

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

DG 22-064

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

Least Cost Integrated Resource Plan (2022/2023–2026/2027)

**INTERVENOR, TERRY CLARK’S, CONDITIONAL ASSENT AND
CONDITIONAL OBJECTION TO MOTION FOR INTERLOCUTORY TRANSFER**

Intervenor, Terry Clark (“Clark”), by and through undersigned counsel, Richard M. Husband, Esquire, hereby respectfully conditionally assents and conditionally objects to the [Motion for Interlocutory Transfer of Questions to the New Hampshire Supreme Court](#) (“Motion”) filed by the Office of the Consumer Advocate (“OCA”) on December 22, 2022. In support of his position, Clark states as follows.

1. Clark (conditionally) assents to the [Motion](#)’s request for interlocutory transfer of any and all of the four proposed questions set forth therein so long as the result does not require or otherwise allow for the filing of a new least cost integrated resource plan (“LCIRP”) in substitution of the [LCIRP](#) filed October 3, 2022 pursuant to [RSA 378:38](#) and interim [Order No. 26,684 \(Sept. 14, 2022\)](#) in [Docket No. DG 17-152](#), which was not appealed.
2. Clark (conditionally) objects to the [Motion](#)’s request for interlocutory transfer of any and all of the four proposed questions set forth therein in the event that the result requires or otherwise allows for the filing of a new LCIRP in substitution of the [LCIRP](#) filed October 3, 2022 pursuant to [RSA 378:38](#) and [Order No. 26,684](#).
3. The greatest danger of this result appears to derive from proposed Question 4 on page 7 of the [Motion](#), as this question and the discussion that follows on pages 7-8 of the [Motion](#) challenges the propriety of the October 3, 2022 [LCIRP](#) filing.

4. While the [Motion](#) does not request or require the filing of a new plan, it does leave open the door to the provision of such relief, which would be inappropriate, for several reasons.
5. First, it would be inappropriate to provide such relief as, again, it has not even been requested, and the parties to the proceeding should have the full opportunity to address such extraordinary relief—in contravention of not only [Order No. 26,684](#) but also [Order No. 26,702 \(Oct. 12, 2022\)](#), the final order in [DG 17-152](#) (which was never challenged by any motion for rehearing, let alone appealed), and [RSA 378:38](#), as next discussed—if, when and as actually presented.
6. Indeed, secondly,¹ as the Commission clearly explained in [Order No. 26,684](#) at 3 in ordering the October 3, 2022 filing, a new filing would be unlawful under [RSA 378:38](#) at this time as October 3, 2022 was the five-year statutory deadline for plan submission. Although the filing time frame was short, it was required under the law, and the Commission provided ample additional time for supplementation, May 1, 2023, as permitted under [RSA 378:38-a. Order No. 26,684](#) at 9. Again, this order was never appealed—the petitioning utility, Liberty Utilities (EnergyNorth Natural Gas) Corp., dba Liberty Utilities (“Liberty”), never even moved for rehearing and timely submitted the waiver—but was plainly proper, in any event.
7. Third, a new plan would contravene appellate law, including the requirements of [RSA 541:3](#) and [RSA 541:6](#), by overturning the October 3, 2022 filing requirement of Order Nos. [26,684](#) and [26,702](#) without compliance with mandated procedures.

¹ In consideration, not importance.

8. Fourth, a new plan provides relief beyond that necessary to reasonably, adequately and fairly address the [Motion](#).
9. The first three proposed questions in the [Motion](#) go to the propriety of Commission adoption of the so-called Unitil working group recommendations developed in [Docket No. DG 19-126](#). See [Motion](#) at 3-4, specifically including FN 2 and 9. This issue was discussed in [Order No. 26,684](#) and the motions for rehearing filed by the OCA and intervenor, Conservation Law Foundation, in response to the same in [DG 17-152](#). See Tabs 142 and 145. Question 4 concerns the appropriateness of the “two-part” (October 3, 2022 and May 1, 2023) LCIRP filing for this proceeding. The answers to these questions do not have to be litigated under a new plan as the Commission is clearly prepared to consider the underlying issues in relation to the complete [LCIRP](#) filing. Pursuant to final [Order No. 26,702](#), the Commission rolled the matter into this proceeding, holding:

“... [T]he parties will have a complete opportunity to litigate whether Liberty’s full 2022 LCIRP complies with the statute in Docket DG 22-064. Their arguments will be fully heard and considered before the Commission issues any order approving or denying the next LCIRP. They suffer no hardship by waiting to raise their arguments when they can be applied to an actual completed LCIRP.”

[Id.](#) at 7-8. The November 17, 2022 [order of notice](#) for this matter confirms this:

“The filing presents, *inter alia*, issues related to whether Liberty’s planning process is adequate in light of the requirements set forth in RSA 378:38 and RSA 378:39; and whether Liberty’s filing adequately addresses the Commission’s requirements set forth in Order Nos. 26,684 (September 14, 2022) and 26,702 (October 12, 2022). Accordingly, an adjudicative proceeding will be convened to address these issues.”

See id. at 1.² Indeed, the Commission’s determination under [Order No. 26,702](#) that the issues raised under [DG 17-152](#) were moot, as they concerned a planning period that had expired by operation of law, left all undecided issues raised under [DG 17-152](#) subject to revival, as appropriate, in this proceeding. See [Order No. 26,702](#) at 2-3, 7-8.

10. Thus, consistent with its orders and obvious intent that the complete [LCIRP](#) be litigated only after the supplemental filing, the Commission may and should, with any grant of the [Motion](#), simply completely stay the proceedings, including the May 1, 2023 supplemental filing, until any final decision on the [Motion](#). Any and all analysis for the supplementation not impacted by the outcome of the [Motion](#) could still be developed in the interim, and the actual supplemental filing completing the [LCIRP](#) in accord with the [Motion](#)’s outcome could then be filed and litigated without undue prejudice to any party.³ While this path may require an extension of the May 1, 2023 supplementation deadline, it will, hopefully, ultimately lead to a quicker final result by utilizing the built-in “down time” between now and the supplementation deadline to convince the New Hampshire

² While the order of notice refers to the Commission’s “requirements” of Order Nos. 26,684 and 26,702, Order No. 26,684 makes clear that the relevant discussion is non-binding.

³ It seems highly unlikely, and fertile grounds for successful appeal should it nonetheless prove true, that the Commission would find the [LCIRP](#) to be inadequate and not approvable under [RSA 378:39](#) due to any problems caused by the Commission’s own orders. Moreover, through the approval of settlement agreements and otherwise, the Commission authorizes and orders changes to LCIRPs all of the time which, if they are not unfairly prejudicial and otherwise appropriate, are beyond challenge. Thus, there is no likelihood of undue prejudice to any party supporting the [Motion](#) to proceed as Clark urges; whereas, as discussed below, there is real prejudice to Clark in proceeding under a result which requires or allows for a new LCIRP filing.

Supreme Court to process a major dispute between the Commission and parties up front that could otherwise only be resolved at the end of the proceedings.⁴

11. Fifth, New Hampshire Supreme Court precedent requires prospective application of the decision on the [Motion](#) should the result require or otherwise allow a new LCIRP filing.

“The Supreme Court of New Hampshire has applied its opinions and decisions prospectively whenever it has thought justice to be better served by doing so.”

Hampton Nat Bank v Desjardins, 114 N.H. 68, 314 A.2d 654, 658 (1974).

12. Justice would unquestionably be better served here by a prospective application of the New Hampshire Supreme Court’s decision on the [Motion](#) which limited the decision’s precedential value to future proceedings, if the result would otherwise require or allow a new LCIRP filing in this matter.
13. In reliance on [Order No. 26,684](#), the October 3, 2022 [LCIRP](#) filing required thereunder and that filing’s correction of planning improprieties Clark alleged in [DG 17-152](#), Clark withdrew the allegation of improprieties. *See* Tabs 146 and 131, respectively, in [DG 17-152](#).⁵ As discussed in Clark’s [motion to dismiss](#), [testimony](#), [position statement](#) and other pleadings and filings in [DG 17-152](#),

⁴ Clark respects and understands the difficulty of the Commission’s decision-making, usually does not dispute its reasoning and, even when he does dispute it, acknowledges that support may often be found through the positions of other parties. However, Clark believes that the OCA is correct in characterizing the underlying dispute, *i.e.*, concerning the propriety of Commission adoption of the so-called Unitil working group recommendations developed in [Docket No. DG 19-126](#), as one in which the Commission’s decision, to only support the recommendations with certain substantial modifications, is not supported by any party. *See* [Motion](#) at 4 FN 2 and 9. Together with the importance of the issue to similar LCIRP proceedings going forward, this almost guarantees a post-Commission proceedings appeal of the issue if the dispute is not settled through the [Motion](#) up front.

⁵ Out of appreciation for the correction and respect for the request made by Liberty’s counsel at the conclusion of the final hearing in [DG 17-152](#), Clark limits discussion herein to minimal necessary reference to the record.

Liberty had been on an unreasonably expansive path contrary to the critical need for substantial immediate and long-term reductions in both natural gas emissions and natural gas dependency. As discussed in Clark's response (Tab 131) to the [settlement agreement](#) proposed in [DG 17-152](#), Liberty's planning required correction for other reasons, as well. The October 3, 2022 filing provides substantial necessary corrections in Liberty's planning that, together with Commission adoption of the [DG 19-126](#) working group recommendations, will set Liberty on the right course, as Clark noted in withdrawing his objections to the *uncorrected* proposed [DG 17-152](#) settlement agreement based (conditioned) on the [LCIRP](#) and its corrections. *See* Tab 146 in [DG 17-152](#).⁶

14. Any result from a decision on the [Motion](#) which paves a backslide in the corrections made under the October 3, 2022 [LCIRP](#) by requiring or allowing a substitute filing would unlawfully retroactively deprive Clark of vested rights in such corrections and the [LCIRP](#) under (i) the filing requirements of [RSA 378:38](#), [Order No. 26,684](#) and [Order No. 26,702](#), (ii) [RSA 541:3](#), [RSA 541:6](#), appellate principles and the doctrine of *stare decisis*, (iii) the [LCIRP](#) itself, (iv) Clark's reasonable reliance on [Order No. 26,684](#) and the [LCIRP](#) in withdrawing his pleading alleging improprieties, and (v) the outcome required by New Hampshire Supreme Court precedent as discussed in paragraphs 11 and 12 above. Although Clark should still be entitled to revive his claim under such circumstances,⁷ he

⁶ Clark was hopeful that the withdrawal would help clear the path for Commission adoption of the [DG 19-126](#) working group recommendations. *Id.*

⁷ Clark withdrew the pleading, he did not waive the claim, but does not currently assert revival: the propriety of revival may only be for determination upon any submission of a proposed substitute LCIRP.

would be severely unfairly prejudiced by the substitution of a claim for established rights.

15. Moreover, such a result would be plainly contrary to the requirements of RSA 378:37-40, the public interest and the standard of service Liberty is required to provide under the circumstances and [RSA 374:1](#), as discussed in Clark's [DG 17-152](#) pleadings (*see, e.g., motion to dismiss, testimony, position statement* and withdrawal of pleadings (Tab 146)).
16. Before the October 3, 2022 [LCIRP](#), Liberty was on an unreasonable, unsustainable path of expansion. Under the planning discussed in its last LCIRP (the [DG 17-152 plan](#)) and in [Docket No. DG 21-008](#) just last year, Liberty was still intending to *increase* its natural gas supplies by another 27,000 Dth per day during this planning period, was projecting an increase in its natural gas use until at least 2038/2039, planned to have well over 100,000 natural gas dependent customers 20 years from now and contemplated no real transition to renewable energy sources during that time. *See* [Testimony of Francisco C. DaFonte and William R. Killeen \(Jan. 20, 2021\)](#) filed in [DG 21-008](#) at 31:1-32:3 (including Table 3); Tabs 1 and 131 in [DG 17-152](#). The [LCIRP](#) makes significant progress in correcting these problems, including making no new incremental natural gas supply request during this planning period and substantially reducing demand and growth projections. *See* Tab 146 in [DG 17-152](#); [LCIRP](#) at p. 2 (specifically including Table 1). Clark supports Commission adoption of the [DG 19-126](#) working group recommendations, but not at the cost of the progress in both emissions and dependency reductions reflected in the October 3, 2022 [LCIRP](#).

We need the October 3, 2022 [LCIRP](#)'s commitment to immediate, concrete, positive results.

WHEREFORE, for the reasons expressed, Clark respectfully requests that the Commission:

- A. Grant or deny the [Motion](#) and every request for relief concerning each of the four proposed questions set forth therein as discussed herein; or
- B. Schedule a hearing on this matter; and
- C. Grant such other and further relief as is just, lawful and otherwise appropriate.

Respectfully submitted,

Terry Clark,

By his Attorney:

Dated: January 3, 2023

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

CERTIFICATE OF SERVICE

I hereby certify that I have, on this 3rd day of January, 2023, served an electronic copy of this pleading on every other person/party identified on the Commission's service list for this docket by delivering the same to the e-mail address identified on the Commission's service list for the docket.

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