to politely deny the July 15, 2022 letter request for a hearing with a response that requests such relief by motion, in accordance with [Puc 203.07](#), accompanied by a copy of the proposed settlement agreement. This would afford Clark the proper time and information necessary for a response to the proposed agreement. Other recipients of this communication would have more time to consider the issues raised herein and, along with Clark, fully express all objections to the request, if any, and/or possibly put forth their own additional terms or revisions to the settlement proposal for proper consideration with the request for hearing. This would allow all involved a better route to a more careful, proper resolution of the matter, still within the normal motion practice time frame.

Sincerely,

//s// Richard M. Husband
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