THE STATE OF NEW HAMPSHIRE

SUPREME COURT

2015 TERM

No. 2015-0729

APPEAL OF RICHARD M. HUSBAND BY PETITION
PURSUANT TO R.S.A. 541:6 AND SUPREME COURT RULE 10

PETITIONER'S OBJECTION TO MOTION FOR SUMMARY DISPOSITION

The petitioner, Richard M. Husband, hereby respectfully objects to the Motion for Summary Disposition ("Motion") filed by Liberty Utilities (EnergyNorth Natural Gas) Corp. d/b/a Liberty Utilities ("EnergyNorth"), stating as follows:

1. The Motion is grounded in erroneous arguments and is without merit.

2. The Motion contends that the petitioner lacks standing to appeal the Public Utilities Commission ("PUC") rulings at issue because: (a) the petitioner was not a party to the PUC proceeding (by intervention or otherwise); and (b) the petitioner has not suffered any injury in fact. *See* Motion, preamble and *generally.*

3. As is plainly pled, the petitioner is appealing the PUC's rulings as a "person directly affected thereby" under R.S.A. 541:3 and 6, not as a party. *See* petitioner's petition ("Petition") at 9-10; petitioner's appendix ("Appendix") at 66. Thus, the issue is whether the petitioner meets such status—as a "person directly affected"—not whether he was ever a party. The Motion's arguments in this regard are confusing, and misleading.

4. While the petitioner avers that his injuries do meet the level of party standing, R.S.A. Chapter 541-A and the PUC's own Rule 203.18 adopted under the statute plainly do not require such a level of standing for public comment submitter standing. *See* Petition at 34-35.[1] They do not have to require such a level: the statutory violation alone may provide standing. *Cf. Warth v. Seldin*, 422 U.S. 490, 500 (1975)("The actual or threatened injury required by Art[icle] III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing."); *Robins v. Spokeo, Inc.*, 742 F.3d 409, 412 (9th Cir. 2014)("the violation of a statutory right is usually a sufficient injury in fact to confer standing").[2] All that is required for public comment submitter standing under R.S.A. Chapter 541-A is that the submitter be an "interested" person. R.S.A. 541-A:11, I(a); *see* Appendix at 163 (text of statute). The term "interested" in R.S.A. 541-A:11, I(a) clearly identifies a much larger class of potential appellants than "directly affected" under R.S.A. 541:3.[3] *See* Appendix at 163, 165 (text of statutes). This makes perfect sense, as

(a) a "party standing requirement" for public comment submitters would allow state agencies to ignore many relevant, meaningful comments—

[1] To hold otherwise would render the distinctions made between "interested persons" and "parties" in R.S.A. Chapter 541-A, and the distinction made between the status of intervenors and "affected" persons entitled to submit public comments under Puc 203.18, meaningless. *Id.*

[2] *Robins v. Spokeo, Inc.* is on appeal before the United States Supreme Court and was argued November 2, 2015, *see* http://www.scotusblog.com/case-files/cases/spokeo-inc-v-robins/, such that a decision may issue at any time. Should this Court believe that the petitioner lacks standing under its current jurisprudence, the potential impact the final *Robins* decision may have on the matter is one more reason why the Court should deny the Motion.

[3] Although, again, the petitioner avers that he meets the "directly affected" standing requirement of R.S.A. 541:3, in part because the failure to consider his comments as an established "interested" person is a huge injury confirming "directly affected" status.

from conservation groups, historic societies, numerous persons with real established "interests" in the proceedings but not the equivalent of "party" standing—with impunity, despite the express mandate under R.S.A. Chapter 541-A that they be *fully considered* if the submitter has shown themselves to be an "interested" person. *See* R.S.A. 541-A:11, I(a) and R.S.A. 541-A:12, I; *see* Appendix at 163, 165 (text of statutes);

(b) the improper rejection of public comments, irrelevant to party standing, is a paramount injury not only to submitters, but the whole administrative process and legislative intent in mandating consideration of comments;

(c) the important public policies underlying comment submission, to encourage public participation in the administrative process so as to educate agencies and thereby help to ensure informed decision-making, *see* Petition at 17-18,[4] can only be fostered by an enforcement mechanism.

5. The petitioner plainly held "interested" person status in the PUC proceeding, by his extensive participation in the matter alone, but also by his residency in a town that will be numerously negatively affected by the PUC's rulings, by that town's submission of its own public comments echoing the petitioner's concerns (also ignored), *see* Appendix at 121, and by the drinking water, property rights, economic, aesthetic and other interests of the petitioner at risk under the PUC's rulings. *See* Petition at 33-38.

[4] Quoting *Chocolate Mfrs. Ass'n of United States v. Block*, 755 F.2d 1098, 1103 (4th Cir. 1985).

6. The petitioner also clearly sustained injuries in fact by the PUC's rulings, affording "directly affected" person status and standing under R.S.A. 541:3, as:

- Again, the PUC's rulings denied the petitioner's right to have his public comments "fully considered," as guaranteed by (a) statute, R.S.A. Chapter 541-A and particularly Sections 11 and 12 thereof, *see* Petition at 19, (b) the PUC's own rule, Puc 203.18, adopted under the statute, *see* Petition at 20, and (c) the fundamental due process "right to be heard" incorporated into R.S.A. 541-A:12 and Puc 203.18 and otherwise applicable to PUC proceedings, *see* Petition at 20-22.
- The violation of the petitioner's statutory right to be heard on his public comments is a sufficient **injury in fact**. *Cf. Robins v. Spokeo, Inc.*, *supra*, 742 F.3d at 412; *cf. also Warth v. Seldin*, *supra*, 422 U.S. at 500;
- The violation of the petitioner's due process rights alone constitutes a sufficient **injury in fact**. *See* Petition at 20-22, and cases cited therein;
- The PUC's failure to follow its own rule requiring comment consideration, Puc 203.18, constitutes **injury in fact**. *See* Petition at 20 (citing *Attitash Mt. Service Co. v. Schuck*, 135 N.H. 427, 429 (1992)(law well-settled that administrative agencies must follow their own rules and regulations); *In re Union Telephone Co.*, 160

N.H. 309, 317 (2010)("[T]he PUC may not act contrary to the plain meaning of [its own] Rule 431.01.");

- The PUC's failure to consider the public comments submitted by the petitioner's Town of Litchfield, in accord with the petitioner's comments, constitutes **injury in fact** as the petitioner was entitled to have the comments of his lawful representatives properly considered—particularly as the town is indisputably being "directly affected" by the pipeline as Litchfield is in its path, with wetlands, the town's drinking water aquifer, numerous wildlife and other environmentally sensitive areas, and approximately 67 properties at risk. *See* Petition at 8, 10, 37 Footnote 9; Appendix at 121. **Indeed, the fact that Litchfield clearly has "directly affected" standing under R.S.A. 541:3 is a compelling reason that the petitioner should also be considered to hold such status: it would be inconsistent and against all trends of increasing citizen involvement and transparency in governmental processes if a citizen of a town, which only exists and acts through its citizens, were found to have lesser public comment rights respecting matters affecting the town, than the town;**
- The diminution in value of the petitioner's property caused by the "fear factor" associated with an enormous, high-pressure gas pipeline, both on an individual property basis (as directly

impacted) and due to the general diminution in town property values caused by a pipeline running through so many town properties, *see* Petition at 8, 36-37, constitutes economic **injury in fact**;

- The additional town taxes the petitioner will have to pay due to the reduction in Litchfield's tax base caused by the diminution in value of so many of its properties constitutes economic **injury in fact**[5];
- The PUC's rulings have or are reasonably likely to cause **additional injuries in fact** to the petitioner by harm to his littoral property rights, *see* Petition at 10, 35-36, health (by the running of the pipeline through his drinking water), *see id.*, and aesthetic interests as a lover of nature (by the damage caused to Litchfield wetlands, wildlife and other environmentally sensitive areas). *See id.* This Court may take judicial notice of its own docket and the pleadings and supporting affidavits recently considered by the Court in *Richard M. Husband, et. al. v. Town of Hudson*, Supreme Court Case No. 2015-0371, to confirm that the petitioner's interests in protecting the water level of his shoreline, nature and

[5] The petitioner believes that he has sufficiently raised this issue insofar as he directly raised it in his public comments, *see* Appendix at 105, and argues in both his motion for rehearing and Petition that he has been directly affected by (i) his status as a citizen of Litchfield, and (ii) the general diminution in town property values caused by the pipeline and "fear factor." *See* Petition at 8, 10, 35-37; Appendix at 66-67. Should the Court disagree, the petitioner hereby moves (or will move by separate motion, if the Court requires) to be allowed to raise the issue now, if late, in the interest of justice, as matters—especially important ones such as those *sub judice*—should be decided on the merits and not dismissed for lack of standing unless there really is none.

town (as a long-time town conservation commission member and otherwise) are not trivial, but significant;

- Any lowering of the petitioner's shoreline level by the blasting associated with the pipeline—again, reasonably likely damage, given that such blasting damages aquifers, *see* Petition at 10, 35-36; Appendix at 122 ("blasting may damage wells, aquifers and buildings …")—will result in further economic injury in fact to the petitioner;
- Contrary to the EnergyNorth's assertion, the petitioner has plainly alleged more than a "mere interest in a problem." *See* Motion at 7, ¶ 12.

7. EnergyNorth's Motion incorrectly contends that only economic injuries constitute injuries in fact, and only its customers can be found to suffer cognizable economic injuries by the PUC's rulings. *See* Motion at 4-5, ¶¶ 7 ("An injury in fact occurs when the appellant has suffered a direct economic injury") and 8 ("to the extent that the Order results in any alleged 'injury in fact' or 'direct economic injury,' it can only be to customers of the utility.").

8. EnergyNorth grounds the first argument in *Appeal of Richards*, 134 N.H. 148, 156 (1991). *See* Motion at 4, ¶ 7 However, (i) *Appeal of Richards* does not limit injuries in fact to economic injuries, *see generally*, (ii) R.S.A. 541:3 does not limit "directly affected" appellants to those with economic injuries, and (iii) EnergyNorth has not otherwise cited any authority to support its position. Nor would one expect to find it: EnergyNorth's interpretation of the law here would

preclude conservation and environmental groups, historic associations, town officials, state representatives, and many other extremely interested and directly affected citizens without economic injuries from having any effective (enforceable by appeal) voice in agency proceedings—even concerning matters within the townships, particular knowledge and (with respect to town officials and state representatives) official purview of such individuals. Thus, the PUC would be free to completely disregard substantial negative impacts caused by its rulings, even in "public interest" determinations such as the one *sub judice,* despite its obligation to act in the public's best interests. *See, e.g., Waste Control Systems, Inc. v. State*, 114 N.H. 21, 24 (1974); *Boston & Maine R.R. v. State*, 102 N.H. 9, 10 (1959); *Harry K. Shepard, Inc. v. State*, 115 N.H. 184, 185 (1975); *Browning-Ferris Industries of New Hampshire, Inc. v. State*, 115 N.H. 190, 191 (1975). This is untenable. In any event, as noted above, the petitioner has sustained more than sufficient economic injury.

9. EnergyNorth grounds its second argument in the PUC's rulings, which it claims limit cognizable standing injuries in this matter to those involving its customers—the petitioning utility's customers. *See* Motion at 5, ¶ 8, Appendix at 94-95, ¶ 4. Whatever the PUC's rulings may ostensibly provide, this is thankfully not the law, for it would preclude even property owners whose homes are being bulldozed from claiming sufficient interest to intervene, unless they will be customers, as well as victims, of the pipeline. This is ludicrous. With all due respect to the PUC: the PUC does not have the authority to refuse the standing provided under R.S.A. Chapter 541-A and R.S.A. 541:3, this Court is the final

arbiter of what confers standing under the law, and the petitioner has appealed the PUC's rulings.

10. EnergyNorth additionally claims that the petitioner lacks standing because "approval to construct the pipeline will come from the Federal Energy Regulatory Commission ("FERC"), not the Commission ... As a result, the injuries that [the petitioner] alleges ... do not result from [the PUC's decision on the merits] because the Commission has no role in approving the construction of the pipeline." Motion at 5, ¶ 9. EnergyNorth is trying to separate the harm caused by the PUC's rulings from the harms of the pipeline, suggesting that these harms will only result upon the happening of subsequent FERC approval, and not result from the PUC's approval. EnergyNorth places much in the argument that the pipeline agreement approved by the PUC is "not effective unless the NED Pipeline is approved, constructed and providing service." Motion at 5, ¶ 9; Appendix at 24. However, even if the initial construction harms are removed from the equation, the bulk—including health and safety issues, property devaluation and continuing injury to drinking water aquifers, conservation, wildlife and other environmentally sensitive areas caused by repair, leaks, more damaging unplanned "events" and/or the herbicides used to limit growth in the pipeline's path—will be triggered by gas authorized under the PUC's approval. Besides, the Petition already thoroughly discusses the nexus between the PUC's approval and the pipeline that mandated consideration of all of its negative impacts. *See* Petition *generally*, and particularly 13-15.

11. The Motion contends that "[t]he Court has already ruled on essentially this same issue in *Appeal of New Hampshire Right to Life*, 166 N.H. 308 (2014)." *Id.* at 6, ¶ 11. The Petition distinguishes this decision, as its import pertains to "generalized" claims of harm to the public, not the injuries to the petitioner claimed in this matter. *See* Petition at 37 and Footnote 9. But it is otherwise clearly not this case. As noted in the Motion, *Appeal of New Hampshire Right to Life* concerns an appellant's claimed right of intervention based on the "mere filing of a written complaint" in an agency proceeding. *See id.* at 6, ¶ 11. We are not concerned with intervention but public comment rights, as previously discussed, and the petitioner's standing claim rests on far more than the filing of a complaint, including following the subject proceeding for months, submitting nearly twenty pages of oral and written public comments, attending all or part of the three days of the hearing on the merits, actively protesting the proceeding, petitioning for intervention (albeit the petition was withdrawn), researching and drafting the nearly 50-page (counting exhibits) motion for rehearing underlying this appeal, *see* Petition at 34, reviewing and critiquing the expert testimony in the matter, Appendix at 106, and tracking down numerous cases, FERC and other pipeline related documents, and arguments, to support his comments to the PUC. *See* Appendix at 105-120.

12. The Motion implies that the limited purpose of the petitioner's intervention petition—to contest PUC scheduling matters—was pled as his only interest in the PUC proceeding. *See id.* at 2, ¶ 3. This is plainly not the case, both from a review of the intervention petition, *see* Supplemental Appendix to Motion for

Summary Disposition at 1, and from all the petitioner has shown in his Petition, its Appendix and this pleading.

13. The Motion concludes that the petitioner is precluded from appealing because he withdrew his intervention petition. *Id.* at 7, ¶ 12. But EnergyNorth has offered no support for the proposition that one withdrawing a (limited-purpose or otherwise) petition to intervene in an agency proceeding thereafter relinquishes all public comment submitter rights. The petitioner's foray into intervention establishes nothing more than his extreme interest in the PUC proceeding, both by the time spent on the intervention pleadings and by the interest exhibited by the protest of the proceeding underlying the intervention petition.

14. Beyond all the aforesaid, this matter is not appropriate for summary disposition under Supreme Court Rule 25 because there are issues of great general importance concerning public comments and appellate rights respecting the same which are likely to arise again. Summary disposition would not only ill afford the breath of discussion and consideration warranted these issues, it would also not afford any precedential value per the rule itself. Indeed, the petitioner would have filed for summary reversal under the rule,[6] if not for the lack of precedential value, as he believes the issues raised in this matter should be decided to give the public and state agencies needed guidance going forward.

15. The petitioner reserves his right to argue for any appropriate exception to, or extension of, existing law to allow for consideration of this appeal in any future briefing on this matter. *See* Petition at 38.

[6] For the reasons expressed herein and in the Petition, there is no defense to this appeal beyond the standing argument.

WHEREFORE, for the reasons expressed, the petitioner respectfully requests that this Honorable Court:

A. Deny the Motion; and/or

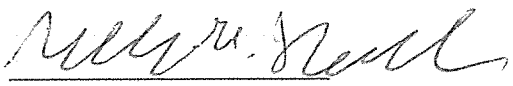
B. Grant such other and additional relief as is just and proper.

Respectfully submitted,

The petitioner,

Richard M. Husband,

Dated: January 12, 2016

By: 

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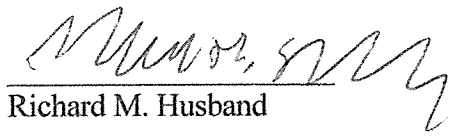
CERTIFICATE OF COMPLIANCE

I, Richard M. Husband, Esquire, hereby certify that on the 12th day of January, 2016, I served copies of the foregoing on the service list noted in the Supreme Court's January 4, 2016 notice of docketing of this matter, either by depositing the same in the United States mails, first class, postage prepaid, or by hand delivery.



Richard M. Husband