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

INTERVENOR, TERRY CLARK'S, REPLY TO
LIBERTY'S OBJECTION TO MOTION TO STRIKE SUPPLEMENTAL FILING

Intervenor, Terry Clark ("Clark"), by and through undersigned counsel, Richard M. Husband, Esquire, hereby respectfully replies to the objection ("Objection") that Liberty Utilities (EnergyNorth Natural Gas) Corp., dba Liberty Utilities ("Liberty") has filed in this proceeding in response to Clark's objection to and motion to strike Liberty's supplemental filing ("Motion"), stating as follows:

1. Clark's disagreement with the positions taken in the Objection are not limited to the issue addressed herein, but the following, in particular, compels reply.

2. In a footnote, the Objection declares that its proposed LNG facility is "not part of Liberty's LCIRP because its earliest projected in-service date was outside the [2017/2018-2021/2022] five year planning window of this LCIRP, which is the planning period of all recent LCIRPs." *Id*. at 7 Footnote 3. Liberty's position cannot be accepted, for several reasons.

3. The proposed Epping LNG facility has certainly been a part of this proceeding since the case commenced. At its commencement on October 2, 2017, the LNG facility was scheduled "to be in-service by April 1, 2022." *See* Pre-filed Direct Testimony of William R. Killeen and James M. Stephens (December 21, 2017) submitted in Docket No. DG 17-198 at Bates 123. Clark raised his concerns with the facility as a reason for intervening. *See* Petition to Intervene of Terry Clark at 9. Liberty did not object to Clark's petition and stated its position at

the March 9, 2018 pre-hearing conference held in this matter that "the 'Granite Bridge **Project**' [is] the best cost option for serving Liberty's customers over the planning period." *See* Transcript of March 9, 2018 pre-hearing conference at 14:1-3 (emphasis added). Liberty has always defined "Granite Bridge **Project**" to include the LNG facility as well as the pipeline. *See* Liberty's petition for approval of the Granite Bridge Project filed in Docket No. DG 17-198, Prefatory Statement. Commission Staff has also always recognized the integral connection between the approval sought in this docket and the approval sought for both the pipeline *and* the LNG facility, as a package deal, in the Granite Bridge **Project** proceeding:

> "In Staff's view, and we've expressed this through informal recommendations, this docket is closely related to Docket DG 17-198, the Granite Bridge proceeding. We believe a lot of the issues regarding supply planning and operational planning are common …
>
> … So, we do share Mr. Kreis's concerns about the need to make sure that we probe and test this Plan quite carefully, in light of what the Company is saying in a parallel docket …"

Transcript of March 9, 2018 pre-hearing conference at 18:15 - 19:15.[1] The Commission expressly noted Clark's concern with the LNG facility in the order allowing his intervention. *See* Order No. 26,134 (May 11, 2018) at 3. The parties then conducted extensive discovery relating to the LNG facility, which was responded to without objection by Liberty that the LNG facility is "not part of Liberty's LCIRP." *See, e.g.*, Motion, Exhibits "A," "B" and "C" (unmarked, but in that order, as referenced in the Motion). Clark raised his concerns with the LNG facility in his Motion to dismiss and for a moratorium, *see id.* at ¶¶ 12 and 26, which the Commission denied, but in a decision which expressly noted Clark facility concerns, *see* Order No. 26,225 (Mar. 13,

[1] Litigants cannot "probe and test" what Liberty is saying in this docket about the LNG facility, compared to what it is saying about it in the parallel Granite Bridge Project docket, if the LNG facility is not part of the LCIRP.

2019) at 3 while ordering Liberty to supplement its LCIRP filing to provide detailed information which should have addressed them.

4. Now, after 19 months of litigation including the LNG facility within the LCIRP, Liberty cannot just declare it "outside" the plan. If Liberty has truly pushed the in-service date of the LNG facility back by at least eight months, from "in-service by April 1, 2022"[2] to sometime in 2023—and the claimed new date does seem a convenient basis for eliminating consideration of the LNG facility in this proceeding—the decision was Liberty's, not the other litigants, and was most likely caused by Liberty's requests to delay both this and the Granite Bridge Project proceedings to better prepare its cases. Thus, it would obviously be unfairly prejudicial to Clark and other litigants concerned with the LNG facility to remove it from consideration in this proceeding at this point.

5. Moreover, Liberty's exclusion of the LNG facility from its R.S.A. 378 assessments and analyses in this case leads to at least one of two (hopefully) legally impermissible results. It either allows for a nearly quarter of a billion dollar facility[3] to be approved in Docket No. DG 17-198 and built to the point of service outside of an approved plan, or to be considered "pre-approved" under the next LCIRP.[4] A good argument could be made that it results in both. Clearly, the facility must be subject to scrutiny under an LCIRP—to disagree is to make a mockery of the planning statute and take the untenable position that the Commission cannot regulate its resource investments—and it has to be this one, as the facility

[2] *See* Pre-filed Direct Testimony of William R. Killeen and James M. Stephens (December 21, 2017) submitted in Docket No. DG 17-198 at Bates 123.

[3] *See* Supplemental Direct Testimony of Francisco C. DaFonte and William R. Killeen (March 15, 2019) filed in Docket No. DG 17-198 at Bates 011 (revised cost of LNG facility is approximately $246 million).

[4] If the LNG facility is not considered "pre-approved," how is Liberty allowed to build it to the point of service under the next LCIRP?

will already have been approved and probably largely built before Liberty's next LCIRP is even considered. If the LNG facility is not part of the current LCIRP, how can it be approved in Docket No. DG 17-198 within the term of the LCIRP? How can the pipeline be considered for approval without the LNG facility, as the pipeline is unsupportable without a supply, which is to be provided by the facility? The pipeline and LNG facility have always been presented, and are integrally connected, as a package deal, and cannot be properly separated for approval in this, or any other, proceeding. If Liberty wants to cover the LNG facility under its next LCIRP, it should dismiss Docket No. DG 17-198 and refile it for approval under the next LCIRP; otherwise, the facility must be considered in this proceeding.

6. Perhaps Liberty has legal support for taking the position that the "in-service date" for the LNG facility takes it outside the plan. Its discussion of the issue only cites cases for the proposition that five years is a proper planning period, not that the "in-service date" of a project determines the plan it falls under. *See* Objection at 7 Footnote 3. However, even if normal requirements or practices would utilize the in-service date as the trigger for plan coverage, they must give way in this case to reliance on the LCIRP covering the time of approval of the facility. The Commission may expressly limit such a holding to this case, should it desire, to leave it as only the law of this case—but it must find that the LNG facility falls under the LCIRP *sub judice* to avoid the unfair prejudice already discussed. Moreover, it makes more sense that the LCIRP governing the time of approval of a facility or other project is the LCIRP the project is a part of; otherwise, as would be the result in this case, the facility would be approved and nearly (if not completely) constructed under Docket No. DG 17-198 without the ability of Staff and other litigants to "probe and test" the merits of the facility and Liberty's plans by comparison of the

project and plan dockets.[5] As the approval of the nearly $250 million LNG facility in Docket No. DG 17-198, along with the pipeline, would substantially add to rate base,[6] such an approval would seem to conflict with the R.S.A. 378:40 prohibition against raising rates outside of an approved plan.

7. Moreover, Liberty was wrong to omit consideration of the LNG facility from its filings even if it is correct that the (asserted) new in-service date mandates its removal from the LCIRP. R.S.A. 378:38, VI and R.S.A. 378:39 still require an assessment of the LNG facility's impacts as part of the long-term assessments required under the statutes: you cannot separate the long-term impacts of the pipeline from the facility as the two will be approved together and the pipeline depends upon the facility and brings the facility with it.

8. This is a critical moment in New Hampshire decision-making and, if Liberty has heretofore managed to avoid the issues raised in this proceeding—which is the thrust of much of the Objection's argument—that does not preclude Clark, the CLF and OCA from raising those issues now. Whatever may fairly be drawn from the authority Liberty cites is clearly tempered by, and subject to, the express current requirements of R.S.A. 378 and Order No. 26,225 (Mar. 13, 2019),[7] and it would be grossly counter to the public interest to lessen them. Again, a huge new, long-term commitment to gas is at stake, which completely contradicts our responsibilities in light of the climate crisis. If approved, Liberty's new 200,000 Dth/day capacity Granite Bridge pipeline and supplying LNG facility would **nearly double the capacity of Liberty's**

[5] *See* Transcript of March 9, 2018 pre-hearing conference at 19:11-15.

[6] *See* OCA response to motion at 1 ("Granite Bridge pipeline and liquefied natural gas storage tank proposal (along with certain wholesale supply agreements) … would add upwards of $400 million to rate base."

[7] As well as Order No. 26,134 (May 11, 2018). *See* discussion at ¶ 9, *infra*.

current natural gas Design Day resources[8] at a time when the worlds' scientists are desperately calling for a reduction in gas use, and will continue that use well beyond the time those scientists agree that all gas use must be eliminated. Clearly, Liberty intends to fully utilize this capacity, as the 200,000 Dth/day capacity of the pipeline represents a 50,000 Dth/day increase from prior planning,[9] and there would be no need for the increase without the anticipated use of it. Especially as Liberty's filings do not even consider the Epping LNG facility, despite all of the emissions and safety concerns associated with such facilities—of course issues are being raised, and properly so, with Liberty's filings.

9. Liberty's refusal to appropriately assess its plan's impacts on New Hampshire, including the specific potential harms enumerated in Clark's prior pleadings,[10] is contrary to the Commission's unequivocable directive near the beginning of the proceedings that:

> "By their own terms, the statutes require a focus on how Liberty's plans would affect the State of New Hampshire and its citizens."

See Order No. 26,134 (May 11, 2018) at 4.

10. Liberty's Objection mischaracterizes the discussion in paragraph 6 of Clark's Motion as an argument that Liberty's filings were required to provide a complete impact analysis of other potential "forms of energy." *See* Objection, ¶¶ 9, 16. The Motion actually contends that Liberty should have provided the statutorily required assessments for "**each option of the plan**

[8] 107,833 Dth/day of firm transportation. *See* Pre-filed Direct Testimony of William R. Killeen and James M. Stephens (December 21, 2017) submitted in Docket No. DG 17-198 at Bates 168 (Table 6). The 107,833 Dth/day is supplemented by far lesser amounts of propane and LNG, as indicated in Table 6.

[9] *See* Supplemental Direct Testimony of Francisco C. DaFonte and William R. Killeen (March 15, 2019) filed in Docket No. DG 17-198 at Bates 034 Footnote 25 ("full operating capacity of 150,000 Dth per day").

[10] If it is not clear from the Motion itself, the particulate issue is not just a Keene—or Epping—concern. Particulate emissions from the Epping LNG facility and other project infrastructure could be wind-borne throughout the state.

… **to allow informed comparison** not just between the plan options, but **with other forms of energy** …" *Id.* at ¶ 6 (emphasis added). Clark does not claim that Liberty was obligated to provide any more than that which is clearly statutorily required, *i.e.*, assessments for each option of the plan—which certainly should have included all alternative supply options under R.S.A. 378:38, III—to "allow informed comparison" between the plan options and "other forms of energy." Liberty's extremely narrow view of its options, filing obligations under R.S.A. 378 and the language of R.S.A. 378:37 renders the statutes meaningless. The issue is perhaps best captured in Liberty's statement that "the Company provided detailed evidence and a thorough assessment of the delivery and supply options presented, identifying those with the lowest reasonable cost." Objection, ¶ 21. Liberty reaches its own conclusion on the ultimate issue, *i.e.*, which options provide the "lowest reasonable cost," based solely on its gas options and the pricing associated with those gas options, and rejects out of hand providing any information on other options, even though the Commission may determine that one or more of them actually provides the "lowest *reasonable* **cost**" overall under a proper, informed R.S.A. 378:37 analysis.

11. Clark does not agree with the OCA's position that no relief is available for Liberty's non-compliance. The OCA draws this position from Order No. 26,225 (Mar. 13, 2019), interpreting it to limit any relief for a non-compliant filing to post-hearing. However, this is not how the Order should be read. Order No. 26,225 (Mar. 13, 2019) expressly directed that Liberty should supplement its LCIRP filing with granular submissions sufficient to meet Liberty's statutory obligations under R.S.A. 378:38 and R.S.A. 378:39 and thus plainly anticipated such a filing before proceeding. Order No. 26,225 (Mar. 13, 2019) could only be read as the OCA urges if it were grounded in this predicate, which was plainly not met. Rather, in response to its directives, the Commission received a patently deficient supplemental filing

which not only failed to comply with the statutes, Order No. 26,225 (Mar. 13, 2019) and its obligations in this proceeding, but made it clear that Liberty will never comply.

12. Under the circumstances, relief certainly is available for Liberty's non-compliance, and it is a summary denial of Liberty's LCIRP, the Granite Bridge Project under Docket No. DG 17-198, and any other projects tied to the LCIRP approval. In his Motion, Clark deferred to the Commission's discretion as to the appropriate relief for Liberty's non-compliance, but suggested that a summary denial would be appropriate. *Id.* at ¶ 42. However, given the subsequent positions taken by Liberty with respect to its filings and clear inclination to never comply with its statutory obligations, it is now clear that the *only* appropriate relief at this point is a termination of the proceedings. The Commission does not have to fully litigate the approvability of an LCIRP filing which is inadequate and unapprovable on its face, and it would be bad precedent to do so. Certainly, the OCA would agree that the Commission and parties would not be required to devote their resources to further litigating Liberty's plan if the supplemental filing had literally just been a napkin, and Liberty's actual filing comes no closer to substantively meeting its obligations. Given Liberty's non-compliance, the appropriate language of Order No. 26,225 (Mar. 13, 2019) to focus on is the language Clark highlighted in his Motion, *i.e.*, the Commission's clear admonishment at the beginning and end of the order that it would

> "review Liberty's LCIRP and the supplemental filing to determine whether it meets the public interest, consistent with all applicable statutory requirements."

As the LCIRP does not meet all statutory requirements on its face, the Commission can *never* determine in this proceeding that the LCIRP "meets the public interest," and thus should make that determination now.

13. In entering Order No. 26,225 (Mar. 13, 2019), the Commission was plainly concerned that Liberty had not argued the issues yet; now, it has. At the time it entered Order No. 26,225 (Mar. 13, 2019), the Commission did not have Liberty's complete filings under R.S.A. 378:38 and R.S.A. 378:39; now, it has. If the case proceeds as filed, it proceeds with Liberty and the Commission shifting the burden to the Staff, OCA and other parties to determine whether Liberty's plan comports with its statutory obligations, which should clearly be deemed inappropriate and impermissible not only under the statutes, but under Order No. 26,225 (Mar. 13, 2019), which expressly noted that its prior decision did not "shift the burden of assessing the applicable statutory factors to the Commission without the benefit of a substantive filing from Liberty addressing each required factor." *See id.* at 7. Moreover, as noted in Clark's Motion, it would result in a further taint to the proceedings:

> "When filings are inadequate, not just the Commission, but Commission Staff, the OCA and other parties to the proceedings are all deprived of information critical to their analyses and positions on case issues. This not only prejudices the litigants' own case preparation and presentation but, by their involvement in the proceedings, diminishes the quality of party input that the Commission relies on for its decision-making."

Id. at ¶ 14.

14. As Liberty has not met its burden on the face of its filings, Liberty does not have a right to proceed. If the Commission is uncomfortable with "summary denials," it is urged to select its own appropriate procedural mechanism for disposing of Liberty's requested approvals in this case, Docket No. DG 17-198 and in any other pending proceeding dependent upon the LCIRP's approval, rather than completely litigate such requests to an obvious, inherently defective conclusion.

Respectfully submitted,

Terry Clark,

By his Attorney:

Dated: May 23, 2019

//s//Richard M. Husband, Esquire
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CERTIFICATE OF SERVICE

I hereby certify that I have, on this 23rd day of May, 2019, submitted seven copies of this pleading to the Commission by hand delivery, with copies e-mailed to the petitioner and the Consumer Advocate. I further certify that I have, on this 23rd of May, 2019, served an electronic copy of this pleading on every other person/party identified on the Commission's service list for this docket by delivering it to the e-mail address identified on the Commission's service list for the docket.

//s//Richard M. Husband, Esquire
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