

STATE OF NEW HAMPSHIRE

PUBLIC UTILITIES COMMISSION

February 17, 2016 - 10:02 a.m.  
Concord, New Hampshire

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RE: DG 15-362  
LIBERTY UTILITIES (ENERGYNORTH NATURAL  
GAS) CORP. d/b/a LIBERTY UTILITIES:  
Petition for Expansion of Franchise to Towns  
of Pelham and Windham and Waiver of the  
Tariff Filing Requirements Pursuant to  
Puc 1603.02(a).  
(Supplemental prehearing conference)

PRESENT: David Wiesner, Esq.  
(Presiding as Hearings Examiner)

Adele Leighton, Clerk

APPEARANCES: Reptg. Liberty Utilities (EnergyNorth  
Natural Gas) Corp. d/b/a Liberty Utilities:  
Sarah B. Knowlton, Esq. (Rath Young...)  
  
Reptg. Northern Utilities, Inc.:  
Patrick H. Taylor, Esq.  
  
Reptg. Residential Ratepayers:  
Donald Kreis, Consumer Advocate  
Pradip Chattopadhyay, Asst. Consumer Advocate  
Office of Consumer Advocate  
  
Reptg. PUC Staff:  
Alexander F. Speidel, Esq.  
Stephen P. Frink, Asst. Dir./Gas & Water Div.

Court Reporter: Steven E. Patnaude, LCR No. 52

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**P R O C E E D I N G**

1  
2 HEARINGS EXAMINER WIESNER: Good  
3 morning. I'm David Wiesner. I'm one of the Staff  
4 attorneys here at the Commission. I will be serving as  
5 Hearings Examiner for today's supplemental prehearing  
6 conference. I've been designated to serve in that role.

7 This is Docket DG 15-362, Petition for a  
8 Franchise Approval in the Towns of Pelham and Windham by  
9 Liberty Utilities (EnergyNorth Natural Gas) Corp. I  
10 understand this is a supplemental prehearing conference,  
11 which was scheduled to make Northern Utilities a mandatory  
12 party in this proceeding for information and positions to  
13 be accepted from the Parties regarding the potential  
14 existence of a existing franchise in the Town of Pelham by  
15 Northern.

16 Mr. Speidel, are there any preliminary  
17 matters we should attend to before we take appearances  
18 from the Parties?

19 MR. SPEIDEL: Not to my knowledge,  
20 Mr. Wiesner.

21 HEARINGS EXAMINER WIESNER: Thank you.  
22 I will then invite the parties to enter their appearances  
23 for the record.

24 MR. TAYLOR: Patrick Taylor, on behalf

1 of Northern Utilities.

2 HEARINGS EXAMINER WIESNER: Good  
3 morning.

4 MS. KNOWLTON: Good morning. Sarah  
5 Knowlton, from the firm of Rath, Young & Pignatelli, here  
6 today for Liberty Utilities (EnergyNorth Natural Gas)  
7 Corp.

8 HEARINGS EXAMINER WIESNER: Good  
9 morning.

10 MR. KREIS: Good morning, Mr. Hearing  
11 Officer. I'm Donald Kreis, the newly appointed Consumer  
12 Advocate, back in this room formally for the first time in  
13 about seven and a half years. Honored to be here on  
14 behalf of residential utility customers. To my immediate  
15 left is the Assistant Consumer Advocate, Pradip  
16 Chattopadhyay.

17 HEARINGS EXAMINER WIESNER: And, let me  
18 take this opportunity to welcome you back, Mr. Kreis, on  
19 behalf of the Commission.

20 MR. KREIS: Thank you, sir.

21 MR. SPEIDEL: Alexander Speidel,  
22 representing the Staff of the Commission, specifically  
23 Stephen Frink, Assistant Director of the Gas and Water  
24 Division.

1 HEARINGS EXAMINER WIESNER: And,  
2 Mr. Speidel, is there any particular order we should  
3 follow this morning? I see Mr. Taylor is sitting up  
4 front. Perhaps, it would be best to let him have the  
5 first word?

6 MR. SPEIDEL: Yes. He is the mandatory  
7 party.

8 HEARINGS EXAMINER WIESNER: Okay.  
9 Mr. Taylor.

10 MR. TAYLOR: Thank you. Regarding  
11 Northern's franchise in Pelham, which is what I understand  
12 we're here to discuss today, the franchise was transferred  
13 to Northern in 1998 by the sale of the propane company,  
14 when Northern acquired the assets of that company,  
15 including its franchise. At the time, Northern believed  
16 that it would be able to deliver natural gas service to  
17 the customers of that company in what was known as "Pelham  
18 Plaza".

19 In 2002, Northern advised the Commission  
20 that natural gas service could not economically be  
21 extended to serve Pelham Plaza customers at that time, and  
22 that the system should no longer be regulated. My  
23 understanding is that the Commission retained regulation  
24 over the propane company, with the understanding that

1 natural gas would eventually come through into the area.

2 The Public Utilities Commission  
3 recognized, in 2006, that the economics didn't justify  
4 natural gas expansion into Pelham at that time. And, in  
5 an order, Order Number 24,689, terminated or approved the  
6 termination of regulated propane service to Pelham Plaza  
7 customers. In that order, the Commission only expressly  
8 approved the termination of service. It didn't speak to  
9 the issue of whether the franchise in the area had been  
10 terminated. And, Northern's tariff continues to identify  
11 Pelham as a town within its gas service territory.

12 But, at this time, Northern hasn't  
13 provided regulated gas service to customers in Pelham  
14 since 2006. And, it has no immediate plans to do so.  
15 And, so, Northern does not intend to hold itself out as  
16 still having a franchise to serve that particular area in  
17 Pelham.

18 However, that doesn't mean that service  
19 to the eastern portion of Pelham may not be economically  
20 viable in the future. And, it's our belief that Liberty  
21 has made proposals, both in this docket, as well as in  
22 another docket for a franchise in Jaffrey, that would  
23 potentially amend the way that the Commission looks at  
24 economic viability of expansion into areas. And, so, to

1 the extent that the Commission grants a franchise to  
2 Liberty in this case, Northern respectfully submits that  
3 such a franchise should not be granted on an exclusive  
4 border-to-border basis throughout the town.

5 Northern's distribution system is  
6 currently very close to the Pelham border. And, it may  
7 yet be the case that it becomes economical to serve  
8 customers within the eastern part of the town. And, in  
9 fact, I have a handout today that I'd like to distribute  
10 to the customers -- I'm sorry, distribute to the  
11 Commission, as well as the other parties, just to  
12 illustrate that.

13 HEARINGS EXAMINER WIESNER: Is there any  
14 objection to that distribution?

15 MR. KREIS: None.

16 HEARINGS EXAMINER WIESNER: Proceed.

17 (Atty. Taylor distributing documents.)

18 MR. TAYLOR: And, so, the handout that  
19 I've just passed out to the parties and brought to the  
20 Bench just illustrates where Northern's distribution  
21 system is in the town of Salem. And, you can see that it  
22 comes right up to the eastern border of Pelham. And, it  
23 also shows Liberty's proposed expansion into the Town of  
24 Pelham, as well as the Town of Windham.

1                   And, so, as you know, RSA 374:26  
2                   indicates that the Commission shall grant permission to  
3                   provide service in a franchise area if it's in the public  
4                   good. And, it's Northern's position that it would not be  
5                   in the public good to foreclose service to potential  
6                   customers in the eastern portion of Pelham, if it becomes  
7                   economical for Northern to do so.

8                   There is a case, of which I'm sure the  
9                   Commission is aware, *Appeal of Public Service Company*,  
10                  that's 141 New Hampshire 13, and that came out in 1996.  
11                  And, in that case, the Commission considered whether --  
12                  well, it considered the potential exclusivity of electric  
13                  franchises. And, in that case, concluded that electric  
14                  franchises are not exclusive as a matter of law, and that  
15                  the PUC is authorized and obligated to grant competing  
16                  electric franchises when doing so is in the public good.

17                  In that case, the Supreme Court outlined  
18                  almost a century of precedent, concluding that the  
19                  Commission must grant competing franchises when it's in  
20                  the public good. And, we believe that the analysis in  
21                  that case and the spirit of that case are equally  
22                  applicable to gas franchises.

23                  Although, I want to be clear that, when  
24                  we talk about "competing franchises", at least in the

1 context of gas utilities, we're not talking about  
2 necessarily competing for the same customers, running  
3 pipes down the same street. That's not what we're talking  
4 about. Our interest is more in serving otherwise unserved  
5 customers, and not being precluded from doing so.

6 And, so, we believe that it's not in the  
7 public good to grant an exclusive border-to-border  
8 franchise that could have the effect of actually  
9 precluding customers from receiving service from a utility  
10 that is closer proximity.

11 And, we also think that exclusive  
12 border-to-border franchises are not consistent with New  
13 Hampshire precedent, holding that the Commission much  
14 grant competing franchises when it's in the public good.  
15 An exclusive border-to-border franchise would effectively  
16 act as a preemptive determination that competing  
17 franchises within a town cannot be in the public good.  
18 And, we believe that's inconsistent with the analysis in  
19 *Appeal of Public Service*. And, at the very least, there  
20 should always be a case-by-case determination of what  
21 suits the public good.

22 HEARINGS EXAMINER WIESNER: Ms.  
23 Knowlton.

24 MS. KNOWLTON: Good morning. The

1 Company is pleased to hear that Northern doesn't have any  
2 claim to serve in Pelham. Certainly, the facts bear that  
3 out, that Northern has not -- has no assets in Pelham, and  
4 that it's indicated no intention to serve in Pelham for  
5 quite some time.

6 Liberty Utilities has been in  
7 communications with Pelham, as well as Windham, with  
8 regard to potential service there, which is what caused  
9 the Company to initiate this docket. The Town of Pelham,  
10 in fact, has told the Company that it had attempted to --  
11 it had reached out to Northern to see whether Northern had  
12 any interest in serving the town and was told that it did  
13 not.

14 I would note that both the Town -- Towns  
15 of Pelham and Windham have filed letters in this docket  
16 indicating their support of Liberty's request to serve in  
17 Pelham. The Greater Londonderry Chamber of Commerce has  
18 also filed a letter with the Commission on behalf of its  
19 325 member businesses, asking that the Commission approve  
20 the Company's Petition for Franchise Rights to Serve  
21 Windham and Pelham. Articulate in their concern that  
22 their -- the areas served by the Greater Derry and  
23 Londonderry Chamber of Commerce is in an economic  
24 disadvantage because there is no natural gas available,

1 and that they very much would like to see natural gas be  
2 made available, so that they can compete with towns over  
3 the border in Massachusetts.

4 In light of Northern's position that it  
5 has no franchise, we would ask that the Commission  
6 establish a procedural schedule immediately, so that this  
7 docket may truly commence and move forward, so that the  
8 Company's Petition can be considered. And, you know,  
9 certainly, I think that, in the course of this docket, the  
10 Company will make its case about why it should be granted  
11 a franchise in Pelham and in Windham, and why that  
12 franchise should be exclusive. Thank you.

13 HEARINGS EXAMINER WIESNER: Mr. Kreis.

14 MR. KREIS: Just briefly, Mr. Hearing  
15 Officer. I agree that the *Appeal of Public Service*  
16 *Company of New Hampshire* case is an important one to be  
17 considered in the context of this docket. I believe it  
18 stands simply for the proposition that utility franchises  
19 in New Hampshire are not automatically exclusive as a  
20 matter of law, and either are or are not exclusive,  
21 depending on the -- what the public interest requires as  
22 ultimately determined by the Commission. So, obviously,  
23 that is an issue that needs to be considered and  
24 potentially litigated in this case.

1                   And, obviously, what the Commission  
2 decides in a case like this could have precedential value  
3 in other parts of the state where natural gas service is  
4 expanding. So, this is an important issue for the  
5 Commission to consider.

6                   Obviously, on behalf of residential  
7 customers, the OCA's position is that the Commission  
8 should do whatever provides the lowest possible -- lowest  
9 cost service to consumers in the most reliable fashion  
10 possible. So, that's what we'll be looking to see happen  
11 as this case moves forward.

12                   HEARINGS EXAMINER WIESNER: Thank you.  
13 Mr. Speidel.

14                   MR. SPEIDEL: Thank you, Mr. Wiesner. I  
15 think, in general terms, Staff's primary interest in this  
16 phase of the proceeding is getting clarity, as the  
17 Commission had sought within its Supplemental Order of  
18 Notice regarding the posture of Northern in this case.

19                   I think, certainly, Northern's  
20 intervention request has been denied by the Commission.  
21 And, it was denied in Order Number 25,864, on February 4th  
22 of 2016. And, therefore, certainly, at the conclusion of  
23 this proceeding, it would be greatly appreciated if the  
24 Hearings Examiner were to recommend to the Commission that

1 Northern be stricken from the discovery service list in  
2 this proceeding, because they're no longer an intervenor.

3 Certainly, they're a mandatory party to  
4 this supplemental prehearing conference. And, Staff was  
5 hoping that at least some level of specificity, some level  
6 of clarity would be developed regarding what Northern  
7 intends to do in Pelham.

8 And, just to correct the record and to  
9 make clear, the order through which Northern took control  
10 of the propane gas entity in Pelham was dated  
11 January 17th, 1989. It was Docket Number DE 88-109, in  
12 Order Number 19,299. And, certainly, after the issuance  
13 of that 1989 order, there was a brief flurry of activity,  
14 and eventually expiration of any activity on the part of  
15 Northern in the Pelham service territory.

16 Certainly, if not the letter, certainly  
17 the spirit of RSA 374:27 has come into play, insofar as an  
18 extended period of inactivity should not necessarily  
19 prevent others from coming into a service territory that's  
20 listed on a tariff, even though the tariff language might  
21 be misleading in that way, in that there's an implication  
22 that service is being provided in the Town of Pelham by  
23 Northern, it is not, and has not been for many years.

24 So, we do have a new -- we have a

1 newcomer here, in the form of Liberty, and they're seeking  
2 to have some right to serve customers in Pelham. I guess  
3 there's still an open question of fact as to whether  
4 Northern is willing to entertain Liberty's entrance into  
5 the specific area that they're seeking. That's number  
6 one.

7           And, number two, if they are all right  
8 with that, whether there's any specific territory that  
9 Northern can point to where they would want to have  
10 nonexclusivity operate. They're mentioning the "eastern  
11 part of Pelham", and Pelham is a fairly sprawling town. I  
12 don't think Northern has indicated on this handout as to  
13 what portions they would want to have as nonexclusive,  
14 depending on how the Liberty Petition is handled.

15           So, there's just a lack of clarity and a  
16 lack of information at this point that needs to be  
17 resolved. Certainly, Northern's participation as an  
18 intervenor in this case has reached a close. But, if  
19 they're intending to make comments regarding  
20 nonexclusivity in certain portions of Pelham, they need to  
21 be a little more specific about that. I don't think the  
22 Commission can be vague about it no matter how it rules.  
23 So, I just wanted to put that out there.

24           And, as far as the procedural schedule

1 goes, I think OCA, the Company, and Staff will discuss a  
2 brief schedule that we've penciled out, with hearings in  
3 the first week of May. Thank you.

4 HEARINGS EXAMINER WIESNER: Mr. Taylor,  
5 I think I share Mr. Speidel's concern that perhaps there's  
6 not been a clarification of the portion of the town that  
7 Northern would be interested in, if I may say, you know,  
8 reserving the right to serve in the future. Is that  
9 something you can shed some light on at this time?

10 MR. TAYLOR: Yes. As I said,  
11 Mr. Speidel is correct, in that we haven't served Pelham  
12 for quite some time. And, you know, we've come in today  
13 and indicated that, you know, we don't claim to continue  
14 to have a franchise in that particular area. At this  
15 time, we don't have immediate plans to expand into the  
16 Pelham area. It hasn't been economical.

17 However, our distribution system is very  
18 close to the eastern portion of Pelham. And, our concern  
19 is more of a policy concern, as opposed to, I think, a  
20 factual concern of, you know, we have immediate plans to  
21 go in there, and we're afraid that that's going to be  
22 stymied by Liberty's exclusive franchise.

23 This is really more of a policy issue.  
24 Which is, if Liberty is granted a border-to-border

1 exclusive franchise in the Town of Pelham, then it will  
2 effectively preclude any other utility from serving any  
3 members of the Pelham community in the future. And, my  
4 reading of the statutes and my reading of the law suggest  
5 that that's really counter to the spirit of competition  
6 that's been promoted by the Commission in the past.

7 And, so, regardless of what Northern's  
8 immediate plans are, it may yet become economical for  
9 Northern to expand its distribution system, which already  
10 exists really very nearly at the border of Pelham, over  
11 the border into Pelham, and that would be for the good of  
12 the customers who are in that portion of the town.

13 And, if the Commission were to now grant  
14 an exclusive border-to-border franchise to Liberty,  
15 because Liberty is serving one part of the town, and may  
16 yet hope someday to serve the entire portion of the town,  
17 but it may take years to reach those customers out in the  
18 eastern portion of Pelham, but Northern can do so in a  
19 much more expeditious way, then the Commission has  
20 effectively prevented those customers preemptively from  
21 receiving service from Northern.

22 What the Commission, we believe, ought  
23 to do, if it's going to grant a franchise in this case, it  
24 should not be exclusive. And, in the future, if Northern

1 believes that it can serve customers in the eastern part  
2 of Pelham, or some other unserved part of Pelham that it  
3 can reach, then that -- then Northern should be allowed to  
4 apply for a franchise, and the Commission can conduct a  
5 "public good" determination, as it normally would under  
6 the statute.

7 And, so, it's really more of a policy  
8 matter that we're raising, as opposed to trying to say  
9 that we have some sort of specific plan for the future.

10 HEARINGS EXAMINER WIESNER: Ms.

11 Knowlton, does Liberty currently intend to provide service  
12 throughout the entire town?

13 MS. KNOWLTON: Yes. It's going to be a  
14 project that would be phased over five to six years. I  
15 would -- as indicated in the Company's filing, Phase 1  
16 doesn't touch the Salem border. But, over time, the  
17 Company does intend to develop its distribution system  
18 throughout the town.

19 And, certainly, you know, I think if  
20 Northern has a plan at some -- some specific plan at a  
21 later point in time, they can bring that to the  
22 Commission. But I don't believe there's any legally  
23 recognized concept of reserving a right to serve in the  
24 future. If that were the standard, then, certainly, you

1 know, I think lots of utilities would be in the  
2 Commission, you know, just submitting their reservation  
3 rights.

4 So, you know, if the day comes when  
5 Northern has a specific plan that it wants to bring to the  
6 Commission, it can do that. And, the Commission, as it  
7 always does, will look at what's in the public good, in  
8 terms of who serves where. But, as of right now, they  
9 have no plan. And, you know, the fact that they have  
10 distribution mains on the border I don't think is  
11 determinative of whether Liberty should have an exclusive  
12 right to serve the town or not. The fact is is they have  
13 not done anything for many years, you know, to cross over  
14 that town border with those distribution mains. So, I  
15 don't think that there should be any limitation on Liberty  
16 because they may have an interest, Northern may have an  
17 interest in doing that at some time in the future.

18 HEARINGS EXAMINER WIESNER: And, I'll  
19 just turn to you, Mr. Speidel. Is it Staff's position  
20 that, if Northern is not a party in this case, and I think  
21 I heard you say that, given the fact that they have  
22 essentially conceded that they don't retain an existing  
23 franchise in the town, that they should be dismissed as a  
24 party from this case? Is there still a vehicle for them

1 to participate, in order to raise the policy issues which  
2 they wish the Commission to consider?

3 MR. SPEIDEL: Yes. As indicated by the  
4 Commission in its order on intervention, Northern is  
5 welcome to monitor the docket's public filings online,  
6 they can attend public hearings, and they can make public  
7 comment filings regarding these policy issues.

8 Staff does wonder whether Northern ever  
9 will file an amendment to its tariff indicating that  
10 Pelham is not one of the towns served in its service  
11 territory, insofar as anyone phoning the company now would  
12 hear "No, we don't have the infrastructure to serve you in  
13 Pelham", even though the tariff says otherwise. That's  
14 one last element that we're concerned about. Exclusivity  
15 or no, it isn't exactly accurate to indicate to the world  
16 that Pelham is one of the towns served by the Northern gas  
17 utility.

18 So, I think there would be a vehicle for  
19 them to make their policy concerns known. But it would  
20 appear that, barring some action by Northern to clear the  
21 tariff record, for instance, there's not going to be  
22 perfect clarity during the pendency of this proceeding.

23 HEARINGS EXAMINER WIESNER: Is Staff  
24 asking that the Commission provide some direction to

1 Northern to revise its tariff?

2 MR. SPEIDEL: I think that would be  
3 fair. I think that would be fair at the present time,  
4 given the record that we have on hand. And, certainly,  
5 there's been such a long period of inactivity, and now  
6 that there is an interested company entering into the  
7 service territory, they are indicating interest in actual  
8 service. It might not yet be approved, and that's another  
9 matter, but I think that, as Ms. Knowlton indicated, it's  
10 probably best that utilities try not to have a notional  
11 tariff service territory, but rather an actual tariff  
12 service territory. So, --

13 HEARINGS EXAMINER WIESNER: Thank you.  
14 Does anyone else have anything they want to say this  
15 morning before we close the record? The next step for me  
16 would be to issue a recommendation to the Commission as to  
17 how this matter would be resolved at this stage, at least  
18 with respect to Northern's mandatory party status.

19 *[No verbal response]*

20 HEARINGS EXAMINER WIESNER: Okay.  
21 Hearing none, I will close the record and prepare that  
22 recommendation for the Commission. Thank you.

23 ***(Whereupon the supplemental prehearing***  
24 ***conference was adjourned at 10:27 a.m.)***