

BEFORE THE NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

Re: Liberty Utilities (EnergyNorth Natural Gas) Corp.

Docket DG 14-380

MOTION FOR REHEARING UNDER R.S.A. 541

Pursuant to R.S.A. Chapter 541 and R.S.A. 541:3, the undersigned movant, Richard M. Husband, a resident of Litchfield, New Hampshire, respectfully applies for rehearing with respect to Order No. 25,822 (the “Order”) entered October 2, 2015 by the Public Utilities Commission (“PUC”) in this proceeding, and the matters discussed herein. The movant specifically contests, without limiting his complaints to, the unjust, unreasonable and unlawful (a) finding and determination of the Order that approval of the subject settlement and precedent agreements is in the public interest (b) standard applied to that determination, (c) exclusion of evidence and public comments which were legally required to be considered with respect to the issue; and (d) preferential treatment afforded some citizens over others by this proceeding and the Order, without a rational basis, in violation of federal and state constitution equal protection guarantees. As grounds for this motion, the movant states as follows:

1. Liberty Utilities (EnergyNorth Natural Gas) Corp. d/b/a Liberty Utilities (“Liberty Utilities”) commenced this proceeding on December 31, 2014 by petition (the “Petition”) for approval of a firm transportation agreement (“Agreement”) with Tennessee Gas Pipeline Company, LLC (“Tennessee Gas”), “including a determination that the Company’s decision to enter into the agreement is prudent and consistent with the **public interest.**” *Id.*, p. 1. A true and accurate copy of the Petition is attached to this motion as Exhibit “A” (emphasis added).

2. The Order of Notice for this proceeding recites the Petition's request for "a determination that the Company's decision to enter into the Agreement is prudent and consistent with the **public interest**," and specifically made this determination a condition of approval. *See* true and accurate copy of the Order of Notice attached to this motion as Exhibit "B," pp. 2-3 (emphasis added).
3. The Order makes a determination that approval of the subject settlement and precedent agreements is in the "**public interest**." *See* Order at 1, 31 (emphasis added).
4. This was a requisite finding for approval of the settlement. *See* Puc 203.20(b) ("The commission shall approve a disposition of any contested case by stipulation, settlement, consent order or default, if it determines that the result is just and reasonable and serves the public interest."); *Concord Steam Corp.*, 94 N.H. P.U.C. 233 (May 22, 2009)(affirming standard of Puc 203.20(b) for settlements).
5. However, this proceeding was not conducted and decided in a manner which properly considered the public interest, but under an unduly narrow view which improperly rejected relevant evidence and public comments on the issue, and unlawfully favored certain classes of citizens over others.
6. As described in the Petition, the subject precedent agreement ("Agreement") is a "contract on the proposed Northeast Energy Delivery ('NED') pipeline project." Exhibit "A," p. 2.
7. The NED pipeline project, one of alternative pipelines in the works, is planned to run through roughly 70 miles of Southern New Hampshire. *See* Order, pp. 2, 7.

“Portions of the route are new ‘greenfield’ rights-of-way, and portions run through existing electric transmission rights-of-way.” *Id.* “‘Greenfield’ rights-of-way” refer to undeveloped, agricultural areas, including working farms, state forests, historic areas, wetlands, aquifers and other environmentally sensitive areas. *See generally* the public comments submitted in this this proceeding. New Hampshire will largely serve as a conduit for this transmission line from New York to Massachusetts. *See* Order, p. 4 Footnote 1 (“it will transport natural gas from Wright, New York, to the market center location serving New England Markets, in Dracut, Massachusetts.”). New Hampshire will receive up to 115,000 dekatherms per day of firm capacity under the Agreement, Order, p. 4, which is only about 10% of the pipeline’s capacity.¹ Of that small amount, only about 57%—roughly just 6% of the pipeline’s capacity—is not gas otherwise already available.²

8. The NED project is in the pre-filing stage of approval with the Federal Energy Regulatory Commission (“FERC”), with Tennessee Gas initiating the process on September 15, 2014, *see* Exhibit “C,” p. 1, only three months before the commencement of this case. *See also* Order, p. 2 (“To take effect, the Federal Energy Regulatory Commission (FERC) must approve the NED Pipeline. FERC’s

¹ It is not believed that this small percentage is substantively disputed by the PUC or any of the parties to this proceeding. In any event, it is discussed in the submitted public comments, is a matter of public record and common knowledge to interested persons, and, but for the PUC’s conduct and rulings complained of herein, could have been further established to any degree reasonably required in this proceeding by records of a kind deemed acceptable for consideration by the PUC.

² “Of the total 115,000 Dth per day of capacity contracted for in the Precedent Agreement, 50,000 Dth per day is replacement of existing TGP capacity and 65,000 Dth per day is new or incremental capacity.” Order, p. 4.

review is ongoing.”). Just as this proceeding was pushed through at an incredible rate for such an impactful project—from its commencement on the last day of 2014 to its last hearing day in early August, this matter received barely seven months of process—the FERC proceedings are expected to move rapidly, with Tennessee Gas planning to file its official application for approval of the project with FERC by the end of this year, and FERC expected to act on the application in a matter of months.

9. On July 22, 2015, day two of the hearing on the merits for this proceeding, the PUC noted that it had already received probably between 80-100 public comments, of which the PUC acknowledged “all but a handful are negative.” July 22, 2015 Transcript, 94:10-12. From July 23, 2015 on, 56 more public comments are posted on the PUC online docket for this proceeding, available at the URL <http://www.puc.nh.gov/Regulatory/Docketbk/2014/14-380.html>. All of these additional comments are negative.
10. Almost all of the negative comments include substantial reasons why the NED pipeline project is not in the public interest.

By letter dated July 21, 2015, the NH Municipal Pipeline Coalition—comprised of the towns of Amherst, Brookline, Fitzwilliam, Greenville, Litchfield, Mason, Merrimack, Milford, New Ipswich, Pelham, Richmond, Rindge, Temple and Troy—submitted the following to be considered as public comments with respect to this matter:

“We represent 14 New Hampshire towns affected by the proposed Northeast Energy Direct (“NED”) high-pressure gas pipeline project. Given the projects potential impact on our communities, we have been closely following developments

regarding Liberty's request for approval of its Precedent Agreement with Tennessee Gas Pipeline Company ("Tennessee"), including the New Hampshire PUC Staff's recent Settlement recommendation.

This letter urges the Commission to reject the Settlement as ill-advised and undertake a full review of the facts and merits of the case.

We believe:

- The capacity of the NED pipeline far exceeds the utility needs of New England (such that taking of private and public land for NED is more for the benefit of its owners than the benefit of New England gas consumers);
- The 'need' for this project is better addressed by competing projects that would require less taking of private and public land; and
- The proposed pipeline route will dramatically impact protected conservation land, watersheds, and aquifers.

...

In addition, the NED project will more deeply and directly impact communities, wetlands and aquifers on the route than other project proposals. Trees will be cut and rivers tunneled under. Required blasting may damage wells, aquifers and buildings. Proposed compressor stations will be located near schools and businesses. Sensitive wetlands will be impacted by construction and excavation and the long-term persistent and harmful application of herbicides, among other methods, to control vegetative growth. Public policy should discourage projects that heavily impact conservation lands, water resources, and environmentally sensitive areas—especially when viable alternatives exist.

...

In short, we believe that the proposed NED pipeline does not benefit New Hampshire or Liberty's customers. We urge you to reject the Staff's Settlement offer. The 'need' NED is attempting to address can be accomplished in a much less disruptive way, in a timely fashion, through other projects that use existing pipeline rights of way."

Id. (emphasis added). From the letter, it is obvious that the municipal coalition

perceives a clear connection between the approval sought in this proceeding and

the negatives of the NED pipeline, and does not believe either to be in the public interest. **This letter represents the “public interest” input of over 100,000 total New Hampshire citizens in these 14 towns.**³ The movant, a resident of Litchfield, is one of these citizens.

By letter dated August 4, 2015, Representative Jack Flanagan (Hillsboro District 26), serving Brookline and Mason, commented that he agreed with the above municipal coalition letter, beginning his reasoning with the clear connection between the Agreement and the negatives of the NED pipeline:

“ ... The approving of the Liberty Utilities settlement would directly impact 17 towns and their citizens in a highly negative way. Indirectly, the charge of the PUC is to minimize the impact of potential Utilities operations and make sure that, if possible, cause no harm to the citizens of New Hampshire. One can not ignore the moral responsibility we all has [sic] as public servants to the state we serve.

In light of the two projects that are also pending, I strongly encourage you to deny the Liberty Utilities proposal and require any natural gas being utilized be from the existing enlarged pipelines.

It is time for the State of New Hampshire to do the right thing for its citizens ...”

Id. (emphasis added).

By letter dated August 4, 2015, a state senator also concurred:

“Dear Chairman Honigberg and Ms. Howland:

I represent Senate District 12 which includes the towns of Brookline, Greenville, I-louis, Mason, New Ipswich, Rindge and the city of Nashua which are affected by the proposed pipeline. I

³ According to the New Hampshire Office of Energy and Planning website, at the URL <http://www.nh.gov/oep/data-center/population-estimates.htm>, the 14 towns had 2014 populations as follows: Amherst (11,269), Brookline (5,111), Fitzwilliam (2,389), Greenville (2,074), Litchfield (8,363), Mason (1,391), Merrimack (25,408), Milford (15, 209), New Ipswich (5,115), Pelham (13,069), Richmond (1,161), Rindge (5,980), Temple (1,380) and Troy (2,141).

have heard the concerns from several of my constituents and completely agree with the attached [NH Municipal Pipeline Coalition] letter and also urge you to reject the Staff's Settlement offer.

The people have spoken loud and clear and I ask you to seriously consider their request .

Sincerely,

Senator Kevin Avar, Dist 12 ...”

Id. (emphasis added).

By letter dated July 16, 2015, New Hampshire State Representative James W. McConnell (Cheshire 12) also opined that the approval sought in this proceeding should be denied because of the negatives of the NED pipeline, including the threat it poses to “sensitive wetlands and aquifers.” He concluded:

“... This project is wrong for New Hampshire and, based on its lack of merit and the risks to New Hampshire residents and Liberty ratepayers, the proposed settlement agreement should be rejected.”

Id. (emphasis added).

Similar comments poured in from citizens: some urging against the approval sought in this proceeding because of its connection to the negatives of the pipeline; many just focusing on the negatives of the pipeline.

From Gloria Barefoot's July 12, 2015 letter:

“The approval of the contract between Liberty Utilities and Kinder Morgan for space on a proposed natural gas pipeline through 70 miles of Southern New Hampshire will have a negative impact on the environment and economics of the area. This would be the largest pipeline in diameter in New Hampshire, and would provide substantial excess capacity that could not be used in the state. The size of the project poses safety risks and passes along costs to customers that are not in line with customer needs. The project will disturb and redirect numerous aquifers, ponds,

watersheds, and lakes. Noise and exhaust from blow down valves and compressor stations will disturb wildlife and will impact hunting, fishing, snowmobiling, and boating in some of the most beautiful country in New England. Is it really the time to invest in excessive infrastructure, constructing the largest gas pipeline and most powerful compressor stations to date in New Hampshire? ...”

From Margaret Viglion’s July 18, 2015 letter:

“... Negative impacts would be severe on the safety, health and welfare of consumers and non-consumers, the ecosystem as well as the economy of the region ...”

From Christine Neill’s July 24, 2015 letter:

“I live in New Ipswich, NH and I am submitting this letter opposing the Tennessee Gas Pipeline proposal for a natural gas pipeline to be built through Massachusetts and New Hampshire.

It will endanger our environment, our historical and cultural resources, our way of life and lower property values ...”

From Laura Baker’s July 28, 2015 letter:

“... Outdoor recreation is one of the area’s most valuable assets to residents and visitors alike and it makes not [sic] sense to jeopardize this resource ...”

From Kerry P. Gagne’s July 29, 2015 letter:

“Dear Executive Director Howland:

Please oppose the Northeast Energy District (NED) Project and the extension of Kinder Morgan’s Tennessee Gas Pipeline.

New Hampshire cannot expect monetary benefits to outweigh the monetary and environmental burdens on residents and towns ...”

From Richard J. Fressilli’s July 26, 2015 letter:

“... The industrial nature of this project is entirely out of keeping with the rural and ecologically sensitive character of this area. The facility as proposed places the compressor and pipeline within a drinking water protection area and poses a threat to wetlands, a reservoir, sensitive wildlife, farms and the children at our elementary school ...”

From Sebastien Barthelmess' August 7, 2015 letter:

"As taxpayers of New Ipswich NH, we feel strongly that our PUBLIC voice is not being heard. Is it not the duty of the PUBLIC Utilities Commission have a duty to protect all residents, the public, in New Hampshire?

I believe the welfare of ALL the citizens of NH should be included in your decision regarding this matter, not just customers of Liberty Utilities. NED affects many many other NH citizens, probably more than it affects the Liberty Utility customers ..."

From Tim Winship's August 5, 2015 letter:

"... The taking of property, not to mention the destruction of a living landscape, is a profound action that can only be justified by an equally profound need of great public benefit. It would take a lot of imagination and a by-passing of conscience to be able to state that this proposal rises to such a high level of need. I sincerely hope that you deny Liberty Utilities request ..."

From Karen Miller's August 10, 2015 letter:

"... The NED/Tennessee gas pipeline will adversely effect many more NH citizens, than it will benefit the 'potential', that is to say, NOT currently contracted, Liberty Utilities customers ..."

From Lisa Derby Oden's August 10, 2015 letter (emphasis in original):

"... The impacts of this project are huge and irreversible. Environmentally, our aquifers and water supply are at stake ..."

The time to have the Public Utilities Commission of the State of New Hampshire do the right thing for its citizens is now! Please scrutinize the information you have received and make a determination based on "**what is good and just for ALL NH citizens.**"

From Susan Wessels' August 15, 2015 letter:

"Dear PUC Commissioners

My husband and I are being told the home we built 20 years ago in Rindge is in the 'study zone' of the planned Kinder Morgan pipeline. Almost our entire wooded 3-acre lot will be permanently

cleared of all the natural and planned vegetation we have so lovingly planted and maintained to provide a peaceful, natural and private setting. ...”

From Michael Maki’s July 30, 2015 letter:

“I am a landowner whose farm, which has been in our family since 1906, lies in the direct path of the Northeast Energy Direct Project (NED) as currently proposed by Tennessee Gas Pipeline Company, L.L.C. Division of Kinder Morgan.

Even though it is generally accepted that New England needs more energy, the NED pipeline would deliver far more natural gas than the region needs or could use. Other projects already approved can meet New England's current and projected shortfall and are much less disruptive than NED. One can only conclude that the natural gas supplied by NED will be sold for export with little or no gas supplied to or needed in New England. Certainly there would be no benefit to New Hampshire. If this project is allowed to proceed the result will be the taking of more private property by eminent domain for corporate profit. The landowners are left with unusable land that they still own and pay taxes on, receiving a onetime token payment to host the pipeline and live with the consequences while Kinder Morgan generates a cash stream for themselves year after year.

Please stand with me and oppose the NED project.”

Overwhelmingly negative, the comments about the pipeline go on and on

...

11. But the PUC unjustly, unreasonably and unlawfully ignored the public comments and refused consideration of similar evidence by applying the incorrect standard to its “public interest” determination.
12. The PUC must act in the public interest. *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).

13. The term “public interest” is analogous to the term “public good” and should be broadly construed “not only to include the needs of particular persons directly affected . . . but also . . . the needs of the public at large . . .” *Waste Control Systems, Inc. v. State, supra*, 114 N.H. at 21)(citing *Boston & Maine R.R. v. State, supra*, 102 N.H. at 10); *see also Black’s Law Dictionary* (6th Ed., West Publishing Co., St. Paul, MN)(1990), p. 1229 (“Public interest” defined as “Something in which the public, the community at large, has some pecuniary interest, or some interest by which their legal rights are affected. . .”). The “public at large” means the public “as a whole; in general” or “the whole of a state, district or body rather than one division or part of it . . .” *Webster’s New Universal Unabridged Dictionary*, p. 808 (defining “at large”).
14. It is well-established that the PUC has broad discretion when it comes to making “public interest” determinations. *See, e.g., Waste Control Systems, Inc., supra*, 102 N.H. at 24. But, with this broad discretion comes a corresponding obligation to cast its net as widely as possible to properly consider the matter. Moreover, the PUC does not have the authority to ignore mandated legislative procedures and rights pertaining to the determination, and it cannot abuse its discretion and corresponding obligation by applying a more limited standard for determining the “public interest” than is required under the law:

“The good of the public and not the benefit to the contending parties being the issue (*Grafton &c. Co. v. State*, 77 N.H. 539, 542), the desire or consent of the latter is not the test. The public, as well as the parties, is entitled to a finding of the public good on a hearing without error of law . . .”

The Parker Young Company and Fox & Putnam v. State, 83 N.H. 551, 560

(1929); *see also In re Pinetree Power, Inc.*, 152 N.H. 92, 97 (2005)(“the ‘public interest’ of PSNH's customers encompasses more than simply rates ...”); *Appeal of Conservation Law Foundation of New England, Inc.*, 127 N.H. 606 (N.H. 1986)(“...the express statutory concern for the public good comprises more than the terms and conditions of the financing ...”).

15. On the home page of its website, at the URL www.puc.nh.gov, the PUC has provided a link relative to this proceeding titled DE 14-380, Information on Liberty's Agreement with Tennessee Gas Pipeline for Firm Transportation for months. The link leads to the document attached as Exhibit “C” to this motion, which provides the PUC’s position, and, in effect, a procedural/evidentiary ruling on the relevance of the NED pipeline project and other matters to this proceeding:

“ The Precedent Agreement will take effect only if TGP’s Northeast Direct project is built. Approval of the Precedent Agreement is separate from any approval of, or permissions for, siting or construction of the Northeast Direct project. Approvals and permissions for the Northeast Direct project are not matters over which the Commission has any say. Those approvals and permissions are currently pending determination by other regulatory agencies, including the Federal Energy and Regulatory Commission (FERC). While the issues related to siting and construction are important, they are not relevant to the Commission’s determinations in Docket DG 14-380, the docket opened by the Commission to consider Liberty’s request, and are not issues over which the Commission has jurisdiction.”

Exhibit “C. It then goes on to suggest that the broader public interest is not relevant to the determination in this proceeding—only the interests of Liberty Utilities and its customers:

“The purpose of the Commission’s review in Docket DG 14-380 is to determine whether the terms of the Precedent Agreement are prudent, just, and reasonable, from the perspective of balancing Liberty’s shareholders’ interests with its customers’ interests.”

Id. Indeed, if this proceeding still required a “determination that the Company’s decision to enter into the [A]greement is ... consistent with the public interest” for the approval sought, as requested in the Petition, Exhibit “A,” p. 2, and adopted in the Order of Notice, Exhibit “B,” pp. 2-3, the public would not know it from reviewing Exhibit “C.” The term “public interest” does not even appear in Exhibit “C” and the only interests mentioned are those of Liberty Utilities and its customers. *See id.* As opposed to “public interest” considerations, Exhibit “C” leads to a pin-hole focus: “The determination will depend on analysis of Liberty’s projected service requirements and an economic review.” *Id.*

16. To the extent the following or other language in the PUC’s March 6, 2015 Order No. 25,767 in this proceeding provides the same or similar procedural/evidentiary ruling as complained of in the previous paragraph, the same is also challenged under this motion:

“This proceeding does not concern and will not result in any approval of, or permissions for, siting or construction of TGP’s NED project ...

Having considered PLAN’s, the OCA’s and Staff’s positions, we grant PLAN’s intervention on behalf of its members who are also EnergyNorth customers and deny its intervention on behalf of landowners along the proposed TGP route who are not EnergyNorth customers. Only EnergyNorth-customer members possess ‘rights, duties, privileges, immunities or other substantial interests [that] may be affected by the proceeding.’ RSA 541-A:32, I (b). It will be EnergyNorth customers who will bear the costs of the Precedent Agreement if the Commission approves it. PLAN’s landowner members possess no such direct interest or cost responsibility; their interests, while important, are not pertinent to the Commission’s determinations in this proceeding. Consequently, it is likely that the participation of PLAN landowner members would ‘impair the orderly and prompt conduct of [these expedited] proceedings.’ RSA 541-A:32, II.”

Id., pp. 3-4.

17. The rulings complained of are unsustainable. This is not even about the merits; it is about just being *heard*.
18. The PUC has minimum threshold requirements for the consideration of matters. It does not follow technical rules of evidence: only that which is “irrelevant, immaterial or unduly repetitious” is barred. R.S.A. 541-A:33, II; Puc 203.23. Proof need only be by a “preponderance “of the evidence, *see* Puc 203.25—not a high obstacle. *See In re Shelby R.*, 148 N.H. 237, 241 (2002)(“relatively low” standard).
19. There is no legal or rational basis for the PUC to hold public comments to a higher standard of consideration than evidence.
20. Thus, if public comments offered on a “public interest” determination are relevant and material, the PUC may not lawfully ignore them.⁴ Public comments are legislatively mandated for PUC rulemaking hearings under R.S.A. 541-A:11, with the statute making it clear that all interested persons should be afforded every opportunity for input, including by public comment:

“ I. (a) Each agency shall hold at least one public hearing on all proposed rules filed pursuant to RSA 541-A:3 and shall afford all interested persons reasonable opportunity to testify and to submit data, views, or arguments

...

III. To provide reasonable opportunity for public comment, the agency may continue a public hearing past the scheduled time or to another date, or may extend the deadline for submission of written comment. ”

⁴ If relevant and material, such comments are clearly not within the first two categories of the only three categories of inadmissible PUC evidence: that which is “irrelevant, immaterial or unduly repetitious.” R.S.A. 541-A:33, II; Puc 203.23. The third category, that which is “unduly repetitious,” should plainly not apply to public comments—particularly in a proceeding of such great public interest as this matter, wherein repetition is a virtual certainty given the number of likely comments, but all are entitled to an equal voice. Indeed, if anything, repetitive “public interest” comments in such a case should be given added consideration, as establishing a clear “public at large” sentiment on the issue.

Id. While “Rule” is not specifically defined under R.S.A. Chapter 541-A to include rulings such as the Order, *see* R.S.A. 541-A:1, IV, it is not defined to exclude rulings, either, and rules promulgated under the statute have the same force of law as rulings. *See* R.S.A. 541-A:22, II (“Rules shall be valid and binding on persons they affect, and shall have the force of law unless they have expired or have been amended or revised or unless a court of competent jurisdiction determines otherwise.”). Thus, especially as the Order will be no less impactful—likely far more—to New Hampshire citizens than most rules promulgated by the PUC under the statute, and no one is more qualified to comment on matters affecting the general “public interest” than the general public, the voice assured public comments under the statute should apply to this proceeding.⁵

21. Additionally, the PUC’s own rules guarantee consideration of public comments, by expressly providing that interested persons *shall* have the opportunity to “state their position”:

“Puc 203.18 Public Comment. Persons who do not have intervenor status in a proceeding but having interest in the subject matter shall be provided with an opportunity at a hearing or prehearing conference to state their position.”

The PUC has to follow its own rules. *Attitash Mt. Service Co. v. Schuck*, 135 N.H. 427, 429 (1992)(law well-settled that administrative agencies must follow their

⁵ To be noted: the “public interest” determination here does not involve matters within the PUC’s areas of expertise. Indeed, many of those submitting public comments in this proceeding, by virtue of their positions and experience as state and town officials, have far more knowledge and expertise than the PUC in the matters discussed in the comments—particularly as concerns matters affecting their own districts and towns.

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.”) .

22. An opportunity for input, or to “state [one’s] position,”—the right to be heard—is meaningless if the input or position (comment) is just ignored. Having invited public comments in this public proceeding, particularly in view of the strong policies involved, the PUC was obligated to consider them—again, at least those relevant and material.
23. There is no question that the negatives of the NED pipeline are relevant and material to the determination in this case.
24. Something is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” *State v. Hayward*, 166 N.H. 575, 580 (2014)(quoting New Hampshire Rules of Evidence Rule 401).
25. Thus, the negatives of the NED pipeline are relevant to this proceeding if they are “of any consequence to the ‘public interest’ determination” and the approval sought herein has “any tendency to make the existence of [the negatives] more probable or less probable.” *See State v. Hayward, supra*, 166 N.H. at 580.
26. Clearly, the negatives of the NED pipeline complained of in the public comments—loss of or injury to drinking water aquifers, wetlands, farmlands, historic areas, conservation and other environmentally sensitive areas; safety concerns, damage to the state’s tourism and related economies, personal hardships, etc.—are of “consequence” to the public interest determination in this

case. Surely, the approval of the settlement and Agreement sought herein will have a “tendency to make the existence of the [the negatives] more probable” than not.

27. Likewise, such substantial negatives are indisputably “material” to the “public interest” determination.
28. While the movant believes the nexus between the approval sought herein and the negatives of the NED pipeline is a matter of common sense and public knowledge, new evidence makes the connection irrefutable.

29. A *Union Leader* article following the Order began with this observation:

“The energy company that wants to build a new natural gas pipeline through southern New Hampshire just got a big boost from the N.H. Public Utilities Commission ...”

See true and accurate copy of October 6, 2015 *Union Leader* online news article attached to this motion as Exhibit “D.”

30. Indeed, as established by the article, a NED pipeline representative *admits* the nexus, hailing the Order, together with similar Massachusetts decisions, as a “‘significant step’ in bringing the project to fruition ...” *See* Exhibit “D.”⁶

31. New evidence provides grounds for a rehearing. *Consumers New Hampshire Water Co., Inc.*, 80 NH PUC 666 (1995), cited in *Verizon New Hampshire Petition to Approve Carrier to Carrier Performance Guidelines*, Order No. 23, 976 (May 24, 2002).

⁶ The attached Exhibit “D” should be acceptable to the PUC. Exhibit “56” admitted as evidence in this case, a copy of which is attached to this motion as Exhibit “E,” is an online news article, “Water woes imperil Deep Panuke output” from the February 25, 2015 edition of *The Chronicle Herald*. Exhibit “57” admitted as evidence in this case, a copy of which is attached to this motion as Exhibit “F,” is a printout of page 1 of the NHPipelineAwareness.org website.

32. In making its “public interest” determination, the PUC presumed that there was no nexus between the approval sought herein and FERC approval of the NED pipeline project—that it was not “more probable” than not that FERC approval would come with this proceeding’s approval—but that presumption has been rebutted, and the process resulting in the Order proved tainted, accordingly. *Cf. Heffenger v. Heffenger*, 89 N.H. 530, 532 (1938) and cases cited therein (a presumption “vanishes” when rebutted, and thus may not be relied on for any purpose).

33. While its rationale is unclear, the PUC’s position also seems grounded in preemption concerns. According to the PUC:

“... While the issues related to siting and construction are important, they are not relevant to the Commission’s determinations in Docket DG 14-380, the docket opened by the Commission to consider Liberty’s request, and are not issues over which the Commission has jurisdiction ...”

Exhibit “C.”

34. Because it is unclear, the PUC’s preemption rationale fails. *See State v. Exxon Mobil Corp.*, 2013-0591, 2013-0668 (N.H., October 2, 2015)(obstacle preemption bears a heavy burden).

35. In any event, there is no rational basis to conclude that state interest in protecting watersheds and conservation areas—or most of the other public comment concerns—is superseded by federal law.

36. Moreover, any preemption would only occur after FERC certification (approval) of the NED project. *See Lng v. Loqa*, 79 F.Supp.2d 49 (D.R.I. 2000). As the

project is only in the pre-filing stage of approval –far from any certification—there is no preemption concern. *Id.*⁷

37. The PUC’s rationale is especially perplexing given that it had no problem in considering the purported “benefits” of the NED pipeline. *See, e.g.*, August 6, 2015 Transcript, 36:17-37:24.
38. State disparate treatment of persons similarly situated, without a legitimate state interest, violates the equal protection guarantee of our state and federal constitutions. *Verizon New England, Inc. v. City of Rochester*, 151 N.H. 263, 270-271, 855 A.2d 497 (2004). Why was Liberty Utilities allowed to support its “public interest” argument or approval by consideration of the positives the NED pipeline will supposedly bring, but opponents of approval not allowed to cite the negatives? Are we all not New Hampshire energy users, with some getting gas through Liberty Utilities and the remainder elsewhere? Indeed, non-Liberty Utilities gas customers comprise the vast majority of New Hampshire’s population: with over 1.3 million New Hampshire citizens as of the 2010 census, and under 90,000 Liberty Utilities gas customers, *see* Exhibit “C,” the latter amounts to **less than 7% of New Hampshire’s energy users**. Absent a

⁷ Perhaps the PUC is concerned that that the federal eminent domain complaints of some of the public comments come too close to federal territory. However, as long as there is no preemption, a fair argument may be made that the PUC, an agency of this state, owes a good faith duty to its citizens to do its best to prevent federal eminent domain from ever becoming an issue—especially as our state constitution guarantees New Hampshire citizens protection from such takings. *See id.*, Article 12-a (“No part of a person's property shall be taken by eminent domain and transferred, directly or indirectly, to another person if the taking is for the purpose of private development or other private use of the property.”). As the PUC’s rationale is unclear, the movant reserves the right to challenge other reasoning.

compelling state reason not shown here, why should 93% of a total population of similarly situated citizens (energy users) be burdened to benefit less than 7%?

39. The Order essentially decided that the interests of less than 90,000 Liberty Utilities customers completely muted the voices of all other New Hampshire citizens—including over 100,000 citizens represented by the NH Municipal Pipeline Coalition alone—with valid reasons why approval of the settlement and Agreement was not in the public interest. Somehow, those voices should have counted.
40. The PUC abused its discretion and committed legal error.

“The [PUC], like a trial judge, has broad discretion over the conduct of its proceedings, including its hearings ... But that discretion is not unlimited. The board may not abuse its discretion ... abuse of discretion by the board constitutes legal error ... “

Appeal of Morin, 140 N.H. 515, 517-518 (1995)(citations omitted). It should have followed its own rule (Puc 203.18), the will of the legislature and basic principles of fairness and allowed **both** sides to fully “state their position.” *See id.* (“An agency, like a trial court, must follow fair procedures and provide due process ... Its discretion must be exercised ‘in a manner to subserve and not to impede or defeat the ends of substantial justice.’ ... One element of this requirement is the opportunity to present one's case—to attempt to meet one's burden of proof—in a fair manner before an impartial fact-finder ... Further, in exercising its discretion, an administrative agency must follow its own rules ...”). The PUC holds the obligations of a trial judge and may not unfairly pick and choose among evidence equally materially and relevant to the ultimate issue to

guide the result it wants. *See Appeal of Public Service*, 122 N.H. 1062, 1074 (1982)(“[to] be paid as a judge, one must act like a judge”).

41. The wrongs complained of herein were made known to the PUC in public comments submitted by the movant and others prior to issuance of the Order.
42. There is a reasonable probability that the PUC will engage in the complained-of conduct again, and with respect to others who might be unable to avail themselves of relief.
43. The movant brings this motion under R.S.A. 541:3, being directly affected by this proceeding : as an impacted citizen of the town of Litchfield, a community on the NED pipeline route, wherein the pipeline is planned to run near the movant’s property, through wetlands, the town’s drinking water aquifer, numerous wildlife and other environmentally sensitive areas, and the property of approximately 67 landowners—and will negatively affect all others, including the movant, by the general diminution of property values associated with the “fear factor” and other concerns associated with a nearby pipeline (with many Litchfield citizens, including the movant, suffering further harm if the blasting associated with running the pipeline through the aquifer wherein the pond on which the movant lives negatively impacts the water table of the pond—more than a reasonable possibility with such blasting); as an impacted nature lover and resident of the State of New Hampshire, numerous times more negatively affected by the pipeline; as one who submitted public comments in this proceeding, which were improperly ignored, and is claiming standing and a legally protected interest and rights under R.S.A. Chapter 541-A and Puc 203.18, and a violation of those

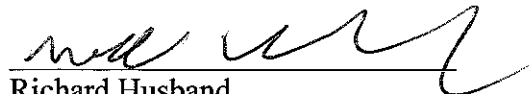
rights, accordingly; as an interested person who has followed this proceeding for months, once petitioned to intervene (withdrawn), and attended all or substantial parts of all three days of the final hearing on the merit in this matter.

WHEREFORE, the movant respectfully requests that the PUC:

- A. Vacate or reverse the Order and schedule this matter for a new hearing on the merits after further proceedings which allow consideration of the negatives of the NED pipeline and the submission of public comments and evidence on the matter and the “public interest” determination, and apply the proper “public interest” standard;
- B. In the order resulting from the new hearing on the merits, sufficiently discuss the rationale of its ultimate findings and conclusions concerning (i) the nexus between the approval sought herein and FERC approval of the NED pipeline, and (ii) matters submitted and considered or not considered respecting the NED pipeline and the “public interest” determination, such that the general public has “an adequate basis upon which to review its decision.” *Petition of Support Enforcement Officers*, 147 N.H. 1, 9 (2002); R.S.A. 541-A:35; and
- C. Grant such other and further relief is just, reasonable, lawful and otherwise appropriate.

Dated: November 2, 2015

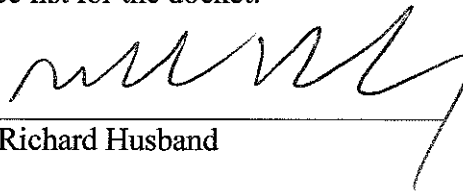
Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I have on November 2, 2015, served an e-mail copy of this motion on each person identified on the Commission's service list for this docket, by delivering it to the e-mail address identified on the Commission's service list for the docket.


Richard Husband