

**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 TERRY CLARK'S MOTION TO COMPEL**

Intervenor, Terry Clark ("Clark"), by and through undersigned counsel, Richard M. Husband, Esquire, hereby respectfully replies to Liberty's Objection to Terry Clark's Motion to Compel ("Liberty's Objection") as follows:

1. **First, Liberty's Objection is groundless as it rests on an objection that Liberty waived.** [Liberty's Objection](#) takes the position that Clark is not entitled to the LNG facility emissions information sought by Clark data request 5-26 because Liberty's proffered expert, Paul J. Hibbard, allegedly does not have the information and thus cannot be compelled "to formulate and offer an opinion that Liberty chose not to develop or present, and ... to conduct the supporting analysis." *Id.* at ¶ 10. This position is just not credible as it is beyond believable that Mr. Hibbard did not calculate the LNG facility's emissions in performing his analysis—given how greatly it would benefit Liberty's case to show that the Granite Bridge Project would result in lower emissions even with the facility's emissions—such that it would be counter to a competent expert undertaking.¹

But, in any event, Liberty's position really raises an objection to production of the

¹ Mr. Clark does not concede that Mr. Hibbard is a qualified expert, leaving that to the Commission's determination, but he has been offered as one. By "counter to a competent expert undertaking," Mr. Clark does not intend to suggest that Mr. Hibbard failed his undertaking in not calculating the LNG facility's emissions, if Liberty made that decision.

requested information, *i.e.*, Clark is requesting information beyond the scope of discovery, which Liberty waived by not asserting the objection in its response; indeed, Liberty’s response to Clark data request 5-26 asserts *no objections*, meaning all Liberty objections to production of the 5-26 information were waived. *See* Puc 203.09(h)(“Failure to object to a data request or requests for documents within 10 days of its receipt without good cause shall be deemed a waiver of the right to object.”). Liberty has not requested the right to assert a late objection and the record does not support good cause for it, as Liberty responded to Clark’s data request 5-26 within 10 days and thus could have raised the objection in a timely fashion with the response. Thus, as “Liberty does concede that the requested information would be discoverable *if it existed*,” [Liberty’s Objection](#) at ¶ 3 (emphasis in original), and it would exist but for the fact that “Liberty chose not to develop or present” it, *see id.* at ¶ 10, the company has no legally cognizable grounds for withholding the requested information, whether it currently “exists” or not.

2. **Second, the question is plainly not what the civil litigation practice allows for expert discovery, as Liberty tries to frame the issue, but what applicable statutes, rules and legal principles specifically require for the result of Clark’s motion to compel in this Commission proceeding.** [Liberty’s Objection](#) argues for an adoption of the civil litigation expert discovery practice to resolve the current dispute, contending that this would preclude discovery of the information sought by Clark as it is not included in the opinions Hibbard has provided, or “facts or data considered by [Mr. Hibbard] in forming [his] opinions.” [Liberty’s Objection](#) at ¶ 7.

However, Liberty’s argument is rebutted by two facts: (1) one of the cases [Liberty’s Objection](#) relies on for its position expressly indicates that the Commission does not adopt the civil litigation practice,² and (2) the Commission discovery practice is much more open-ended than the civil practice, without any limitations on expert discovery other than that the information sought must be relevant and material.³ Indeed, as previously noted in [Clark’s motion to compel](#), *see id.* at ¶ 12, Staff, OCA and other parties often requests data and information requiring analyses of the nature sought by Clark in discovery, and it is provided by utilities without question: such information always exists in that it is readily available and just needs to be gathered, or brought to light by established calculations, to be produced. The only difference with Clark’s data request 5-26 is that he asked Liberty/Hibbard to update Hibbard’s *conclusions*, as well. But, [R.S.A. 378:38](#) and [R.S.A. 378:39](#) require “assessments” from Liberty, which certainly implies more than data and would include conclusions if the assessments were provided in that fashion; so, as Liberty chose to provide its assessments with conclusions, the statutes also require updating those conclusions—whatever expert practice otherwise requires or precludes.

3. But, in any event, the parties’ rights in this proceeding are not fixed by whatever the Commission’s expert discovery practice may be. Rather, again, as noted in

²² *Public Service Co. of New Hampshire*, Order No. 25,646 (Apr. 8, 2014), quoted at length in [Liberty’s Objection](#) at ¶ 6. However, as noted in Liberty’s quote, the Commission prefaces its civil litigation practice discussion with the clear statement “we do not adopt the requirements of the statute titled ‘Disclosure of Expert Testimony in Civil Cases’” and notes only that the Commission “generally agree[s] with its requirements ...”).

³ *See* Puc 203.23(d). This includes expert discovery, as the Commission does not have any specific rule concerning experts and expert discovery: in fact, the word “expert” does not even appear in the Commission’s procedural rules, *i.e.*, Puc 200. *See id.*

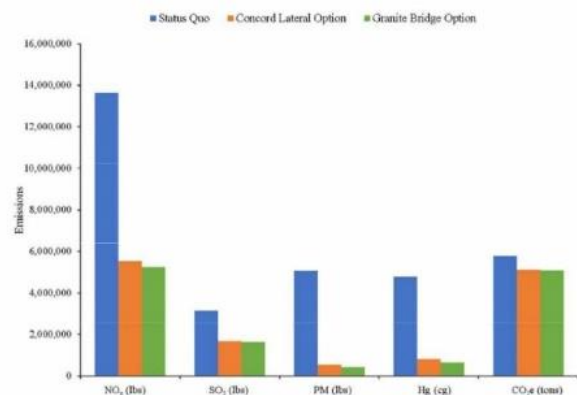
[Clark's motion to compel](#), the rights here are determined by [R.S.A. 378:38](#) and [R.S.A. 378:39](#), which require Liberty to provide emissions assessments (which would include the LNG facility if the statutory requirement is treated at all seriously), the Commission rules affording Clark the right to such discovery, and New Hampshire Supreme Court cases which make clear that due process requires the Commission to follow its own rules and provide Clark “the opportunity to present [his] case” by compelling Liberty to produce the requested information. *Appeal of Morin*, 140 N.H. 515, 518 (1995).

4. Even assuming *arguendo* that the Commission were to agree with Liberty's position that proffered experts in Commission proceedings do not have to update their conclusions in response to discovery requests, this would not excuse Liberty from providing the raw data plainly necessary for the assessments required under [R.S.A. 378:38](#) and [R.S.A. 378:39](#). Thus, while reserving all of his rights on the issue in future proceedings, and to all of the information sought now should the Commission decline the offer, Clark proposes that the Commission order the following to resolve the parties' dispute.
5. The Commission should compel Liberty to provide Clark with a revised Sensitivity Figure 3, revised Sensitivity Table 2 and revised Sensitivity Table 4, which currently only reflect the proposed pipeline's emissions, with all such revisions reflecting inclusion of the proposed LNG facility's projected emissions through the same 2037/2038 time period and applying the same GWP (84) as is shown in Liberty's current Sensitivity Figure 3, Sensitivity Table 2 and Sensitivity Table 4. The Commission may do this pursuant to Prayer C of

[Clark's motion to compel](#) which requests, as an alternative to an order compelling production of all of the requested information, a Commission order providing for “such other and further relief as is just and appropriate.” Subject to the reservation of rights in the preceding paragraph, Clark would accept just these revisions in lieu of all of the information sought under [Clark's motion to compel](#), and Liberty cannot complain that it would require supplementation of Mr. Hibbard's conclusions to provide such revisions, as the task should involve just inputting different data (which, again, Liberty is obligated to provide under [R.S.A. 378:38](#) and [R.S.A. 378:39](#)).

6. Sensitivity Figure 3, Sensitivity Table 2 and Sensitivity Table 4 are reproduced on page 22 of Clark's testimony. See [Direct Testimony of Terry Michael Clark dated September 6, 2019](#) at 22. For the Commission's convenience, they are also reproduced here, as follows (see how close the projected greenhouse gas emissions, (CO₂e), from the project are to exceeding the *status quo*—without proper emissions calculations?):

Sensitivity Figure 3: Long-run emissions impacts associated with total additional customers under long-term Granite Bridge Pipeline planning period - GWP of 84 for methane emissions.



Sensitivity Table 2: Total long-run emissions from customers remaining on existing heating technologies compared to switching to natural gas heating technologies under the Granite Bridge or Concord Lateral Expansion options - GWP of 84 for methane emissions.

<i>GB-LR</i>	Status Quo	Granite Bridge Option	Concord Lateral Option
NO _x (lbs)	13,629,053	5,250,732	5,521,009
SO ₂ (lbs)	3,157,123	1,630,470	1,681,805
PM (lbs)	5,062,057	421,858	527,957
Hg (cg)	4,768,887	654,623	798,470
CO _{2e} (tons)	5,771,166	5,087,590	5,110,354

Sensitivity Table 4: Annual reductions in emissions associated with reduced delivery truck traffic - GWP of 84 for methane emissions (estimates in pounds).

	235 trucks	300 trucks
CO _{2e} (CO ₂ + CH ₄)	49,603.8	63,324.0
NO _x	285.7	364.7
PM _{2.5}	6.7	8.5

The required revisions to the above, reflecting inclusion of the LNG facility emissions data, should cut to the chase on Liberty’s emissions claims in this case—*i.e.*, that the Granite Bridge Project would reduce greenhouse gas and pollutant emissions relative to the *status quo* and “thereby contribute to a lowering of risks associated with climate change”⁴—and thus get closer to the

⁴ See [Direct Testimony of Paul J. Hibbard \(June 28, 2019\)](#) at Bates 036-037.

heart of Liberty's [LCIRP](#) conformity with [R.S.A. 378:37](#), and therefore approvability under [R.S.A. 378:39](#).⁵

7. The Commission requires the information Clark seeks as much as Clark to properly perform its required analyses and [R.S.A. 378:39](#) review in this matter. Especially as it appears from the testimony provided in the Granite Bridge Project approval case, Docket No. DG 17-198, that the LNG facility's emissions have not been disclosed and are not at issue in that proceeding, it is imperative that they be considered in this matter so that they will be assessed in some fashion, as required under [R.S.A. 378:38](#) and [R.S.A. 378:39](#), to ensure that the project is approvable as consistent with [R.S.A. 378:37](#) and the public interest. The Commission's environmental and health impact assessment obligations under the statutes cannot be ignored.
8. Moreover, the Commission must reject Liberty's position to avoid the resulting evil this Commission has tried to avoid. In its [Order No. 26,225 \(Mar. 13, 2019\)](#) entered in this case, the Commission indicated that it did not want "the burden of assessing the applicable statutory factors" to shift from Liberty to the Commission. [Id. at 7](#). However, Liberty's position, if accepted, will do just that—not only in this, but in future LCIRP proceedings. If utilities are allowed to simply choose "not to develop or present, and ... to conduct the supporting analysis" for assessments required under R.S.A. 378, as Liberty contends is its right, *see* [Liberty's Objection](#) at ¶ 10, utilities will naturally opt not to provide

⁵ Liberty acknowledges that its ultimate burden in establishing approvability under [R.S.A. 378:39](#) in this case requires proof that its [LCIRP](#) (and expansion plans) are consistent with [R.S.A. 378:37](#). *See* [LCIRP](#) at 55 ("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.").

assessment information which is required under the statutes but unfavorable to approval of the utility's plans, and shift the burden on to the Commission, Staff, OCA and other parties to find and pay experts to perform the required assessments. Otherwise, the required assessments will not be undertaken and considered in the planning process, meaning the planning environmental, health, safety, *etc.* impacts of planning will be left out of decision-making—which may be a great result for utilities, but it would be a horrible outcome for ratepayers and the public at large.

Respectfully submitted,

Terry Clark,

By his Attorney:

Dated: September 24, 2019

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

I hereby certify that I have, on this 24th day of September, 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 24th day of September, 2019, served an electronic copy of this pleading on every other person/party identified on the Commission's service list for this docket by delivering it to the e-mail address identified on the Commission's service list for the docket.

//s//Richard M. Husband, Esquire
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