

Richard Husband
10 Mallard Court
Litchfield, NH 03052

August 5, 2015

Attorney General Joseph Foster
c/o attorneygeneral@doj.nh.gov

**RE: DG14-380
Liberty Utilities (EnergyNorth Natural Gas) Petition for Approval of
Long-Term Firm Transportation Agreement**

Dear Attorney General Foster:

This serves as a follow-up to my July 28, 2015 letter to the Public Utilities Commission (“PUC”). Although you were copied on this letter, I have attached it to this e-mail for your convenient reference.

As I have not received any response from the PUC or your office in response to my previous letter, I thought that it might help to try and rearticulate my position and concerns. Please understand that, although the following discussion will be largely legal, I am writing this as a concerned citizen only, entirely on my own behalf, and not in any representative capacity. Essentially, I am hoping that, if the following legal discussion is incorrect, you (or someone at the PUC) will point out the flaws; but if it is correct, either on its own or at your urging, the PUC will remedy the situation.

The concerns I have with respect to the PUC’s narrow focus on the proposed Liberty Utilities’ gas agreement, and refusal to consider the greater issue of the NED pipeline’s negatives, may be summarized as follows:

- The due process clauses of our federal and state constitutions apply to administrative agency proceedings, including PUC proceedings. *See Appeal of Public Service Co. of New Hampshire*, 122 N.H. 1062 (1982); *Appeal of Morin*, 140 N.H. 516 (1995); *In re Union Telephone Co.*, 160 N.H. 309 (2010).
- The requirements of due process are triggered, *inter alia*, when there is a property interest at stake. *See In re Union Telephone Co.*, *supra*, 160 N.H. at 321-322. Thousands of property interests are at stake in the proceedings before the PUC. The gas agreement at issue necessarily brings with it the pipeline and all of the negative property impacts of federal eminent domain: forced easements, loss of use and enjoyment, diminished property values, etc.
- Among other requirements, due process demands an “opportunity to be heard,” *see Hagar v. Reclamation Dist.*, 111 U.S. 701, 708 (1884). Or, as the New

Hampshire Supreme Court has put it: “the opportunity to present one's case ...”
See Appeal of Morin, supra, 140 N.H. at 518.

- From where I stand, the PUC’s refusal to consider affected property owners’ arguments against the pipeline in its decisional analysis, takes away their due process right to be heard and present their case.
- Although the PUC cites no case law or any other legal source to support its refusal to consider the pipeline in its decision, see <http://www.puc.nh.gov/Gas-Steam/Public%20Comments%20on%20PA.pdf>, my understanding is that it may be claiming that it cannot consider the pipeline due to “preemption” or lack of “jurisdiction,” given that the federal government and the Federal Energy and Regulatory Commission (“FERC”) have decisional authority over whether the pipeline is approved. But the pipeline has not been approved as of yet, may never be approved—there has not even been a submitted application for certification—and it is clear that the PUC cannot, and has no intention of even trying, to substitute its decision-making for FERC’s: all that is being asked is that the PUC, as a state agency, follows state law and standards in a matter before it, which is entirely within its jurisdiction.
- My reading of applicable state law and standards is that the PUC not only has the ability, but the obligation, to consider the negative impacts of the NED pipeline and related concerns of the public at large, in its decision. This conclusion is grounded in two New Hampshire Supreme Court cases referenced in my July 28, 2015 letter: *Waste Control Systems, Inc. v. State*, 114 N.H. 21 (1974) and *Boston & Maine R.R. v. State*, 102 N.H. (1959). As I read these cases, the PUC’s analysis of what is in the “public interest,” i.e., “best interests of New Hampshire” (as the PUC has repeatedly stated the standard in the current proceedings) and “the public good,” not only may, but should, go beyond limited consideration of the claimed “need” for the proposed agreement before it and its impact on just Liberty Utilities customers. Per the *Boston & Maine R.R.* case, the New Hampshire Supreme Court states that any analysis of the “public good” should involve “not only the needs of particular persons directly affected by ... services” (as is the PUC’s intended analysis) but “the needs of the **public at large.**” By specifically referencing the “public” or “public at large,” the New Hampshire Supreme Court is referring to needs “relating to or affecting **the whole people** of [the] state ... **not limited to any particular class of the community.**” See <http://legal-dictionary.thefreedictionary.com/Public>. Per the *Waste Control Systems* case, the New Hampshire Supreme Court states that “public interest” has a meaning analogous to the “public good,” and also means consideration of the needs of the “**public at large**”--in addition to the “general welfare of the utility involved.”. The PUC is essentially just considering the utility involved in the current proceedings, not the needs of (negative impacts on) the state as a whole.
- Consideration of the impact of the PUC’s decision on the public at large obviously includes consideration of all of the impacts that will result from that decision: on private and town property rights, our farming and tourism economies, sensitive conservation and environmental areas, historic areas and

artifacts, safety concerns, diminished town tax bases and increased town response costs, potential harm to numerous town drinking water aquifers and other public waters, etc., It is ridiculous that a decision having such magnitude should rest solely on what a company standing to profit off it *claims* is a need,* and an impact on a relative handful of customers, rather than the state as a whole.

- If the PUC's stated decisional analysis stands, Over 100 public comments establishing that the NED pipeline is not in "the best interests of New Hampshire" may be swept under the rug with perhaps a footnote in the PUC's decision. This is not right, it is not fair, it is not comprehensive reasoning, and it is completely contrary to the purpose of the public comments portion of the PUC proceedings.
- If there are one or more absolutely controlling cases in the 1st Circuit standing for the direct proposition that the PUC absolutely does not have the jurisdiction, or otherwise the ability, to consider the NED pipeline and public concerns relating to the pipeline in its decision, the PUC should—on its own or at your urging-- identify them in its reasoning *not* to consider the pipeline, so concerned citizens such as myself may understand the reasoning and know that the PUC's decision to deny the public a voice on important public matters is without choice. Again, "the [PUC] has broad discretion to act in the public interest" here. *Harry K. Shepard, Inc. v. State*, 115 N.H. 184, 185, 339 A.2d 2 (1975); *Browning-Ferris Industries of New Hampshire, Inc. v. State*, 115 N.H. 190, 339 A.2d 1 (1975). If the PUC has any debatable room to exercise that discretion in the "best interests of New Hampshire", it should consider the pipeline, as that is its state law obligation in carrying out a state agency function; otherwise, without clearly binding authority precluding such consideration, an awful lot of citizens will just see a cop-out.

I would greatly appreciate it if Executive Director and Secretary Debra Howland would add this letter to the public comments of this proceeding, in supplementation of my prior comments.

Thank you for your time and courtesy.

Sincerely,



Richard Husband

cc: Debra Howland, Executive Director and Secretary (via e-mail)

*Particularly when that company (Liberty Utilities) is ultimately owned by another company (APUC) having a huge investment in the pipeline project, at least one identical member on its Board of Directors, and therefore an incentive, if not influence, to inflate the claimed "need." See transcript of July 22, 2015 hearing.