

**BEFORE THE NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

Docket No. DG 17-068

Liberty Utilities (EnergyNorth Natural Gas) Corp. d/b/a Liberty Utilities

Petition for Declaratory Ruling

Docket No. DG 17-152

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

Least Cost Integrated Resource Plan

**INTERVENOR, TERRY CLARK’S, AMENDED MOTION TO FILE REPLY
TO LIBERTY’S OBJECTION TO CLARK’S AMENDED MOTION
TO CONDITION KEENE PROJECT ON RSA 378 CONSISTENCY AND
COMPLIANCE AND TO ORDER SUPPLEMENTAL RSA 378 FILING**

Terry Clark (“Clark”), an intervenor in each of the above-captioned proceedings before this Commission, hereby respectfully moves that the Commission allow Clark to file a reply to the objection (“Objection”) of Liberty Utilities (EnergyNorth Natural Gas) Corp. d/b/a (“Liberty”) to Intervenor, Terry Clark’s, *Amended* Motion to Condition Keene Project on RSA 378 Consistency and Compliance and to Order Supplemental RSA 378 Filing (“Motion”), which reply is evidenced as Exhibit “A” to this motion. As grounds for this motion, which amends his motion filed September 22, 2020, Clark states as follows:

1. This amended motion adds a prayer for the requested relief, which prayer was inadvertently omitted from the original motion.¹
2. The proposed reply will respond to claims and issues raised in Liberty’s Objection, filed on September 18, 2020, and, hopefully, will better inform the Commission’s

¹ Changes, largely to correct typographical and citation/reference errors and poor phraseology, have also been made to the proposed reply.

decision-making. As Clark's reply is already prepared, attached hereto and ready for filing, allowance of this motion will not delay these proceedings.

3. As Liberty was allowed a week extension (with Clark's assent) to file the Objection, it would be fair to allow Clark to file his reply.

4. The Commission's rules are silent on the issue but a review of the docket for both proceedings indicates that the Commission routinely accepts replies without motions. However, Clark files this should the Commission prefer a motion.

5. As indicated in his original motion Liberty, Staff, the DES, PLAN and the CLF, *i.e.*, all parties in both proceedings which are the subject of this motion except the OCA, assent to Clark's filing of a reply. Staff and PLAN have specifically reaffirmed their assent to the filing of this motion. Although Liberty, the DES and the CLF have not yet responded to Clark's request for reaffirmation of their assent they, again, did assent to the filing of a reply, and Clark thought it best to file this motion as soon as possible. The OCA has indicated that it does not assent to Clark's request.

6. If this motion is allowed, Clark will file a separate copy of his proposed reply, apart from the copy evidenced by the attached Exhibit "A," unless the Commission instructs otherwise.

WHEREFORE, Clark respectfully requests that the Honorable Commission:

- A. Grant this motion and accept Clark's reply attached as Exhibit "A"; or
- B. Provide such other and further relief as is just and proper.

Respectfully submitted,

Dated: September 23, 2020

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

I hereby certify that I have, on this 23rd day of September, 2020, served this motion by e-mail on the petitioner and the Consumer Advocate. I further certify that I have, on this 23rd of September, 2020, served an electronic copy of this motion on every other person/party identified on the Commission's service list for Docket No. DG 17-068 and Docket No. DG 17-152 by delivering it to the e-mail address identified for each person/party on the Commission's service list for the dockets.

//s//Richard M. Husband
Richard M. Husband

EXHIBIT “A”

**BEFORE THE NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

Docket No. DG 17-068

Liberty Utilities (EnergyNorth Natural Gas) Corp. d/b/a Liberty Utilities

Petition for Declaratory Ruling

Docket No. 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 CLARK’S AMENDED MOTION TO
CONDITION KEENE PROJECT ON RSA 378 CONSISTENCY AND
COMPLIANCE AND TO ORDER SUPPLEMENTAL RSA 378 FILING**

Terry Clark (“Clark”), an intervenor in each of the above-captioned proceedings before this Commission, hereby respectfully replies to the objection (“Objection”) of Liberty Utilities (EnergyNorth Natural Gas) Corp. d/b/a (“Liberty”) to Intervenor, Terry Clark’s, *Amended Motion to Condition Keene Project on RSA 378 Consistency and Compliance and to Order Supplemental RSA 378 Filing* (“Motion”) pending in Docket Nos. DG 17-068 and DG 17-152 as follows:

1. The Objection is extremely disappointing on two levels. First, considered generally, it starkly contradicts with Liberty’s claim to being a health and environmental champion calling for *more* regulatory review of the industry and climate impact planning in light of the climate crisis. *See* Motion at ¶¶ 12, 14. Second, it continues to refuse *any* review and consideration of the specific health and environmental impacts its fracked gas business will bring to Keene, which has a pollution/health problem whereby air inversions in the Keene valley trap unhealthy pollutants, including particulates, to a degree causing respiratory and other health

issues. See [Initial Brief of Intervenor, Terry Clark](#) filed in Docket No. DG 17-068 at 40-41; [Petition to Intervene of Terry Clark](#) filed in Docket No. DG 17-152 at ¶ 24.

2. While Liberty promotes its fracked/natural gas expansion plans as “better than oil” and responsibly responsive to the climate crisis and health problems caused by oil heating emissions (CO₂), fracked/natural gas methane emissions exacerbate the crisis, warming the planet 84 times more than CO₂ emissions for the first 20 years, and 28 times more than CO₂ emissions for the first century, after their release, according to the IPCC. See [Direct Testimony of Terry Michael Clark \(Sept. 6, 2019\)](#) filed in Docket No. DG 17-152 at 18:13-20:13.

Moreover, Liberty itself acknowledges that fracked/natural gas (methane) emissions contain particulates and other harmful pollutants, such as nitrogen oxides (NO_x), sulfur dioxide (SO₂), and mercury (Hg),¹ which may cause premature deaths and exacerbate health problems, including asthma, costing New Hampshire *billions of dollars* (as well as lives):

“... the New Hampshire DES estimates that one premature death due to air pollution results in \$9.35 6 million in costs, one asthma-related emergency room visit costs \$440, and one lost work day averages \$150.40. Moreover, DES estimates that fine particulate matter and ozone accounted for approximately \$3.8 billion in health impacts in New Hampshire from 2013 through 2015 ...”

[Direct Testimony of Paul J. Hibbard \(June 28, 2019\)](#) filed in Docket No. DG 17-152 at Bates 029:04 - 029:09. New Hampshire (including Keene) has one of the highest asthma rates in the country, with approximately 110,000 adult and 25,000 child asthma sufferers. [Direct Testimony of Terry Michael Clark \(Sept. 6, 2019\)](#) filed in DG 17-152 at 29:5-6. Liberty does not deny that its product is mostly, if not all, fracked gas, *see discussion* in [Intervenor, Terry Clark’s, Motion](#)

¹ See also [Initial Brief of Intervenor, Terry Clark](#) filed in Docket No. DG 17-068 at 21-23, discussing the many New Hampshire regulated toxic air pollutants that have been associated with fracked gas (as indicated in the discussion, it is unclear which of these may be associated with Liberty’s specific gas use).

[to Dismiss and for a Moratorium on Gas Expansion Plans](#) filed in Docket No. DG 17-152 at ¶ 19, which is common knowledge. *See, e.g.*, July 31, 2020 wmur.com online news article, “Liberty Utilities abandons ‘Granite Bridge’ natural gas project, shifts to existing pipeline” (“Liberty Utilities has abandoned its fracked natural gas transmission pipeline project known as Granite Bridge ...”) available at <https://www.wmur.com/article/liberty-utilities-abandons-granite-bridge-natural-gas-project-shifts-to-existing-pipeline/33484973>.

3. Yet, while Liberty nakedly claims that building a fracked gas plant in Keene will improve its citizens’ health and our climate in general, *see* Motion at ¶ 12, the utility refuses any consideration of the project’s actual impacts.² The company’s recent commendable about-face on the Granite Bridge Project notwithstanding, the Objection seems distressing confirmation that Liberty is still not willing to commit to responsible planning.

4. Liberty’s Objection makes two primary arguments: (1) the New Hampshire Supreme Court decision affirming the Commission orders entered to date in Docket No. DG 17-068 precludes RSA 378:37-39 review; and (2) it is too late for such review. However, for the reasons already stated in Clark’s Motion, and to follow, neither argument has merit.

5. Liberty’s first argument is not supported by the record, and is contradicted by its position to date. The utility asserts that Clark’s rights respecting the Keene project in Docket No. DG 17-152 were extinguished by the Commission’s decisions to date in Docket No. DG 17-068 and the affirming Supreme Court order, which the utility contends allows a complete

² New Hampshire will suffer greatly from climate change, including the rising remedial costs of addressing storms, droughts and other associated weather events, damage to our tourism, sugar, agricultural and dairy industries, and the loss of seacoast properties which are not only homes and businesses but worth billions of dollars. [Initial Brief of Intervenor, Terry Clark](#) filed in Docket No. DG 17-068 at 25-29; [Direct Testimony of Terry Michael Clark \(Sept. 6, 2019\)](#) filed in Docket No. DG 17-152 at 28:7–31:2.

buildout of the project at this point without the possibility for further regulatory oversight and approval of any matters pertaining to the project. But, again, as discussed in the Motion, the Commission’s DG 17-068 orders did not find that the company holds its 1860 franchise grant authority in insulation from all current applicable legal requirements and further Commission review and orders. To the contrary, the Commission’s orders confirm just the opposite. [Order No. 26,274 \(Jul. 26, 2019\)](#) stresses:

“We clarify that the decision in Order No. 26,065 was limited to a ruling that Liberty has the general right to change the type of gas that it provides to its customers under its franchise authority ... Order No. 26,065 was not intended to be read to permit a public utility that provides gas to customers in a defined franchise service territory to provide any type of gas in any manner that it might deem expedient, without further regulatory oversight or approvals ... Such a conversion raises a number of regulatory issues that warrant further oversight and approval ...”

Id. at 8-9. Moreover, [Order No. 26, 294 \(Sep. 25, 2019\)](#) specifically conditions the development of each phase of the Keene project going forward on further Commission oversight and approval through “future approval proceedings.” *See generally id.* and *specifically* at 8, 11. The Supreme Court’s final order on DG 17-068 only affirms a narrow issue decided under the Commission’s orders, likewise leaving open the possibility for further review and approval proceedings for the Keene project, including RSA 378:37-39 review under DG 17-152.

6. Inconsistently, Liberty argued through the DG 17-068 appeal, as it asserts even now in its Objection, that this narrow issue was the sole focus of the Commission’s decision-making. Objection at ¶ 7. Clearly, the Commission’s determination on just that issue, which was all that was affirmed by the Supreme Court’s decision and is not being considered in Docket No. DG 17-152 at all, did not decide whether the project is consistent with the state’s official energy policy under RSA 378:37 or in the public interest, which Clark has claimed from the outset in DG 17-152 is not the case. *See generally* [Petition to Intervene of Terry Clark](#).

7. Although Liberty has not argued that claim or issue preclusion principles bar consideration of Clark's claims in Docket No. DG 17-152, such principles are plainly not applicable. Again, neither the Commission nor the Supreme Court decided any issues or claims before DG 17-152, but both expressly declined consideration of them as beyond the scope of the "narrow issue" they considered presented by Docket No. DG 17-068. As that narrow issue was the only issue decided in Docket No. DG 17-068 and is not an issue in DG 17-152, there clearly can be no issue preclusion preventing litigation of Clark's claims in DG 17-152. Likewise, there is no claim preclusion, for it only applies to claims that were "**actually** litigated" and decided on their merits. *Merriam Farm, Inc. v. Town of Surry*, 168 N.H. 197, 199 (2015) (emphasis added).

8. In any event, again, Clark's arguments do not present just "issues" or "claims," but legal requirements that must be met irrespective of any interest Clark has in the matter.

9. Liberty plays semantics in suggesting that Clark's request to have the Keene project conditioned on RSA 378:37-39 consistency and compliance must be denied because the underlying declaratory judgment petition for that case does not expressly seek any planning approval for the Keene project. Objection, ¶¶ 4, 10. As the only docket involving the physical buildout of the project and planning approvals, Docket No. DG 17-068 would certainly seem the proceeding most appropriate for issuing the order Clark seeks. Again, the Commission ordered the imposition of conditions on the project in DG 17-068 subsequent to its declaratory ruling and the docket expressly remains open for "future approval proceedings" concerning all remaining phases of expansion and other project development. [Order No. 26, 294 \(Sep. 25, 2019\)](#) at 8, 10. While the Commission plainly may continue to issue orders relating to the Keene project under Docket DG 17-068, including the order Clark requests, by its own orders in the proceeding, the Commission may also condition the Keene project on RSA 378:37-39 consistency and

compliance—indeed, *must* so condition the project under the statutes—via any proceeding it deems appropriate, be it Docket No. DG 17-152, another pending docket, or a new docket. Clark leaves that decision to the Commission but, in any event, “the Keene project which is the subject of DG 17-068” must be conditioned on RSA 378:37-39 consistency and compliance, however effected.

10. Liberty’s second main argument is that

“Mr. Clark’s request is untimely, coming almost three years after the original filing in this docket and with no explanation for the failure to raise the issue earlier ...”

Objection at ¶ 16(2). However, the Objection ignores what brought us to the Motion.

11. Again, the issue was raised earlier—at the outset of Docket No. DG 17-152.

Clark made plain in his initial pleadings in DG 17-152 that his interest as an intervenor in the case included his interest in the Keene project and claim that the project, along with Liberty’s other expansion plans, is contrary to the public interest and inconsistent with the policies of [RSA 378:37](#). See generally [Petition to Intervene of Terry Clark](#); [Intervenor, Terry Clark’s, Motion to Dismiss and for a Moratorium on Gas Expansion Plans](#). The Commission allowed Clark to intervene to pursue this interest—without objection by Liberty. See [Order No. 26,134 \(Mar. 11, 2018\)](#) at 1, 3-4. If “fairness” is considered, it is unfair that Liberty is just now raising objection, after three years, to relief that Liberty has clearly known Clark was pursuing from the start.

12. Liberty’s explanation for not meeting its statutory obligations by now is the explanation that is lacking, but, again, the Motion was not filed sooner because Liberty took the position at the beginning of Docket No. DG 17-152 that the Keene project did not have to be included in its LCIRP filings as its Keene franchise was considered a separate division apart from its other business. Motion at ¶ 10. From Staff’s non-objection to this position and the fact

that the Commission, which is charged with knowledge of utility “compliance with all provisions of law” under [RSA 374:4](#), did not press the issue, Clark reasonably, albeit reluctantly, accepted Liberty’s position as having legal merit. It was not until the Commission issued [Order No. 26,294 \(Sep. 25, 2019\)](#) a year ago in DG 17-068, explaining, *id.* at 10, that the Keene division had subsequently been consolidated with the rest of Liberty’s business by [Order No. 26,122 \(Apr. 27, 2018\)](#) at 37-38, that Clark became aware that Liberty’s argument for withholding Keene project information from its LCIRP filing had been eliminated.³ In the interim, though, the Commission had issued [Order No. 26,225 \(Mar. 13, 2019\)](#) and [Order No. 26,286 \(Aug. 12, 2019\)](#), which made plain that the Commission would only order a general RSA 378:38-39 filing for Liberty’s LCIRP, without specifics as to the required content, and will not address adequacy/filing deficiency issues until the conclusion of the DG 17-152 proceedings. *See* [Order No. 26,225 \(Mar. 13, 2019\)](#) at 6-8; [Order No. 26,286 \(Aug. 12, 2019\)](#) at 6-7; *see also* [Order No. 26,307 \(Nov. 6, 2019\)](#) at 6. As the Motion clearly presents such issues, Clark was, understandably, unwilling to file it before the Supreme Court final order on DG 17-068 suggested that Clark could not wait until the conclusion of the Commission proceedings to raise the issue, but needed to “meaningfully object” now to preserve his appellate rights. *See* Motion, Exhibit “A,” p. 1. Thus, it is baseless to argue that the Motion should have been filed before now, especially when an earlier filing plainly would not have made a difference: Liberty has refused to provide any

³ The consolidation discussion was on two pages of an 80+ page order (including exhibits) in an entirely different Commission proceeding. Clark’s counsel does not read all Commission orders in all proceedings and does not believe that he may be reasonably held to that level of knowledge: the Commission itself may only be held to notice of “[t]he relevant portion of the record of other proceedings before the commission” which has actually been presented to the Commission. [Puc 203.27\(2\)](#).

LCIRP information not contained in its filings without being compelled by the Commission, and the Commission has refused to consider specific inadequacies until the end of the case.

13. In any event, Clark is not Liberty's compliance officer and the utility's statutory obligations under RSA 378:38-39 are unavoidable. Liberty alone bears responsibility for adequate/approvable LCIRP filings and must pay the price for filing inadequacies at the end of the proceedings, whether raised before then or not, as the Commission strongly suggested in its last order on the issue:

“We have already permitted two supplemental filings from Liberty to support its LCIRP. Liberty has confirmed that it chose not to assess the projected carbon emissions of the proposed LNG storage facility in the supplemental filing required by Order No. 26,225. Liberty carries the burden of proof for the approval of its LCIRP, as well as the risk associated with not having an approved LCIRP on file.”

[Order No. 26,307 \(Nov. 6, 2019\)](#) at 6. Thus, while Liberty complains of its timing, Clark's Motion is actually right on time in providing the company with one more opportunity for RSA 378:37-39 compliance before the matter locks into a schedule that will necessarily conclude in a finding of inadequacy, resulting in far greater approval delay for the company. Indeed, Liberty's counsel, Attorney Sheehan, recently advised (by e-mail) that the Keene project “is done until we make a filing for the next phase of the Keene conversion, which is at least a year from now,” meaning there is certainly ample time between now and then for RSA 378:37-39 review.

14. However, while the Motion provides Liberty the opportunity, only the Commission has the ability to compel Liberty to provide the RSA 378:38-39 filings required for the Keene project in DG 17-152, pursuant to its general oversight authority and plenary powers, specific authority to meet its statutory/regulatory obligations (including those under [RSA 374:4](#) to enforce compliance and oversee and regulate resource investments), and duty to provide due process, including that required under its own rules. Again, Clark needs the Keene project RSA

378:38-39 supplementation to have a fair opportunity to present his case. To expound: Clark needs the information for a baseline of emissions and other information he cannot obtain elsewhere showing planning consistency or inconsistency with [RSA 378:37](#) (and the public interest), and to determine, *inter alia*, the information to be explored and established under his discovery requests, whether and what expert and fact witness(es)/testimony may be necessary to support his case, the exhibits and other evidence he will need to properly present his case, and the legal and other issues that need to be researched and argued in his briefing for the case.

15. The Objection's final arguments are easily dispelled. While Liberty argues that only the "legacy" (non-Keene) portion of its business should be included in its LCIRP, Objection at ¶ 16(1), this is not supported by RSA 378:37-39, which absolutely requires planning approval for Keene, and the absence of any other Keene proceeding under RSA 378:37-39. Similarly, Liberty's argument that it would not be "appropriate" to include the Keene project in its LCIRP filing because prior filings have not been made for the territory and "because the Commission, and Mr. Clark, have other opportunities to examine the Company's planning for the Keene Division, plans that are far less complicated than what is presented in EnergyNorth's LCIRP," Objection at ¶¶ 37-41, does not establish RSA 378:37-39 compliance, review, consistency and approval for the Keene project. Liberty's argument that Clark's opportunity to "comment" on the Keene project should suffice for RSA 378:37-39 compliance, review, consistency and approval, Objection at ¶ 41, is not only ludicrous as a matter of law and insulting to someone who has invested the time that Clark has invested in these proceedings, but shows alarming disregard for the statutes, and their purpose.

Respectfully submitted,

Dated: September 23, 2020

//s//Richard M. Husband, Esquire
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