

THE STATE OF NEW HAMPSHIRE  
SUPREME COURT

NO. 2019-0629

LIBERTY UTILITIES (ENERGYNORTH NATURAL GAS) CORP.  
d/b/a LIBERTY UTILITIES – KEENE DIVISION  
PUBLIC UTILITIES COMMISSION CASE DG-17-068

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APPEAL OF TERRY CLARK BY PETITION  
PURSUANT TO R.S.A. 541:6 AND SUPREME COURT RULE 10

**BRIEF OF APPELLANT TERRY CLARK**

*Oral Argument Requested:* Attorney Husband will argue on behalf of Terry Clark

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## **QUESTIONS PRESENTED FOR REVIEW**

1. Appellant, Terry Clark (“Clark”), contends that the Public Utilities Commission (“Commission”)’s orders, which allow Liberty Utilities (EnergyNorth Natural Gas Corp.) d/b/a Liberty Utilities – Keene Division (“Liberty”) to expand its natural gas business in Keene with resulting greenhouse gas and other harmful emissions, are against the public interest and inconsistent with the state’s official energy policy under RSA 378:37 due to climate, health and other concerns which were well-developed and supported by Clark’s pleadings, but not considered by the Commission. Are the Commission’s orders unlawful and unreasonable?

This was raised in Clark’s [Terry Clark and NH Pipeline Health Study Group's Joint Motion for Rehearing](#) dated November 16, 2017 (“[joint motion for rehearing](#)” or “[JMR](#)”), ¶¶ 1-7, 28-43 (and Prayers for Relief), Exhibits “A”-“N,” Certified Record (“CR”) at 52-57, 67-160; [Initial Brief of Intervenor, Terry Clark](#) (“[initial brief](#)” or “[IB](#)”) dated May 1, 2018 at 1-34, Exhibits “A”-“D,” CR at 228-261, 277-295, 299-300, 305-309; [Reply Brief of Intervenor, Terry Clark](#) (“[reply brief](#)” or “[RB](#)”) dated May 15, 2018 at 2-6, CR at 322-326; [Terry Clark’s Motion for Rehearing or Reconsideration Pursuant to R.S.A. 541, and Clarification](#) dated August 26, 2019 (“[second motion for rehearing](#)” or “[SMR](#)”), ¶¶ 8-9, 16-17, 24-34, 42 (and Prayers for Relief), Exhibit “A,” CR at 525-526, 529-530, 534-543, 548-550, 552; April 6, 2018 hearing [Transcript](#) (“[Trans.](#)”) at 9:6-23, CR at 205.

2. In deciding the matter, the Commission rejected, without explanation, Staff's well-reasoned recommendation and Clark's well-developed arguments, violated or ignored statutes, its own rules and orders, and due process, then ignored the burden of proof. Are the Commission's orders unlawfully and unreasonably grounded, and a nullity?

This was raised in [JMR](#), ¶¶ 1-43 (and Prayers for Relief), Exhibits "A"- "N," CR at 52-160; [IB](#) at 1-34, 39-50, Exhibits "A"- "D," CR at 228-261, 267-300, 302, 305-309; [RB](#) at 1-10, CR at 321-330; [SMR](#), ¶¶ 1-43 (and Prayers for Relief), Exhibit "A," CR at 520-552; [Terry Clark's Reply to Liberty's Objection to Terry Clark's Motion for Rehearing](#) dated September 11, 2019 ("[reply to Liberty's objection](#)" or "[RO](#)"), ¶¶ 2-15, CR at 576-585; [Trans.](#) at 9:6-23, 14:18-15:17, 24:22-26:11, CR at 205, 210-211, 220-222.



**PROVISIONS OF CONSTITUTIONS, STATUTES  
AND RULES INVOLVED IN CASE**

*See* the Addendum (“Add.”) to this brief.

**STATEMENT OF THE CASE AND FACTS**

**General Background**

This is an administrative appeal pursuant to [RSA 541:6](#), [RSA 365:21](#) and [Supreme Court Rule 10](#) of three Commission decisions *i.e.*, [Order No. 26,065 \(Oct. 20, 2017\)](#)(also, the “[Declaratory Ruling](#)”), [Order No. 26,274 \(Jul. 26, 2019\)](#)(also, the “[Confirming Decision](#)”) and [Order No. 26,294 \(Sep. 25, 2019\)](#)(also, the “[Final Order](#)”)(collectively, the “Decisions”) entered in [Commission Docket No. DG 17-068](#) (“the Keene case”) which allow Liberty to expand its natural gas business into the City of Keene. It results from the utility’s ongoing, aggressive expansion of its natural gas infrastructure and customer base throughout the state, as is evidenced by its Commission approvals for (1) Keene, as discussed below, (2) Concord, (3) Pelham/Windham, and (4) Lebanon/Hanover, and the approvals that it is seeking under (5) [Commission Docket No. DG 17-198](#) for the Granite Bridge Project, a proposed 27-mile pipeline and 2 billion cubic feet LNG facility in Epping with infrastructure projected and priced for use well into the last half of the century, and (6) [Commission Docket No. DG 17-152](#), the lead case for the utility’s expansion plans, wherein the company is seeking approval for its “least cost integrated resource plan” (“LCIRP”) for the forecast period 2017/2018 - 2021/2022 (the “LCIRP case”). [IB](#) at 4, 17 (including FN 33), CR at 231, 244; [SMR](#), ¶ 9, CR at 525-526. As Liberty contends that a moratorium will have to be placed on all of its expansion plans if the Granite Bridge Project is not approved, [IB](#) at 5, CR at 232, those plans obviously greatly depend on the fate of that project.

### **Liberty's Expansion Plans**

Liberty is planning for continuing, substantial, long-term growth commitment in New Hampshire, connecting non-natural gas customers to natural gas through at least 2037/2038, with corresponding emissions, for potentially decades thereafter. [IB](#) at 15-18, CR at 242-245. Especially given the opposition by many to “subsidizing” renewable energy projects, it is important to note that the cost of the utility’s Granite Bridge Project alone will be over \$400 million dollars,<sup>1</sup> and, with its other projects, Liberty has a lot more new gas infrastructure than that planned for ratepayer payment which, for the reasons discussed below, will be abandoned for renewables long before the bill is paid, if/when we responsibly respond to climate change. The resulting “stranded costs” should be enormous, if we plan to act responsibly. *Id.* at 14-18, CR at 241-245.<sup>2</sup> On information and belief (and the company never denied it below): much, if not the vast majority, of the natural gas that Liberty is currently distributing and will distribute under its expansion plans is, and will be, hydraulically fractured (“fracked”) natural gas. *Id.* at 4-5, CR at 231-232. Keene is part of Liberty’s expansion plans. *Id.* at 4, CR at 231; [Final Order](#), Add. at 70 (“In DG 17-048, we allowed Liberty to consolidate the Keene Division into the rest of the Liberty gas system. See Order No. 26,122 at 37-38.”).

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<sup>1</sup> Project costs were estimated at over \$300 million at the time Clark’s May 1, 2018 brief was filed below, [IB](#) at 17 FN 33, CR at 244, but this projection was subsequently increased to over \$400 million. See [SMR](#), ¶ 9, CR at 525-526.

<sup>2</sup> Please note that the hyperlinks in [IB](#) at 14 FN 26, 15 FN 30 and 20 (CR at 241-242, 247) to the Fifth Edition of the "Compendium of Scientific, Medical, and Media Findings, *etc.*" by Physicians for Social Responsibility, now access the Sixth Edition, instead. The Fifth Edition may now be accessed at the following hyperlink: ["Compendium of Scientific, Medical, and Media Findings Demonstrating Risks and Harms of Fracking \(Unconventional Gas and Oil Extraction\)" by Physicians for Social Responsibility" \(Fifth Edition, March 2018\).](#)

### **Clark**

Clark is an approximately 40-year resident of Keene and city councilor (intervening solely in his individual capacity) who opposes Liberty's expansion plans as being contrary to the public interest and New Hampshire's official energy policy under [RSA 378:37](#), Add. at 78, not only in the Keene case, but as an intervenor in the LCIRP case, as well. [JMR](#), ¶¶ 2, CR at 53-54; [IB](#) at 3-5, CR at 230-232; [SMR](#), ¶¶ 16-17 (including FN 19); [Trans.](#) at 9:6-23, CR at 205. Indeed, Clark's pleadings in the two cases often mirror each other on the public interest/[RSA 378:37](#) issue, *see* [SMR](#) ¶ 17 (including FN 20), CR at 530, except that Keene also its own specific particulate pollution problem, which may cause respiratory and other health problems at elevated levels and could be exacerbated by an increase in gas use, as fracked gas use is associated with particulates. [IB](#) at 21, 40-41, CR at 267-268. Clark is concerned with climate change and the other harms associated with fracked gas use, believes that a rapid transition to sustainable energy sources is necessary to address the climate crisis, and fears that Liberty's Keene expansion plans will likely impede the development and availability of sustainable alternatives in the city for at least another generation. [JMR](#), ¶ 2, CR at 53-54; [IB](#) at 5, CR at 232.

Thus, it is Clark's position that a moratorium on natural gas infrastructure and customer expansion—not increasing and extending our commitment to its use for decades—is called for under a public interest/[RSA 378:37](#) analysis due to the climate crisis alone, as well as for the associated health, safety, economic and other concerns. [JMR](#), ¶¶ 28-41, CR at 67-73, 154-160; 1-32, CR at 228-259, 277-295, 299-300, 305-309; [SMR](#), ¶ 9, CR at 525-526. Minimally, at this critical moment in the climate crisis, *see* discussion below, no natural gas project or expansion should be allowed to go forward in New Hampshire, absent an established urgent or equally compelling need, unless and until it is shown that

(1) there is no reasonable alternative, on *due* consideration of the climate crisis as a *crisis*, and that (2) the project/expansion will have a positive climate impact during both the next decade and for the full projected usable life of all of the associated infrastructure. See [JMR](#), ¶¶ 34-36, 41, CR at ¶ 70-71, 73; [RSA 378:38, VI](#), Add. at 79.<sup>3</sup> This was never done below; if it had been, Clark avers that Liberty’s Keene plans would have been precluded under a public interest/[RSA 378:37](#) analysis. *Id.*<sup>4</sup>

### **The Keene Propane-air System**

Currently, Keene has two propane-air gas distribution systems in Keene which store the gas in above-ground tanks and distribute it via roughly 30 miles of underground pipe to approximately 1,200 customers. [Staff Adequacy Assessment of Compressed Natural Gas Installation](#) 4, CR at 342. Liberty claims that it “*must*” install its new system by 2029 as the land lease for its current system expires then. [Liberty’s Motion for Rehearing](#), ¶¶ 7-9, CR at 555-557.

### **Liberty’s Petition for Declaratory Ruling**

The Decisions issued on a [revised petition for declaratory ruling](#) (“[petition](#)” or “[declaratory judgment petition](#)”) which Liberty filed on April 25, 2017, solely pursuant to [Puc 203](#) and [Puc 207](#). [Petition](#), Preamble, CR at 24. The [petition](#) requested a determination that Liberty is not required to obtain permission under [RSA 374:22](#), Add. at 78, and [RSA 374:26](#), Add. at 78, to offer compressed natural gas (“CNG”) and liquefied natural gas (“LNG”) services to its

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<sup>3</sup> See discussion *infra* pp. 27-28 regarding the difference in warming impacts for the two periods of time.

<sup>4</sup> Clark’s complete positions are set forth in the following pleadings: (1) the [joint motion for rehearing](#); (2) his [initial brief](#); (3) his [reply brief](#); (4) his [second motion for rehearing](#); and (5) his [reply to Liberty's objection](#) to that motion. Clark’s [second motion for rehearing](#) incorporates all of his arguments from the first three pleadings in his grounds for relief. *Id.*, ¶ 16 (including FN 19), CR at 529.

Keene propane-air customers under the original 1860 Keene “gas” franchise granted to the utility’s predecessor-in-interest. *Id.*, ¶¶ 1-6; CR at 24-26. The filing responded to Staff’s determination that Liberty’s plans constituted a “change in the character of service,” requiring approval under [RSA 374:22](#) and [RSA 374:26](#). [Declaratory Ruling](#), Add. at 41-42. Although the [petition](#) provided no information concerning the compositions of propane-air or natural gas or makeup of the two service systems, it argued that the new gas and service, to be used for heating (¶ 11), would provide “no change in the character of service,” (¶ 12), that the broad definition of “gas” under [Puc 502.06](#) supports the determination, and that the distribution of coal gas, propane-air and other forms of gas in Keene over the years without further approval obviated any need for permission. *See generally id.*, CR at 24-36. Under the 1860 grant, authority is provided to “carry on the manufacture, distribution and sale of gas, **for the purpose of lighting ...**” [Petition](#), ¶ 15 and Exhibit “1” (emphasis added), CR at 29-30, 37.

Under the latter statute, an [RSA 374:22/RSA 374:26](#) filing requires a “due hearing” on the matter and determination that the requested permission is for the “public good”/“public interest” for approval. [RSA 374:26](#).<sup>5</sup>

But, again, Liberty’s [petition](#) was filed solely pursuant to [Puc 203](#) and [Puc 207](#). Still, those rules have requirements, and the Commission must follow its own rules. *See Attitash Mt. Service Co. v. Schuck*, 135 N.H. 427, 429 (1992)(law well-settled that administrative agencies must follow their own rules); *In re Union Telephone Co.*, 160 N.H. 309, 317 (2010)(“PUC may not act contrary to the plain meaning of [its own] Rule 431.01.”). [JMR](#), ¶ 24, CR at 64.

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<sup>5</sup> The statute uses both terms, “public good” and “public interest,” but they are analogous. *Waste Control Systems, Inc. v. State*, 114 N.H. 21, 24 (1974). Thus, the remainder of this brief will refer to the standard under [RSA 374:26](#) as just the “public interest” standard (or requirement).

### Commission Rule Requirements

As a request for a declaratory ruling, Liberty's [declaratory judgment petition](#) was governed by [Puc 207.01](#), Add. at 82, which requires that such petitions be conducted under an adjudicative proceeding in accordance with [Puc 203](#). [Puc 207.01\(d\)](#).

[Puc 203](#) governs adjudicative proceedings. [Puc 203.12](#), Add. at 82, requires published notice of, and a hearing on, all adjudicative proceedings. .

In relevant part, [Puc 102.07](#), Add. at 80, defines the word "hearing," as used under Commission rules, and therefore under [Puc 203.12](#) and in relation to the "due hearing" required by [RSA 374:26](#), to mean "a properly noticed session held in a contested case ... which provides for **opportunity for any party, intervenor or commission staff to present evidence and conduct cross-examination** ..." [Puc 102.07](#) (emphasis added). [Puc 203.18](#), Add. at 81, additionally makes clear that interested persons are to be afforded a public comment session at the hearing (or prehearing conference, if scheduled). *Id.*

Under [Puc 203.09\(a\)](#), Add. at 80, parties to adjudicative proceedings are entitled to discovery **as a matter of right**. *Id.*

However, notwithstanding Staff's determination that a proceeding under [RSA 374:22](#) and [RSA 374:26](#) (with a "due hearing") was required, and the clear requirements of its own rules, the Commission granted Liberty's [petition](#) by the [Declaratory Ruling](#), issued October 20, 2017, without notice, hearing, the opportunity to cross-examine, discovery or any of the other requirements of adjudicative proceedings. *See generally* [Declaratory Ruling](#), Add. at 41-45. Moreover, because the [petition](#) was filed as only a request for declaratory relief and not under [RSA 374:22/RSA 374:26](#), the [Declaratory Ruling](#) did not consider the public interest standard. [JMR](#), ¶ 24, CR at 65.

### **The Declaratory Ruling**

The [Declaratory Ruling](#), Add. at 41, found Liberty’s “arguments that CNG and LNG constitute gas of the same character as the propane-air mixture currently supplied to Liberty-Keene customers to be persuasive” and supported by three prior Commission decisions, and concluded that

“(1) Liberty possesses a franchise to provide gas service which includes CNG/LNG service in Keene, and (2) that Liberty has continually exercised this franchise, as referenced in RSA 374:22, I, to the present day.”

*Id.* at 43. Thus, it held that Liberty “has the authority to offer compressed natural gas and liquefied natural gas service to customers in Keene, with conditions ...”

*Id.* at 41. In support of its conclusion, the decision also noted that “RSA 362:2, I, includes in the definition of ‘public utility’ the activity of the ‘distribution or sale of gas.’ This statute does not differentiate among various types of gas.” *Id.* at 43.

While the [Declaratory Ruling](#) acknowledged Staff’s determination that a change in the Keene gas system from propane-air to CNG/LNG would constitute a “change in the character of service,” requiring Liberty to file a petition under [RSA 374:22](#) and [RSA 374:26](#), Add. at 41-42, neither it, nor the Commission’s subsequent opinions, explained why the Commission considered Staff’s conclusion to be wrong—as, whether or not natural gas is “the same character” as the “gas” authorized under the grant (which Clark disputes and rebutted, *see* below), Liberty’s plans could still not otherwise result in a “change in the character of service,” as Staff contended. [SMR](#), ¶ 7, CR at 524-525.

From the record, the utility’s plans plainly will result in a change in a “change in the character of service.”

### **The System Changes at Issue**

Although the difference is not disclosed in Liberty's [petition](#), the [Declaratory Ruling](#) acknowledged "that CNG/LNG installations of the type contemplated by the Company include technology and piping that requires much higher operating pressures than are found in New Hampshire gas distribution systems." Add. at 43. Although it is not discussed in the [Declaratory Ruling](#), the subsequent [Confirming Decision](#) acknowledged that Liberty's plans will involve the construction, operation and maintenance of CNG decompression and injection equipment, with associated trucking (and pollution) activities,. Add. at 52, 54. It also acknowledged that the utility's plans not only call for replacing "much of the existing system pipelines that currently provide propane-air gas to customers," Add. at 55, but for an "extensive whole-system" change, *id.* at 53, resulting in an all new "separate and distinct" natural gas system. *Id.* at 58. [SMR](#), ¶ 5, CR at 522-523. Not discussed in the [petition](#) or any of the Decisions: the LNG facilities will include a 100,000 gallon LNG storage tank. *Id.* at 522.

The all new "separate and distinct" natural gas system will be used to expand Liberty's natural gas business into Keene. [SMR](#), ¶ 6, CR at 523. Although generally called just a "conversion" of propane-air to natural gas in Liberty's [petition](#)<sup>6</sup> and the Commission's [Declaratory Ruling](#),<sup>7</sup> without reference to the expansion side of it, the [petition](#) notes that the resulting new natural gas system will present "a lot of potential in the Keene area to expand and grow the system," in a footnote, *see id.* at FN 1, CR at 24, and the [Confirming Decision](#) acknowledges that the company plans continuing expansion off the project.<sup>8</sup>

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<sup>6</sup> *See id.*, ¶¶ 1, 7, 9-10, CR at 24, 27-28.

<sup>7</sup> Add. at 41.

<sup>8</sup> Add. at 57 ("Future reports with the requisite cost details shall be filed no later than 180 days in advance of each future expansion phase.").



### **The Joint Motion for Rehearing**

Following the [Declaratory Ruling](#), Clark, together with seven members of the NH Pipeline Health Study Group,<sup>9</sup> an unincorporated association of New Hampshire citizens concerned with the harms of fracked gas use, filed a timely [joint motion for rehearing](#) of the decision under [RSA 541:3](#), Add. at 79, which argued, *inter alia*, that:

- (a) the [Declaratory Ruling](#) was unsustainable as Liberty’s expansion plans were contrary to the public interest and violate [RSA 378:37](#) due to the climate, health, safety, economic and other concerns of gas use, and for the climate concerns alone. [JMR](#), ¶¶ 28-41, CR at 67-73;
- (b) the [Declaratory Ruling](#) did not meet [Puc 203](#) and [Puc 207](#) rule requirements, [RSA 374:22](#) and [RSA 374:26](#) statutory requirements, including its public interest standard and requirements mandating notice, a hearing, public comment period, *etc.* in declaratory and other adjudicative proceedings, and thus violated due process and should be vacated. [JMR](#), ¶¶ 10-11, 23-27, CR at 58, 66-68;
- (c) the Commission should have deferred to Site Evaluation Committee (“SEC”) jurisdiction over the matter. [JMR](#), ¶¶ 12-15, CR at 58-61;<sup>10</sup> and
- (d) the [petition](#) should be dismissed as Staff was right, CNG/LNG would constitute a “change in the character of

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<sup>9</sup> Beverly Edwards, Elizabeth Fletcher, Douglas Whitbeck, Gwen Whitbeck, Susan Durling, Julia Steed Mawson and Marilyn Learner.

<sup>10</sup> Clark is not pursuing the SEC jurisdictional issue in this appeal. [SMR](#) at 13 FN 24, CR at 532.

service” requiring permission under [RSA 374:22](#) and [RSA 374:26](#) to distribute CNG/LNG in Keene, as it exceeded the authority under the 1860 franchise grant. [JMR](#), ¶¶ 18-22 (including FN 6), CR at 63-65.

### **Liberty’s Objection to the Joint Motion for Rehearing**

Liberty objected to the [joint motion for rehearing](#), arguing that the movants lacked standing, its [petition](#) did not violate rule requirements, the SEC did not have jurisdiction over the matter and its [petition](#) did not have to meet the requirements of [RSA 374:22](#) and [RSA 374:26](#) “because the petition did not seek franchise approval, but sought confirmation that Liberty need not travel that road,” (¶¶ 27). [Liberty’s objection](#), ¶¶ 4-29, CR at 166-172.

### **Clark Allowed Intervention and Briefing Ordered**

The Commission granted the [joint motion for rehearing](#), in part, pursuant to Commission [Order No. 26,087 \(Dec. 18, 2017\)](#), which found that only Clark had standing, but afforded him some additional “opportunity to be heard” by ordering briefing and the issuance of an order of notice for a conference, which would include establishing a briefing schedule. *Id.* at 4-5, CR at 177-178.

An [Order of Notice](#) issued for a prehearing conference on April 6, 2018, *id.* at 2-3, CR at 184-185, and Clark petitioned to intervene, as the only intervenor this time. CR at 190-191. Clark’s petition was granted, with Liberty stating that it had no objection to the intervention at the April 6, 2018 prehearing conference. [Trans.](#) at 5:4-14-6:9, CR at 201-202.

### **The Prehearing Conference**

At the prehearing conference, Clark opened the discussion of his position on the utility’s [petition](#) by referring the Commission to his filings for all of his concerns, [Trans.](#) at 9:6-13, CR at 205, and closed with a reminder of his position that the case must receive the full process afforded adjudicative proceedings:

“And finally, I would say that the Commission could only hear the request pursuant to 374:22, and as such, it would have to be a proceeding -- a full, you know, a full adjudicative proceeding, with a final hearing at the end, witnesses, discovery, and all of that. But it's not scheduled for that, so it has to be dismissed.”

*Id.* at 15:10-17, CR at 211. But, the Commission never allowed more than briefing, [Confirming Decision](#), Add. at 47, [Trans.](#) at 24:4-26:17, CR at 220-222, although Clark did obtain some limited discovery through the LCIRP case. [RO](#), ¶¶ 10-13, CR at 581-582.<sup>11</sup>

The prehearing conference also resulted in a May 1, 2018 deadline for initial briefs and a May 15, 2018 deadline for reply briefs. Add. at 2. [Confirming Decision](#), Add. at (2).

### **Clark’s Briefing**

Despite the discovery and other procedural impediments, Clark’s briefing offered substantial support for his positions on the [RSA 374:22/RSA 374:26](#), authority and public interest/[RSA 378:37](#) issues,<sup>12</sup> and ample rebuttal to the [petition](#)’s positions and the [Declaratory Ruling](#)’s determination. This discussion is otherwise included herein, primarily in the Argument section of this brief, below.

### **Liberty’s Briefing**

The utility’s initial briefing repeated its [petition](#) positions that the 1860 grant included natural gas and CNG/LNG authority, the broad definition of “gas” under [Puc 502.06](#) and use of various fuels over the years without Commission

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<sup>11</sup> The [Commission Secretarial Letter dated April 11, 2018](#) approving the procedural schedule reflects a three-day discovery period for Clark from the date of the conference, April 6, 2018, to April 9, 2018. CR at 195. This actually refers to the limited discovery Clark obtained in the LCIRP case, not discovery that was allowed in the Keene case. [RO](#), ¶ 12, CR at 584.

<sup>12</sup> Clark’s position on the public interest/[RSA 378:37](#) issue obviously also precludes legal authority.

approval supported this, and that its proposed changes did not constitute a change in the character of its service requiring permission under [RSA 374:22](#) and [RSA 374:26](#); but also agreed with the [Declaratory Ruling](#) that [RSA 362:2, I](#), Add. at 77, and the three cases cited in the opinion were supportive. [Liberty's Memorandum of Law](#) at 2-9, CR at 312-319.

The utility's reply to Clark's initial brief argued that its [declaratory judgment petition](#) was not violative of [RSA 378:37](#) (the "public interest" side of the issue was not discussed) because it "does not seek approval of any 'expansion plans,' just confirmation of the right to distribute natural gas," and that the [Declaratory Ruling](#) was otherwise correctly decided. [Liberty's Reply Memorandum of Law](#) at 1-3, CR at 332-334.

The utility's briefing never substantively addressed, or at least sufficiently rebutted, Clark's climate, health, safety, economic and other public interest/[RSA 378:37](#) arguments, although they were plainly at issue as Clark had raised them in his [joint motion for rehearing](#), *id.*, ¶¶ 1-8, 28-43, CR at 52-57, 67-73, and position statement at the prehearing conference, [Trans.](#) at 9:6-13, CR at 205, prior to initial briefing, and, as discussed in the Argument section *infra*, in his initial brief prior to the company's reply brief. CR at 310-319, 332-335.

### **The Confirming Decision**

After Safety Division, Staff and further Liberty input and submissions, the [Confirming Decision](#), Add. at 47-48, issued July 26, 2019, just two days after Liberty filed a [request for the Commission to promptly resolve Clark's motion for rehearing](#). CR at 399-502. The [Confirming Decision](#) not only confirmed (and clarified) the scope of the [Declaratory Ruling](#), but set forth requirements and conditions for Liberty to meet in installing the five phases of its new natural gas system. *See generally id.*, Add. at 51-60. As this process excludes Clark and

public involvement except by public comment, *id.* at 10-14,<sup>13</sup> Clark contends that it results in a continuing violation of the due process rights of Clark and the public. [SMR](#), ¶ 544, CR at 544.

The [Confirming Decision](#) did not even address Clark’s well-developed expansion, climate, health, safety, economic and other public interest/[RSA 378:37](#) arguments, discussed *infra*, despite recognizing the issue. Add. at 50 (“Mr. Clark argued that Liberty’s petition for a declaratory ruling could not be granted because the conversion is part of Liberty’s broader expansion plans ...”).

Similarly, the [Confirming Decision](#) acknowledged that “Mr. Clark contended that the Petition should be dismissed because it should have been filed under RSA 374:22 and RSA 374:26.” *Id.*, Add. at 50. Yet, its only apparent response to the issue is the statement in its Conclusion that

“Although the Commission is requiring additional approvals pursuant to its general supervisory authority, no additional permissions are required under RSA 374:22 and RSA 374:26.”

*Id.* at 59.

Nor did the opinion adequately and reasonably, *i.e., properly* address Clark’s other thoroughly-briefed arguments against authority, discussed *infra*.

Moreover, incredibly, the [Confirming Decision](#) acknowledged for the first time that the terms of the [Settlement Agreement](#) and Commission [Order No. 25,736 \(Nov. 21, 2014\)](#) in [Commission Docket No. DG 14-155](#), by which Liberty acquired the Keene franchise, require the utility “to continue operation of the system ‘as is’ ... ‘until the Commission approves otherwise’” [Confirming Decision](#), Add. at 53-54. Thus, as such permission clearly had not been granted at the time Liberty filed its declaratory judgment, the utility plainly **did not have the**

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<sup>13</sup> As confirmed by the subsequent [Final Order](#), Add. at 70.

**authority** at the time it filed its petition requesting a declaratory ruling that it did. [SMR](#), ¶ 39, CR at 546-547.

### **Clark's Second Motion for Rehearing**

In his subsequent timely [second motion for rehearing](#) under [RSA 541:3](#), Clark asserted numerous grounds supporting rehearing of the [Confirming Decision](#) and [Declaratory Ruling](#), including not only those already asserted in his prior pleadings, *see* [SMR](#), ¶ 16, CR at 529, but additional specific reasons why the opinions were unlawful and unreasonable. Clark noted among these grounds the Commission's acknowledgment of conflicting/preclusive terms of the [Settlement Agreement](#) and Commission [Order No. 25,736 \(Nov. 21, 2014\)](#) and the Commission's failure to properly address Staff's determination and Clark's well-developed arguments, including his public interest/[RSA 378:37](#), [RSA 374:22/RSA 374:26](#) and authority arguments. [SMR](#), ¶¶ 5-7, 12, 24-25, 36-39, 41 and FN 24, CR at 522-524, 534-535, 544-548. This error was contrary to Commission [Order No. 24,442 \(Mar. 11, 2005\)](#) at 49, as explained and confirmed by Commission [Order No. 26,291 \(Sep. 5, 2019\)](#) at 24 (Commission must address well-developed issues).

On the public interest/[RSA 378:37](#) issue, Clark complained that it was unlawful and unreasonable for the [Confirming Decision](#) to *not even consider* an issue of such enormous public concern and obvious impact to Keene, while ignoring better alternatives for the city, and the decision was "contrary to the only lawful, reasonable decision that could be made consistent with the public interest and [RSA 378:37](#), *i.e.*, dismissal or other denial of the petition in some form, if the public interest/[RSA 378:37](#) issue had been considered." [SMR](#), ¶¶ 24-26, 32-34, CR at 534-535, 541-543.<sup>14</sup>

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<sup>14</sup> Besides the alternatives suggested by Clark, other potentially better options for Keene, such as extending the current land lease or purchasing/leasing new and and/or equipment, CR at 555-557 ¶¶ 7-9, should have been probed.

Clark also contended that, in supplementation of his arguments, the Commission should have considered three well-publicized, important matters which occurred subsequent to the final May 15, 2018 briefing deadline in issuing the [Confirming Decision](#)—and/or that the Commission should consider them now as new evidence—as all strongly repudiate the lawfulness and reasonableness of the [Declaratory Ruling](#) and [Confirming Decision](#): (1) the Merrimack Valley gas disaster of September 13, 2018, (2) the 13-agency federal government report, ["The Fourth National Climate Assessment," Vol. 2](#),<sup>15</sup> released by the Trump Administration, in November, 2018, and (3) the Intergovernmental Panel on Climate Change (“IPCC”) [special report](#),<sup>16</sup> issued in October, 2018. [SMR](#), ¶¶ 27-28, CR at 535-539. Clark argued that, had the aforementioned reports and gas disaster been properly considered by the Commission, no lawful, reasonable decision could have been reached, particularly in light of the circa 2030 and 2050 deadlines under the IPCC special report and its admonition that “everything matters,” but that Liberty’s plans are contrary to the public interest and [RSA 378:37](#). *Id.*, ¶ 29, CR at 539.

### **Liberty’s Objection To Clark’s Second Motion for Rehearing**

Liberty objected to Clark’s second motion for rehearing by primarily arguing that its decision to employ a declaratory judgment petition for the relief it sought limited the challenges that Clark could raise to the requested relief and proceedings to “the single, narrow issue Liberty raised ... that Liberty need not

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<sup>15</sup> For citation, see [SMR](#) at 18 FN 29, CR at 537.

<sup>16</sup> For citation, see [SMR](#) at 18-19 FN 30, CR at 537-538. A “Summary for Policymakers” should be available at <https://www.ipcc.ch/sr15/chapter/spm/> or otherwise easily locatable online by its citation: IPCC, 2018: *Summary for Policymakers. In: Global Warming of 1.5°C. An IPCC Special Report, etc.*

seek permission under RSA 374:22 and 374:26 to distribute natural gas in Keene.” [Liberty \(ENGI\) dba Liberty – Keene Objection to Terry Clark Motion for Rehearing](#) dated September 5, 2019, ¶¶ 2-3, CR at 566-567. In the utility’s view, this issue had been properly decided and process was sufficient as only a legal question was raised. *See generally* [Liberty \(ENGI\) dba Liberty – Keene Objection to Terry Clark Motion for Rehearing](#) dated September 5, 2019, CR at 566-573. As for the [Settlement Agreement](#) and Commission [Order No. 25,736 \(Nov. 21, 2014\)](#), the utility argued:

“... the settlement agreement, which PUC approved in Order No. 25,736 (Nov. 21, 2014), says its terms ‘shall remain in effect until the Commission approves otherwise.’ In Docket DG 17-048, the Commission ‘approve[d] otherwise’ and allowed Liberty to consolidate the Keene Division into the rest of the Liberty system.”

*Id.* at 4, CR at 569.

### **Clark’s Reply**

Clark replied, *inter alia*, that the utility could not circumvent requirements mandated by law, the utility’s position on the [Settlement Agreement](#) and Commission [Order No. 25,736 \(Nov. 21, 2014\)](#) was contrary to their terms and established legal principles requiring dismissal of the utility’s [declaratory judgment petition](#) as speculative and failing to claim a present justiciable right, and that the Commission’s failure to apply the [RSA 374:26](#) public interest standard alone was a violation of due process requiring that the Commission’s opinions be held void *ab initio* and vacated. *See generally* [Terry Clark reply to Liberty \(ENGI\) dba Liberty – Keene Objection to Terry Clark Motion for Rehearing](#) dated September 11, 2019, ¶¶ 2-16, CF at 576-586.

### **The Final Order**

The Commission issued the [Final Order](#), Add. at 61, on September 25, 2019, which denied not only Clark’s [second motion for rehearing](#) (and clarification) but one Liberty filed, as well (essentially seeking clarification), and



clarified certain requirements imposed on the utility by the [Confirming Decision](#). Add. at 68-76. Again, the [Final Order](#) failed to properly address all of Clark's well-developed arguments, including Clark's positions on the public interest/[RSA 378:37](#), [RSA 374:22](#)/[RSA 374:26](#), authority and due process issues, despite acknowledging them. *Id.* at 63-65. Moreover, the decision unlawfully and unreasonably did not even acknowledge the IPCC special report, Merrimack Valley gas disaster or "[The Fourth National Climate Assessment](#)," Vol. 2, as Clark had urged, [SMR](#), ¶¶ 27-29, CR at 535-539—or even Clark's request, for that matter. Add. at 61-76.

Instead, the Commission improperly agreed with the utility's arguments that its filing of a declaratory judgment petition dictated and narrowed the legal requirements for the proceedings, that they had been met and that the permission requirement of the [Settlement Agreement](#) and Commission [Order No. 25,736 \(Nov. 21, 2014\)](#) was satisfied when the Commission "approved otherwise" under Commission [Order No. 26,122 \(Apr. 27, 2018\)](#) *subsequent* to the October 20, 2017 [Declaratory Ruling](#), and gave short shrift to Clark's other arguments. [Final Order](#), Add. at 69-70. A review of Commission [Order No. 26,122 \(Apr. 27, 2018\)](#) indicates that the Commission found the requisite "approval" to change the "operation of the system," [Confirming Decision](#), Add. at 68-69, in a rate distribution consolidation order entered in a rate case.

On October 24, 2018, within 30 days of the [Final Order](#), pursuant to [RSA 541:6](#), Add. at 80, Clark filed this timely appeal of the Decisions.

### **SUMMARY OF THE ARGUMENT**

The Commission must act in the public interest and has broad discretion to carry out this obligation. Meeting its charge requires the Commission to weigh purported public benefits against actual costs, including environmental costs. Climate change is a "well-established environmental cost of methane use" as methane, the primary component of natural gas, warms the planet roughly 86

times more for the first couple of decades after its use, and 34 times as much for a century, than oil heat emissions. Natural gas is thus not a “bridge fuel” to carry us from oil heat to clean sustainable energy.

The public demands climate action because it is one of the all-time greatest “needs of the public at large.” There is especially great demand for climate action in New Hampshire, and particularly in Keene, which has adopted the emissions reduction goals of the [Paris Climate Accord](#).

Natural gas use comes with tremendous hidden costs, including the health, economic and other harms associated with climate change and potentially enormous “stranded costs,” and fracked gas use brings even greater health concerns. If climate change, alone, had been properly considered below, the petition *sub judice* should have been dismissed or denied as being contrary to the public interest and the state’s official energy policy under [RSA 378:37](#), especially if the Commission had properly considered the IPCC special report, 13-agency government report and Merrimack Valley gas disaster raised by Clark. But, the petition was unlawfully and unreasonably granted without the Commission even considering the public interest issue and Clark’s well-developed, unrebutted arguments on the issue.

The Decisions are a nullity. The utility’s petition should have been dismissed under Commission rules and for being contrary to the public interest and violative of [RSA 378:37](#), [RSA 374:22](#) and [RSA 374:26](#). The Commission’s failure to do this, to lawfully and reasonably ground its opinions, to follow statutory requirements (including the public interest standard) and its own rules and orders in the proceedings below, including failing to hold the utility to its burden of proof, and other due process and egregious errors—on top of its potential to be horrible precedent—should result in the Decisions being held void *ab initio* and vacated.

## **ARGUMENT**

### **1. The Decisions are Unlawful and Unreasonable as Contrary to the Public Interest and RSA 378:37**

In his briefing to the Commission, Clark urged:

“The Commission must act consistent with the public interest and has broad discretion in carrying out this obligation. *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 requires consideration of not only the needs of the persons and utility directly involved, but also ‘the needs of the public at large.’ *See Waste Control Systems, Inc. v. State, supra*, 114 N.H. at 24)(citing *Boston & Maine R.R. v. State, supra*, 102 N.H. at 10). To meet its charge, the Commission must weigh asserted public benefits against actual costs, including environmental costs. *See Public Service Company of New Hampshire d/b/a Eversource Energy*, [Commission Docket No. DE 16-241, Order of Notice, at 3-4](#) ...

... The Commission cannot stand idly by, holding the button on the breaks to a runaway train, blaming the job description or lack of clarity in orders for not doing the obviously **only** right thing—not when it must act in the public interest and the button is in its hand ... Besides, again, to meet its charge, the Commission must weigh asserted public benefits against actual costs, including environmental costs, *see Public Service Company of New Hampshire d/b/a Eversource Energy*, [Commission Docket No. DE 16-241, Order of Notice, at 3-4](#), and climate change is a well-established environmental cost of methane use.”

[IB](#) at 6, 19-20, CR at 233, 246-247, 238-239 (some citations omitted).

Clark explained, citing ample support, that climate change is a “well-established environmental cost of methane use” because methane, the primary component of natural gas, is an extremely potent greenhouse gas that warms the planet 86 times more for the first couple of decades after its use, and 34 times as much for a century, than oil heat emissions (carbon dioxide); that natural gas is

thus not the “bridge fuel” to carry us from oil heat to clean sustainable energy that had been hoped; that the public demands climate action because it is one of the all-time greatest “needs of the public at large,” *Waste Control Systems, Inc.*, 114 N.H. at 24, as “[t]he situation is truly dire, with a rapidly closing window for action”; and that there is especially great demand for climate action in New Hampshire, and particularly in Keene, which has adopted the emissions reduction goals of the [Paris Climate Accord](#). [IB](#) at 6-15, CR at 233-242.

Clark further explained that fracked gas use brings serious health concerns. [IB](#) at 20-23, Exhibits “A”-“D,” CR at 247-250, 278-295, 299-300, 305-309. Clark cited ample support for the concerns, including studies associating respiratory, heart and other health problems with fracked gas releases, the industry’s refusal to disclose certain fracked chemicals, the company’s inability to tell us what is in Liberty’s gas and the fact that, besides particulates, a number of toxic air pollutants have been associated with fracked gas. *Id.*

Clark also noted the safety concern: pipelines and other gas infrastructure do explode, or leak, with often catastrophic consequences. [IB](#) at 23-24, CR at 250-251.

Gas use comes at enormous, largely hidden, costs not associated with sustainable energy, including millions of premature deaths, losses suffered by our tourism, sugar, agriculture and dairy industries, as well as seacoast homeowners and towns, increased health costs, and the rising remedial costs of addressing storms, droughts and other weather events associated with climate change—with one study determining that it will cost between \$1.9 million and \$2.9 million to address the climate impacts to just three New Hampshire coastal towns. [IB](#) at 24-29, CR at 251-256. As projected by the ["The Fourth National Climate Assessment," Vol. 2](#) at 25-26, CR at 535-537, the economic losses for New Hampshire and the rest of the country will be staggering.

Then, of course, there are the tremendous stranded costs inherent in approving gas infrastructure, such as the Granite Bridge Project, for ratepayer payment well into the next half of the century, when we will have to discontinue use long before then if we are to responsibly address climate change. [IB](#) at 29-30, CR at 256-257.

In a nutshell, Clark explained, from a climate standpoint alone, we must be substantially decreasing, not increasing methane emissions at this time,<sup>17</sup> and thus *must* reject Liberty’s expansion plans for continuing, substantial, long-term gas growth commitment in New Hampshire, through at least 2037/2038, with corresponding emissions for potentially decades thereafter, [IB](#) at 14-18, CR at 241-245, as being against the public interest. *Id.* at 24, CR at 251.

The same result is reached under an [RSA 378:37](#) analysis, which requires that our fuel choices come at “the lowest **reasonable** cost.” [IB](#) at 25-34, CR at 252-261. Moreover, the conclusion is supported by [RSA 378:38, VI](#), which requires environmental impact assessments, mandating impact analysis, in gas utility planning, and climate change is an environmental impact. [IB](#) at 19, CR at 246.

It is also strongly supported by the three post-brief matters Clark urged the Commission to consider:

- (1) the Merrimack Valley gas disaster on September 13, 2018, caused by a high-pressure natural gas incident, which resulted in “a series of explosions and fires” that damaged 131 structures, including destroying five homes, killed one individual and injured 28 others;

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<sup>17</sup> A 45% reduction from 2010 levels is required by circa 2030 to avoid the worst of climate change under the IPCC special report, *see* discussion *infra*.

- (2) the 13-agency federal government report, "[The Fourth National Climate Assessment](#)," Vol. 2,<sup>18</sup> issued by the Trump Administration in November, 2018, which warns, in part, that:

“In the absence of significant global mitigation action and regional adaptation efforts, rising temperatures, sea level rise, and changes in extreme events are expected to increasingly disrupt and damage critical infrastructure and property, labor productivity, and the vitality of our communities ... With continued growth in emissions at historic rates, annual losses in some economic sectors are projected to reach hundreds of billions of dollars by the end of the century— more than the current gross domestic product (GDP) of many U.S. states.”

*Id.* at 25-26. [SMR](#), ¶ 27, CR at 535-537; and

- (3) the Intergovernmental Panel on Climate Change (“IPCC”) [special report](#),<sup>19</sup> issued in October, 2018, which warns that:

- We are in desperate straits with climate change. Currently at only 1°C global warming, we are on a path for 3°C warming by 2100, with continuing warming afterwards;
- We will be much worse at even 1.5°C warming, with substantial increases in climate-related harms to health, food and water supplies, livelihoods, economic growth and human security;
- Just a half of a degree increase from 1.5°C to 2°C global warming will significantly increase the risks and harms of droughts, floods, extreme heat and other climate-related events;
- We have only until about 2030 to reduce emissions sufficiently to limit global warming to 1.5°C, and only then if we cut emissions by about 45% from 2010 rates (which have gone up since then),

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<sup>18</sup> For citation, see [SMR](#) at 18 FN 29, CR at 537.

<sup>19</sup> For citation, see [SMR](#) at 18-19 FN 30, CR at 537-538.

which will require an incredibly ambitious, united, sustained worldwide effort. Even then, to limit global warming to 1.5°C, we will have to achieve net-zero in human-caused emissions by about 2050;

-- **Everything we do to mitigate, or increase, warming matters** as every fraction of a degree will make a difference.<sup>20</sup>

[SMR](#), ¶¶ 27-28, CR at 535-539.

Particularly if the Commission had properly considered the IPCC special report, 13-agency government report and Merrimack Valley gas disaster, the issue is not close from Clark’s vantage, given the harm New Hampshire will suffer from climate change. Everything the Commission does is in the public interest: franchise approvals, *see* [RSA 374:26](#), settlement agreements, *see* [Puc 203.20](#), Add. at 82, even *schedules*,<sup>21</sup> CR at 195. How could it approve a [petition](#) and project clearly raising climate and other major public concerns, then, without even considering the issue? [RSA 374:26](#) does not just concern franchise approvals, it facially requires utilities to operate in the public interest for as long as they are “engaging in business,” *id.*, and there is no rational reason why the obligation should be read to terminate short of that point—or to at least not require recognition of and appropriate responsiveness to a *crisis* in the utility’s business planning; as, again, [RSA 378:37](#) must be read.

But, again, the Commission never addressed Clark’s public interest/[RSA 378:37](#) arguments. Nor did Liberty ever adequately rebut them. The company’s sole response to the issue, that it was not seeking “approval” for its expansion plans, just “confirmation” of the authority, CR at 333, ignored that it was *required*

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<sup>20</sup> [“IPCC Press Release”](#) dated October 8, 2018.

<sup>21</sup> *See* [Commission secretarial letter approving schedule dated April 11, 2018](#), CR at 195.

to seek approval, for all of the reasons stated herein. It also overlooked that the result of the relief it seeks is unlawful expansion and an unlawful order, however characterized, an issue Clark had clearly raised as preclusive of the finding of authority, and which thus had to be rebutted to obtain that relief. The utility's response fell far short of the mark.

As Clark's position on the public interest/[RSA 378:37](#) issue was well-developed, Clark was entitled to proper Commission consideration of the issue and, as his position was amply supported and not disproved, Clark was entitled to a decision on the merits in his favor by dismissal or denial of the utility's petition. The Decisions are unlawfully and unreasonably grounded and should be reversed.

## **2. The Decisions are a Nullity and Should be Vacated**

### **The Grant Lacks Authority and it May only be Provided Under RSA 374:22 and RSA 374:26**

Clark's briefing below established the following.

Under [RSA 374:22](#) and [RSA 374:26](#) and this Court's decisions, Liberty's original franchise rights must be held to be limited to the four corners of the 1860 grant, strictly construed to exclude CNG/LNG service unanticipated at the time, and incapable of expansion to include such service, except by further legislative permission under the statutes. *See, e.g., State v. Hutchins*, 79 N.H. 132, 137-139 (1919)(rights in legislative grants are fixed by the grant, must be read to comport with the legislative rights customarily granted at the time, and cannot be changed except by further legislative action); *Buatti v. Prentice*, 162 N.H. 228, 230 (2011)(as the grant bestowed rights not known under the common law, "strict compliance with its terms is required"); *Attorney General ex rel. Abbot v. Town of Dublin*, 38 N.H. 459, \_\_\_\_ (1859)("This is but the application to a particular subject of a well settled general rule, applicable to all trades, professions and customs, that the meaning of the word is to be ascertained by the usage of the time when employed ..."). [IB](#) at 41-44, CR at 268-271; [RB](#) at 6-7, CR at 326-



327. The type of “gas” business actually conducted over the years does not change this result, as “[n]o act, or failure to act, on the part of state officials could enlarge” the grant. *State v. Hutchins*, *supra*, 79 N.H. at 137, CR at 327. Indeed, “[i]t would be an anomalous situation if [an] unauthorized act... before legislative sanction therefor was obtained should be the means of ... thereafter acquiring a grant of extraordinary rights.” *Id.* Nor do subsequent Commission rules, including [Puc 502.06](#), adopted a century after the Keene grant, change the result. *Milette v. New Hampshire Retirement System*, 141 N.H. 342, 347 (1996) (legislature’s grant of rulemaking authority to agency is not grant of power to agency to modify legislation by regulation); *In re Campaign for Ratepayers’ Rights*, 162 N.H. 245 (2011) (agency rules may not modify statutory law) and *In re Appeal of Morrill*, 145 N.H. 692 (2001) (generally, substantive changes to statutes or rules are applied prospectively). CR at 268-271, 326-327.

Thus, CNG/LNG authority cannot be read into the original grant; and, even if it could, it was never “theretofore actually exercised” and thus lost, requiring new permission under [RSA 374:22](#) and [RSA 374:26](#). CR at 268-271, 275-276, 326-327.

CNG and LNG cannot be considered the same “gas” that was authorized under the Keene grant as CNG and LNG were still unknown as of 1860, and even traditional natural gas was not used by a utility until 1865, and thus cannot be considered to be included within the legislative intent of the grant. CR at 271.

The [Declaratory Ruling](#) grounded support in its determination that [RSA 362:2, I](#) “does not differentiate among various types of gas.” *Id.*, Add. at 43. However, *Allied New Hampshire Gas Co. v. Tri-State Gas & Supply Co.*, 107 N.H. 306, 307-309 (1966), discussed at CR at 327-329, instructs that [RSA 362:2, I](#) does differentiate as, although it is broad enough to include a number of modern “gas” distribution services not offered by any state “public utility” at the time of the legislation, only those consistent with its legislative purpose are intended to be

included in the statute. So, too, the 1860 grant should not be read to include natural gas, including CNG/LNG, within its intent, as neither had previously been distributed by a public utility at the time of the grant and adding such gas, for heating, to the scope of the grant would not further its purpose—lighting.

Liberty has not established that its proposed new gas is of the “same character” as that authorized under the franchise grant—in fact, it claims that it does not even know what is in its “natural” gas, but admits that it is a new fuel compared to propane-air—and thus did not meet its burden of proof on the issue, *i.e.*, by a “preponderance of the evidence,” under [Puc 203.25](#), Add. at 82. CR at 270-274, 327-329.

The utility also did not meet its burden to establish that the addition of an all new type of gas distribution system, with “technology and piping that requires much higher operating pressures than are found in New Hampshire gas distribution systems,” and other extensive system changes discussed herein will not otherwise result in a change in the character of Liberty’s gas service in Keene, requiring permission under [RSA 374:22](#) and [RSA 374:26](#), as Staff contended and is obviously the case. CR at 274-275, 327-329.

“[G]oing from an authorization to sell what was likely water gas or coal gas ‘for the purpose of lighting’ to fracked (or even conventional) CNG/LNG for heating, is a quantum leap that should be met with a lasso and a tethering back to the original grant.” CR at 275.

The three decisions the Commission relied on for its “same character” determination in the [Declaratory Ruling](#), Add. at 43, were inapposite as they only involved cases concerning temporary gas service supplementation on an essentially emergency basis (and were uncontested). CR at 275.<sup>22</sup>

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<sup>22</sup> The [Confirming Decision](#) at 8, Add. at 53, points out more distinguishing facts but, unreasonably, does not change its opinion.

### **Additional Reasons Support Vacating the Decisions**

The Decisions are unsustainable under a public interest/[RSA 378:37](#) analysis and in light of the legal principles just discussed. Additionally, the Decisions are a nullity, void *ab initio*, and should be adjudged as much and vacated due to the Commission's processing and determination of the matter in violation of [RSA 374:22](#) and [RSA 374:26](#) and its own rules requiring dismissal, under the wrong standard, and without the hearing, opportunity for cross-examination, discovery and other "opportunity to be heard" required by its own rules and this Court's precedent to provide due process. See [RSA 374:22](#); [RSA 374:26](#); [Puc 207.01\(d\)](#); [Puc 203.12](#); [Puc 102.07](#); [Puc 203.09\(a\)](#); *Appeal of Morin*, 140 N.H. 515, 519 (1995)(due process requires "the opportunity to present one's case"); *Attitash Mt. Service Co. v. Schuck*, *supra*, 135 N.H. at 429 (agencies must follow their own rules); *In re Union Telephone Co.*, 160 N.H. at 317; *Appeal of Public Service Co. of New Hampshire*, 122 N.H. 1062, 1077 (1982)(Commission imprudency finding, improperly made in financing hearing under wrong standard, violated due process and ordered expunged); *Clark v. New Hampshire Dept. of Health and Welfare*, 114 N.H. 99, 104 (1974)(agency regulations contrary to statutory requirements held void); *Appeal of Gallant*, 125 N.H. 832, 834 (1984); *WorldWide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980)(judgment rendered in violation of due process is void); 2 Am.Jur.2d Judgments § 31 (1994)("... a void judgment ... has no legal or binding force or efficacy for any purpose or at any place. It cannot affect, impair, or create rights, nor can any rights be based in it ... All proceedings founded on the void judgment are themselves regarded as invalid and ineffective for any purpose."). [JMR](#), ¶¶ 10-11, 23-27, CR at 58, 65-67; [SMR](#), ¶¶ 2-4, 19, CR at 521-522, 532. See also 2 Am.Jur.2d Admin. Law § 51 (2004)("An agency has no power to act in conflict with the authority granted to it by the legislature or outside of its own regulations ... and administrative actions exceeding authority delegated by law are void. An

agency cannot expand its granted powers by its own authority ...”)(footnotes omitted); 2 Am.Jur.2d Admin. Law § 264 (2004)(“An attempt to exercise a power without compliance with statutory provisions as to the manner and circumstances of its exercise is a nullity.”)(footnote omitted).

As Clark noted at the prehearing conference, discovery was essential here given that the utility’s [petition](#) did not provide sufficient specificity to make necessary factual determinations. [Trans.](#) at 24:22-26:11, CR at 220-222. Indeed, the “same character” issue, the sole issue addressed by the utility and Commission with regard to authority, requires two obviously factual determinations, *i.e.*, whether the “same character” of “gas” and “same character” of everything else about service will be provided, clearly entitling parties to discovery to properly prepare their cases. *See also Society for Protection of N.H. Forests v. Site Evaluation Comm.*, 115 N.H. 163, 168 (1975)(“Where issues of fact are presented for resolution by an administrative agency due process requires a meaningful opportunity to be heard.”); [Puc 203.09\(a\)](#).

However, the Decisions should also be declared a nullity and vacated due to the Commission’s other unlawful and unreasonable conduct, including failing to address Staff’s reasonable position on the “change in the character of service” issue and failing to hold Liberty to its burden of proof under [Puc 203.25](#). [SMR](#), ¶ 5-7, 16, CR at 522-525, 529; [IB](#) at 43-49, CR at 270-276; [RB](#) at 7-9, CR at 327-329. It also erroneously ignored the fact that Commission [Order No. 26,122 \(Apr. 27, 2018\)](#) could not have “approved otherwise,” in terms of the approval required under the [Settlement Agreement](#) and Commission [Order No. 25,736 \(Nov. 21, 2014\)](#). The April 17, 2018 order plainly arose subsequent to the October 20, 2017 [Declaratory Ruling](#) and, as Clark explained, the authority declared by the [Declaratory Ruling](#) had to arise under the Keene grant, as declaratory judgments cannot be based on hypothetical, speculative, nonjusticiable rights, under Commission rules or otherwise, but must be grounded in a claim of “a present

legal or equitable right or title” at both the time of the filing of the declaratory judgment petition and the Commission’s ruling on it. Commission [Order No. 24,137 \(Mar. 14, 2003\)](#) at 28; [RSA 491:22](#), Add. at 79; *Conway v. Water Resources Bd.*, 89 N.H. 346 (1938); *Carbonneau v. Hoosiers Engineering Co.*, 96 N.H. 240 (1950); [Puc 207.01\(c\)\(2\)](#); [JMR](#), ¶¶ 16-17, CR at 61-63; [SMR](#), ¶¶ 19, 41, CR at 532, 547-548. Moreover, [Order No. 26,122 \(Apr. 27, 2018\)](#) could not have provided the approval required under [Settlement Agreement](#) and Commission [Order No. 25,736 \(Nov. 21, 2014\)](#), as the former was a rate consolidation order in a rate case, and the permission required under the latter went to *operation* of the Keene franchise. [Confirming Decision](#), Add. at 54.

Perhaps trying to harmonize the [Settlement Agreement](#) and Commission [Order No. 25,736 \(Nov. 21, 2014\)](#) in its Decisions, the Commission shifted from finding CNG/LNG authority under the original 1860 Keene grant in its [Declaratory Ruling](#) and [Confirming Decision](#), to finding it (“approved otherwise”) in its [Final Order](#). But, if the 2014 Commission order “approved” the CNG/LNG authority, why did Liberty even file its declaratory judgment case in 2017? The Decisions’ unlawful and unreasonable inconsistencies and errors on this issue are unsustainable.

Nullifying the Decisions is paramount as they may be relied on for horrible precedent from a climate, health, safety and citizens’ rights standpoint. [SMR](#), ¶ 42, 548-549; [IB](#) at 2-3, 229-230.

### **CONCLUSION**

The Court should, as Clark's first preference, reverse the Decisions and outcome below in favor of Clark on the merits of the public interest/[RSA 378:37](#) issue; or, alternatively, the Court should vacate the Decisions and require further proceedings under [RSA 374:22](#) and [RSA 374:26](#) for the relief Liberty seeks, providing such directions and orders concerning the same, if any, as may be just and proper.

### **REQUEST FOR ORAL ARGUMENT**

Clark requests a 15 minute oral argument, to be presented by Richard M. Husband.

### **STATEMENT OF PRESERVATION OF ISSUES**

Pursuant to [Supreme Court Rule 10\(1\)\(i\)](#), the appellant hereby states that "[e]very issue specifically raised has been presented to the administrative agency and has been properly preserved for appellate review by a contemporaneous objection or, where appropriate, by a properly filed pleading."

### **APPELLANT'S CERTIFICATION**

The Appellant certifies that copies of the appealed decisions are appended to this brief.

Respectfully submitted,

Terry Clark,

Dated: March 23, 2020

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

**CERTIFICATE OF SERVICE**

I, Richard M. Husband, Esquire, hereby certify that on March 23, 2020, I served copies of the foregoing on the Attorney General and all counsel and parties on the Court's service list via the electronic filing system.

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

## ADDENDUM



**STATE OF NEW HAMPSHIRE  
PUBLIC UTILITIES COMMISSION**

**DG 17-068**

**Liberty Utilities (EnergyNorth Natural Gas) Corp. d/b/a Liberty Utilities - Keene Division**

**Petition for Declaratory Ruling**

**Order on Declaratory Ruling**

**ORDER NO. 26,065**

**October 20, 2017**

In this Order, the Commission grants the Company's request for a declaratory ruling that it has the authority to offer compressed natural gas and liquefied natural gas service to customers in Keene, with conditions based on the Commission's existing authority regarding engineering and operational safety.

**I. PETITION FOR DECLARATORY RULING**

On April 26, 2017, Liberty Utilities (EnergyNorth Natural Gas) Corp. d/b/a Liberty Utilities - Keene Division ("Liberty" or "the Company") filed a petition for a declaratory ruling pertaining to the Company's plans for compressed natural gas ("CNG") and liquefied natural gas ("LNG") installations in Keene. For some time the Company has contemplated conversion of the system in Keene from a propane-air system to a CNG/LNG system. The conversion has been partially motivated by recent equipment failures on the propane-air system. Petition at 1-2. The Company's petition followed a discussion with Commission Staff in which, according to Liberty, Staff stated that the Company is required to file reports and "a petition under RSA 374:22 and RSA 374:26, the franchise statutes, for permission to distribute natural gas because ... the conversion from propane to natural gas constitutes a 'change in the character of service.'" Petition at 2. While Liberty did not object to reporting requirements associated with RSA 374:5,

it disagreed with the assessment that the Company needed to petition for new franchise rights. According to Liberty, it has a franchise to provide gas service in Keene which can be provided using various types of gas. Petition at 12.

Liberty presented a series of arguments to support its position. The Company first made reference to its original 1860 charter, which refers to "gas." The Company then pointed to N.H. Code Admin. Rules Puc 502.06, which defines gas as "any manufactured or natural gas or any combination thereof," in the context of CNG and LNG being produced from the compression and liquefaction of natural gas. Petition at 3. Liberty argued that the shift in supply technology from one subclass of Puc 502.06 gas (propane-air) to another (CNG/LNG) was allowed under its franchise authority, without any need for further Commission approval under RSA 374:22 and RSA 374:26. The Company cited to several instances in the 1970s and 1980s when natural gas utilities installed or acquired propane equipment, without requesting additional franchise permission from the Commission. Petition at 6-9. With regard to Liberty's own franchise for Keene, handed down through a chain of corporate successors in interest, the Company referred to a series of fuel conversions between various classes of gas (manufactured gas, butane, butane-air, propane-air) from the 1950s through the 1970s, without any Commission requirements for franchise approval. Petition at 8.

In conclusion, Liberty asked the Commission to declare that the Company did not need to seek permission under RSA 374:22 and RSA 374:26 to distribute natural gas in the form of CNG/LNG in Keene. Petition at 13. In making its request, the Company stated that it "also welcomes the [Commission's] Safety Division's review and inspection of the facility and related issues as it enforces applicable safety laws." Petition at 12.

## II. COMMISSION ANALYSIS

Having reviewed the Company's petition and the arguments and information presented, we conclude that under RSA Chapter 374, Liberty has the authority, pursuant to RSA 374:22, to supply CNG and LNG service in Keene under its current franchise. RSA 362:2, I, includes in the definition of "public utility" the activity of the "distribution or sale of gas." This statute does not differentiate among various types of gas.

We find the Company's arguments that CNG and LNG constitute gas of the same character as the propane-air mixture currently supplied to Liberty-Keene customers to be persuasive. This interpretation of gas service is consistent with prior Commission decisions allowing natural gas utilities to supplement natural gas supply with propane without requiring additional franchise approval under RSA 374:22 and RSA 374:26. *See, e.g., Gas Service, Inc.*, 58 NH PUC 48 (July 24, 1973); *Manchester Gas Company*, 58 NH PUC 71 (October 2, 1973); *Concord Natural Gas Corp.*, 58 NH PUC 78 (October 16, 1973). Consistent with this interpretation of gas service, we conclude that (1) Liberty possesses a franchise to provide gas service which includes CNG/LNG service in Keene, and (2) that Liberty has continually exercised this franchise, as referenced in RSA 374:22, I, to the present day.

While we agree with Liberty that it has the legal authority to offer CNG/LNG service in Keene, it is critical that any new CNG/LNG installations be accomplished safely. We note that CNG/LNG installations of the type contemplated by the Company include technology and piping that requires much higher operating pressures than are found in New Hampshire gas distribution systems. Pursuant to RSA 374:1 (utilities must provide safe and adequate service), RSA 374:3 (Commission's general supervision of utilities), RSA 374:4 (Commission's duty to keep informed), and related statutes, the Commission has the authority and responsibility to ensure



that all utility installations are safely and reliably engineered in conformance with all applicable standards, and that public utilities like Liberty meet their duty to provide safe and adequate service under RSA 374:1. To that end, pursuant to RSA 374:1, RSA 374:3, and RSA 374:4, with respect to the system conversion in Keene, we order Liberty to provide all final plans for engineering, construction, installation, testing, operations, public awareness, maintenance, emergency response, procedures, and schematics, including qualifications and training of personnel, in sufficient detail as requested by the Commission's Safety Division. Further, before gas flows through these installations, we must receive a report from the Safety Division assessing the adequacy of the Company's plans and the satisfactory completion of a physical inspection of all installations.

It has also come to the Commission's attention, within the context of the companion rate case (Docket No. DG 17-048), that the Company's affiliate, Liberty Utilities Corp. (EnergyNorth Natural Gas), seeks to consolidate the costs of the planned Keene installations into its larger customer rate base (which is much larger than that of just Liberty's Keene franchise). This Order does not address the appropriateness of such consolidation of rates under RSA Chapter 378, nor does it include any finding of prudence regarding the Keene installation. These matters should be examined in the rate case in the first instance, and potentially, as part of a separate review proceeding.


**Based upon the foregoing, it is hereby**

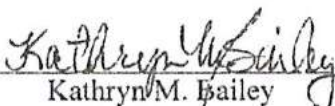
**ORDERED**, that Liberty's request for a declaratory ruling is GRANTED, subject to the reporting and operational requirements delineated in this Order; and it is

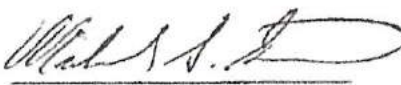
**FURTHER ORDERED**, that Liberty provide the final comprehensive plans and reports as described above; and it is

**FURTHER ORDERED**, that Liberty shall not flow any gas through the CNG/LNG installation in Keene until the Commission's Safety Division has found the required plans and reports adequate, and completed its physical inspection of the facilities as described above.

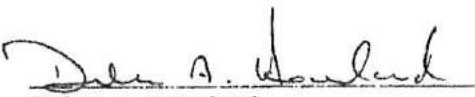
By order of the Public Utilities Commission of New Hampshire this twentieth day of October, 2017.

  
\_\_\_\_\_  
Martin P. Honigberg  
Chairman

  
\_\_\_\_\_  
Kathryn M. Bailey  
Commissioner

  
\_\_\_\_\_  
Michael S. Giaimo  
Commissioner

Attested by:

  
\_\_\_\_\_  
Debra A. Howland  
Executive Director

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

**DG 17-068**

**LIBERTY UTILITIES (ENERGYNORTH NATURAL GAS) CORP.**  
**d/b/a LIBERTY UTILITIES – KEENE DIVISION**

**Petition for Declaratory Ruling**

**Order Affirming and Clarifying Declaratory Ruling**

**ORDER NO. 26,274**

**July 26, 2019**

In this Order, the Commission confirms its prior declaratory ruling, clarifies the scope of that ruling, approves the initiation of Phase I of the proposed conversion of the Keene distribution system from propane-air to compressed natural gas, and directs Liberty to comply with reporting and operational requirements for Phases II through V of the system conversion.

**I. PROCEDURAL HISTORY**

On April 24, 2017, Liberty Utilities (EnergyNorth Natural Gas) Corp. d/b/a Liberty Utilities – Keene Division (Liberty or the Company) filed a Petition for Declaratory Ruling and two days later, the Company submitted a Revised Petition for Declaratory Ruling (Petition) pursuant to N.H. Code Admin. Rules Puc 203 and Puc 207. Specifically, Liberty requested a ruling “that it need not seek permission under RSAs 374:22 and 374:26 to distribute natural gas in the City of Keene, because Liberty’s existing franchise to distribute ‘gas’ already includes ‘natural gas.’” Petition at 1.

On October 20, 2017, the Commission issued Order No. 26,065 granting the requested ruling and imposing conditions relating to engineering and operational safety.

On November 16, 2017, Terry Clark, a resident of Keene (Mr. Clark), and the NH Pipeline Health Study Group (the Pipeline Health Group) jointly filed a motion asking the Commission to reconsider Order No. 26,065. On November 20, 2017, Mr. Clark and the Pipeline Health Group filed an amendment to their motion. Liberty filed a timely objection.

On December 18, 2017, the Commission issued Order No. 26,087 granting the motion for reconsideration in part. The Commission subsequently issued an Order of Notice on March 1, 2018, scheduling a Prehearing Conference to be followed by a technical session in early April. The Order of Notice directed the parties to discuss a procedural schedule for submitting legal briefs.

Mr. Clark filed a petition to intervene on April 4, 2018. A Prehearing Conference was held as scheduled on April 6, 2018. The Commission granted Mr. Clark's intervention at the Prehearing Conference, with no objections from any party. On April 10, 2018, Staff filed a proposed procedural schedule agreed to by all parties, and the Commission approved the schedule the following day. Mr. Clark and Liberty filed legal briefs on May 1, 2018, followed by reply briefs on May 15, 2018.

On October 5, 2018, the Commission's Safety Division (Staff) filed an adequacy assessment (Assessment) of the Company's proposed compressed natural gas (CNG) installation in Keene.<sup>1</sup> The Assessment identified multiple deficiencies and found Liberty's installation plans to be inadequate. On November 14, 2018, the Commission issued a secretarial letter directing Liberty to file a status report on its plans for the conversion of the Keene system. Liberty filed the requested report on December 7, 2018. On February 28, 2019, Liberty filed a letter informing the Commission that it had filed a response to Staff's Assessment, which

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<sup>1</sup> See Safety Division Adequacy Assessment of the Proposed Compressed Natural Gas Installation by Liberty Utilities – Keene, NH Division (filed October 3, 2018).



included a cover letter to Randall S. Knepper dated February 21, 2019, and copies of the Company's amended and annotated plans for the conversion of the Keene gas system.

On April 16, 2019, Staff filed a memorandum stating that the Company's February 28 response, including its amended and annotated plans, addressed Staff's comments and recommendations in the Assessment. Staff reported that the Company's amended conversion plan complied with Commission Order No. 26,065. Staff recommended that the Commission accept the Company's filing and permit the commencement of the proposed Monadnock Marketplace system conversion from propane-air to natural gas (Phase I).

The petition for declaratory ruling and subsequent docket filings, other than any information for which confidential treatment is requested of or granted by the Commission, are posted at <http://puc.nh.gov/Regulatory/Docketbk/2017/Docketbk/2017/17-068.html>.

## **II. ORDER NO. 26,065**

In Order No. 26,065, the Commission ruled that Liberty "has the authority to offer compressed natural gas and liquefied natural gas service to customers in Keene." Order No. 26,065 at 1. The Commission required that any new CNG or liquefied natural gas (LNG) installations be accomplished safely, noting that the CNG/LNG installations contemplated by the Company included technology and piping that would require much higher operating pressures than are found in gas distribution systems in New Hampshire. *Id.* at 3-4. The Order directed Liberty to provide:

all final plans for engineering, construction, installation, testing, operations, public awareness, maintenance, emergency response, procedures, and schematics, including qualifications and training of personnel, in sufficient detail as requested by the Commission's Safety Division.

Order No. 26,065 at 4. In addition, the Commission decided that before gas flows through the proposed CNG/LNG installations, the Safety Division must submit a report assessing the



adequacy of the Company's plans and the satisfactory completion of a physical inspection of all installations. *Id.*

### III. STAFF'S ADEQUACY ASSESSMENT

Staff's Assessment included over 170 recommendations for design, installation, operational, and maintenance changes, and other actions regarding the Company's engineering plans that Liberty would have to address before the Company could begin operation of Phase I. Staff further recommended that the Company refile an amended and annotated plan that demonstrated compliance actions taken in response to the Assessment. The Assessment stated that, upon receipt of the amended plan, Staff would review the Company's amendments and recommend final approval for the commencement of the initial system conversions and the supply of CNG for Phase I.<sup>2</sup>

In its April 16, 2019, memorandum, Staff found that the Company's February 28 amended plan adequately addressed the Safety Division's comments and recommendations detailed in the Assessment. Accordingly, Staff recommended that the Commission accept the information provided by Liberty in its response to the Assessment. Staff stated that the Commission's acceptance of Staff's recommendation would permit Liberty to begin Phase 1 of the proposed conversion. Staff also recommended that, given the extensive list of issues and required amendments highlighted in the Assessment of the Phase I plans, Phases II through V should be reviewed carefully when the Company's plans for each phase are fully developed and filed.

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<sup>2</sup> See Cover Letter to Debra A. Howland, Executive Director, from Randall S. Knepper, Director, Safety Division, filed on October 5, 2018, with the Assessment.

#### **IV. POSITIONS OF THE PARTIES**

##### **A. Terry Clark**

Mr. Clark argued that Liberty's petition for a declaratory ruling could not be granted because the conversion is part of Liberty's broader expansion plans under consideration in Docket No. DG 17-152. That docket concerns the Company's Least Cost Integrated Resource Plan (LCIRP) under RSA 378:39. Mr. Clark challenged Liberty's LCIRP as contrary to the public interest and to the requirements of the state energy policy codified in RSA 378:37. He argued that the Commission should stay its decision on the Petition until DG 17-152 has been decided.

Mr. Clark further argued that, even if Liberty's plans were lawful, the Commission should defer to the Site Evaluation Committee's jurisdiction over Liberty's proposed energy facilities and dismiss the Petition. Mr. Clark contended that the Petition should be dismissed because it should have been filed under RSA 374:22 and RSA 374:26. In Mr. Clark's view, the Petition clearly proposed a change in the character of Liberty's service in the City of Keene. Mr. Clark asserted that the Petition would result in a substantial change in operations and the exercise of rights and privileges "not theretofore actually exercised in the town," and therefore requires statutory approval.

##### **B. Liberty Utilities**

Liberty argued that it holds the franchise right to distribute gas to its Keene customers and does not need to seek permission pursuant to RSA 374:22 and RSA 374:26 to convert the propane-air system to a CNG or LNG system. Liberty contended that its existing franchise rights have been used to distribute coal gas, butane, and propane-air through the years, and those franchise rights permit the Company to distribute natural gas, including CNG or LNG. Liberty

maintained that the Commission reached the correct decision in Order No. 26,065 when it stated that Liberty “has the authority to offer compressed natural gas and liquefied natural gas service to customers in Keene.” Liberty Objection to Motion for Rehearing at 1 (citing Order No. 26,065 at 3).

## V. COMMISSION ANALYSIS

In Order No. 26,065, the Commission ruled that Liberty “has the authority, pursuant to RSA 374:22, to supply CNG and LNG service in Keene under its current franchise.” Order No. 26,065 at 3. To ensure that any such activity would be done safely, the Commission also directed the Company to provide Staff all final plans for the proposed conversion. Order No. 26,065 further conditioned final approval for operation of the converted system on the receipt of a report from Staff “assessing the adequacy of the Company’s plans and the satisfactory completion of a physical inspection of all installations.” *Id.* at 4.

In this order, we clarify our declaratory ruling in Order No. 26,065, accept the Safety Division’s recommendation that we permit the Company to commence conversion of Phase I, and require the same reporting and assessment requirements for the conversion of Phases II through V of the Keene system.

A declaratory ruling constitutes a binding agency determination to dispose of legal controversy or to remove legal uncertainty. *See North Country Environmental Services, Inc. v. Town of Bethlehem*, 150 N.H. 606, 621, 843 A.2d 949, 961 (2004). The issuance of a declaratory ruling is a discretionary matter for the agency. *Delude v. Town of Amherst*, 137 N.H. 361, 363, 628 A.2d 251, 253 (1993). A party seeking a declaratory ruling must “show that the facts are sufficiently complete, mature, proximate, and ripe ... to warrant the grant of ... relief.” *Merchants Mutual Casualty Co. v. Kennett*, 90 N.H. 253, 255, 7 A.2d 249, 250–51 (1939)



(quotations omitted). A petition for declaratory ruling “cannot be based on a set of hypothetical facts.” *Silver Brothers, Inc. v. Wallin*, 122 N.H. 1138, 1140, 455 A.2d 1011, 1013 (1982) (citing *Salem Coalition for Caution v. Town of Salem*, 121 N.H. 694, 433 A.2d 1297 (1981)); *see also* Puc 207.01.

RSA 374:22 states that “[n]o person or business entity ... shall exercise any right or privilege under any franchise not theretofore actually exercised in such town, without first having obtained the permission and approval of the commission.” RSA 374:26 requires the Commission to:

grant such permission whenever it shall, after due hearing, find that such ... exercise of right, privilege or franchise would be for the public good ... and may prescribe such terms and conditions for the exercise of the privilege granted under such permission as it shall consider for the public interest.

In Order No. 26,065, the Commission found that, while Liberty did not need new franchise authority to serve its Keene customers with CNG rather than propane-air, the Company’s proposal to construct new system facilities or to convert existing facilities warrants regulatory oversight over financial costs as well as further approvals regarding the safe and reliable operation of the system.

Based on the filings in this proceeding, the conversion of the existing system will require the construction, operation, and maintenance of decompression skids that will depressurize CNG delivered by truck to permit its introduction into Liberty’s existing distribution system. The conversion will also require the adjustment of all customer meters and certain behind-the-meter changes to customer appliances inside their homes and commercial premises. Liberty has also indicated its intent to construct, operate, and maintain LNG facilities to serve Keene. *See* Petition at Bates Pages 1 and 11.

In its Petition, Liberty cited a series of orders concerning New Hampshire gas utilities switching from natural gas to propane to serve customers without requiring commission permission. Petition at Bates Pages 9-11. Liberty argued that those orders confirm the interchangeability of natural gas and propane. In Order No. 26,065, we found the prior orders persuasive with respect to the Company's argument that CNG and LNG constitute gas service for which Liberty had a franchise. None of the cases cited by Liberty, however, involved extensive whole-system conversions such as those required in Keene. Moreover, in each case, the Commission at the time was notified of the change in gas product and the reasons why the substitution was required. As a result, we determined that Liberty had the legal authority to offer CNG and LNG service in Keene, but recognized that certain conditions and approvals related to the safety and reliability of the service of CNG or LNG were warranted before Liberty could proceed to exercise that authority.

We clarify that the decision in Order No. 26,065 was limited to a ruling that Liberty has the general right to change the type of gas that it provides to its customers under its franchise authority. In that order, we recognized that Liberty has the authority to provide "gas" service to customers within the franchise territory of the City of Keene, as approved in its acquisition of New Hampshire Gas Corp. in Docket No. DG 14-155. The ruling stated that "(1) Liberty possesses a franchise to provide gas service, which includes CNG/LNG service in Keene, and (2) that Liberty has continually exercised this franchise, as referenced in RSA 374:22, I, to the present day." Order No. 26,065 at 3.

Order No. 26,065 was not intended to be read to permit a public utility that provides gas to customers in a defined franchise service territory to provide any type of gas in any manner that it might deem expedient, without further regulatory oversight or approvals. When Liberty

acquired New Hampshire Gas Corporation (now Liberty Utilities – Keene Division) in November 2014, the Company agreed to continue operation of the existing system “as is.”<sup>3</sup> The terms of the settlement agreement were to remain in effect “until the Commission approves otherwise.” Order No. 25,736 at 4. Here, Liberty proposes to convert its entire existing gas system in Keene by switching from propane-air to natural gas in the form of CNG. The conversion requires gas decompression and injection, the adjustment of customer appliance fittings, and the proposed replacement of pipes. Such a conversion raises a number of regulatory issues that warrant further oversight and approval – notably with respect to careful review of conversion plans and progress to ensure safe and reliable service to the affected customers. Accordingly, in Docket No. DG 17-048, Liberty’s most recent rate case, we required regulatory oversight over financial costs of the proposed conversion, as well as the further approvals regarding safety and reliability concerns associated with the conversion plans, consistent with Order No. 26,065.

As noted above, Order No. 26,065 conditioned the approval on the Safety Division’s assessment of the adequacy of the Company’s plans, and a complete physical inspection of all installations before Liberty would be permitted to initiate operations and serve gas through the converted installations. The Commission also directed Liberty to provide “all final plans for engineering, construction, installation, testing, operations, public awareness, maintenance, emergency response, procedures, and schematics, including qualifications and training of

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<sup>3</sup> See *Liberty Utilities (EnergyNorth Natural Gas, Corp., et al.*, Order No. 25,736 at 2 (November 21, 2014) (“The overriding theme of the Settlement Agreement is that [Liberty] will separately account for the Keene Division and will operate the Keene Division largely without change,” citing Tr. at 14, 21 (“[Liberty] characterized its proposal to operate the Keene Division “as is”), at 3 (“The Settlement Agreement requires [Liberty] to operate the Keene Division largely without change from existing operations.”), and at 6 (“The Settlement Agreement requires [Liberty] to manage and operate...the Keene Division separately...without substantial changes in the Keene Division’s operation.”)).



personnel, in sufficient detail as requested by the Commission's Safety Division." Order No. 26,065 at 4.

Although satisfied with the Assessment after more than a year's work, that process identified many additional complex issues not anticipated by the Commission when it issued Order No. 26,065. Given the five phases of conversion that Liberty has outlined in its filing and the extensive review and recommendations by Commission Staff for improvements to the Company's plans required for safety and reliability for the first of five phases of the conversion, we find that the same submission and review requirements should apply to each of the remaining phases.

#### **A. Financial Costs**

According to assertions made by the Company in dockets that touch upon the Keene conversion, including the general rate case in Docket No. DG 17-048 and the recent summer cost of gas (COG) rate proceedings in Docket No. DG 19-068, the conversion of the Keene system will also include the replacement of much of the existing system pipelines that currently provide propane-air gas to customers. Liberty provided only limited testimony in its general rate case as to how the proposed conversion might be economically just and reasonable.

In Order No. 26,065, we cautioned that the declaratory ruling did not include any finding of prudence. *Id.* In this order, we clarify that Order No. 26,065 should not be construed to constitute pre-approval of as yet undefined proposals for future capital projects within Liberty's Keene service territory. *See, e.g., Silver Brothers, Inc. v. Wallin*, 122 N.H. 1138 (1982). The Company stated in the acquisition proceeding that it would pursue conversion to CNG or LNG "[i]f it's economical to do so, and results in lower cost to customers." *See Liberty Utilities*

*(EnergyNorth Natural Gas) Corp., et al.*, Docket No. DG 14-155, Hearing Transcript of October 30, 2014, at 25-26.

As Staff testified in Liberty's most recent rate case, the Company has not provided a comprehensive business plan for the Keene system conversion and has provided little to no economic analysis or justification of the costs of the proposed system to ratepayers.<sup>4</sup> In the meantime, the Company is already pursuing recovery of certain costs associated with the conversion of the Keene system in its petition for recovery of 2019 summer COG expenses in Docket No. DG 19-068. *See, e.g.*, Order No. 26,241, permitting the requested inclusion of CNG supply costs in the 2019 summer COG rates.

We note that Puc 503.04(a) requires gas utilities to "provide certain services to its customers when service conditions such as change in pressure or composition of gas affect or would affect efficiency of operation or adjustment of appliances." Puc 503.04(b) further requires that if any such change occurs, the "utility shall, without undue delay and without charge, inspect the appliances of its customers and, if necessary, readjust those appliances for the new conditions." Based on the Staff Assessment, it appears that these provisions will apply to the Keene system conversion, and we direct Liberty to address these rules when it seeks to recover Keene conversion costs from ratepayers.

### **B. Reporting Requirements**

In its Petition, Liberty stated that it did not object to filing the reports required by RSA 374:5. Indeed, the Company said it would do so through its annual E-22 report and through a more detailed supplemental report specific to this project.<sup>5</sup> RSA 374:5 requires:

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<sup>4</sup> *See Liberty Utilities (EnergyNorth Natural Gas) Corp.*, Docket No. DG 17-148, Hearing Exhibit 5 at Bates Page 10.

<sup>5</sup> Petition at Bates Page 2.



[E]very public utility, before making any addition, extension, or capital improvement to its fixed property in this state, except under emergency conditions, shall report to the commission the probable cost of such addition, extension, or capital improvement whenever the probable cost thereof exceeds a reasonable amount to be prescribed by general or special order of the commission .... Reports shall be filed in writing with the commission within such reasonable time as may be prescribed by the commission before starting actual construction on any addition, extension, or improvement. The commission shall have discretion to exclude the cost of any such addition, extension, or capital improvement from the rate base of said utility where such written report thereof shall not have been filed in advance as herein provided.

The Petition notes that the Settlement Agreement in Docket No. DG 14-155, involving Liberty's acquisition of the Keene gas system, required Liberty to "notify the Staff and OCA of Keene Division capital projects other than ... [the E-22 reports] referenced in Puc 509.11(c) with projected costs greater than \$50,000 at least 60 days prior to commencement, where feasible." Revised Petition at Bates Page 2. In light of Liberty's commitment to file such reports, the E-22 reports filed to date, and Staff's testimony in Docket No. DG 17-048, we will require Liberty to file a detailed and comprehensive supplemental report specific to the Keene conversion project for each phase of system conversion and construction pursuant to RSA 374:5.

Accordingly, we direct Liberty to include a detailed report that includes all project costs to date as well as detailed projected cost estimates for all conversion projects to be included in the revenue requirement analysis that is required as part of the previously established risk sharing mechanism. *See Liberty Utilities (EnergyNorth Natural Gas) Corp. d/b/a/ Liberty Utilities*, Order No. 26,122 at 39 (April 27, 2018) (item 3). A detailed report of the cost of the Company's current efforts to convert the initial portion of the system to CNG shall be provided within 90 days of the issuance of this order. Future reports with the requisite cost details shall be filed no later than 180 days in advance of each future expansion phase. Receipt of the reports shall not be deemed pre-approval of projected expenditures or a finding of prudence.

We also direct Liberty to file updated system maps and drawings pursuant to Puc 507.04 as the Company completes each phase of the conversion of the Keene system. In addition, in accordance with the directives set forth in Order No. 26,122, Liberty must provide updated discounted cash flows (DCFs) based on detailed engineering plans and customer commitments that will produce at least 50% of the revenue requirement associated with the new facilities prior to the initiation of construction of each conversion phase.

The gas supply and production facilities and the distribution system used to provide natural gas to Keene customers will be separate and distinct from the system used to provide propane-air. Once a customer begins receiving natural gas, that customer will no longer be able to receive propane-air as a fuel source. In essence, until Phases II through V of the proposed conversion are completed and in operation, Liberty will be operating two separate systems in Keene. The Company's supply planning and reporting should reflect that. Commission rules applicable to supply planning and reporting, such as on-site storage requirements, will be applicable to each of the two distinct systems while Liberty is providing both natural gas and propane-air in Keene. *See e.g.*, Puc 506.03 (On-Site Storage Requirements).

With respect to Mr. Clark's argument regarding the Site Evaluation Committee (SEC), it is apparent from review of RSA Ch. 162-H, that the SEC's jurisdiction and responsibilities have no bearing on the issues raised in this docket.

## **VI. CONCLUSION**

As stated in the Order of Notice issued on March 1, 2018, Liberty's petition for a declaratory ruling raised issues related to the scope of Liberty's existing gas franchise and whether RSA 374:22 and RSA 374:26 required Liberty to obtain additional franchise permissions from the Commission before converting the type of gas Liberty delivers to

customers. Based on our review of the record, we clarify that Liberty has the general authority to offer gas service to its customers in Keene under the franchise authority granted to it when it acquired the New Hampshire Gas Corporation from Iberdrola USA Enterprises, Inc. in Docket No. DG 14-155. Although the Commission is requiring additional approvals pursuant to its general supervisory authority, no additional permissions are required under RSA 374:22 and RSA 374:26.

The declaratory ruling in Order No. 26,065 was not intended to grant the Company *carte blanche* to substantially change its system operations. Based on the record in this proceeding, we confirm that further regulatory oversight to ensure compliance with all applicable rules and statutory requirements is warranted. We find that the conditions related to engineering and operational safety of the proposed system conversion are necessary to ensure safe and reliable service and are therefore in the public interest. Accordingly, we grant Liberty the permission and approval to undertake the conversion of the Keene system, subject to the conditions set forth herein.

**Based upon the foregoing, it is hereby**

**ORDERED**, the declaratory ruling in Order No. 26,065 is clarified to recognize that Liberty has the right, with conditions, under its existing franchise authority to serve compressed natural gas to its customers in the Keene Division of EnergyNorth; and it is

**FURTHER ORDERED**, that the Commission's Safety Division's recommendation that Liberty be permitted to initiate the conversion of the Keene propane-air distribution system to compressed natural gas to customers in the Keene Division for Phase I is approved; and it is

**FURTHER ORDERED**, that Liberty shall not flow any gas through Phases II through V of CNG/LNG installations in Keene until the Director of the Commission's Safety Division has




found the required plans and reports to be adequate and has completed its physical inspection of the facilities; and it is

**FURTHER ORDERED**, that within 90 days of this order, Liberty shall file with the Commission its business plan and its operations and maintenance plans for the conversion and operation of the proposed natural gas system.

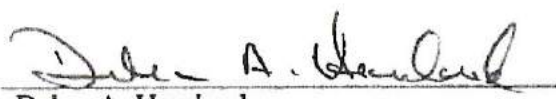
By order of the Public Utilities Commission of New Hampshire this twenty-sixth day of July, 2019.

  
Martin P. Honigberg  
Chairman

  
Kathryn M. Bailey  
Commissioner

  
Michael S. Giaimo  
Commissioner

Attested by:

  
Debra A. Howland  
Executive Director

**STATE OF NEW HAMPSHIRE  
PUBLIC UTILITIES COMMISSION**

**DG 17-068**

**LIBERTY UTILITIES (ENERGYNORTH NATURAL GAS) CORP.  
d/b/a LIBERTY UTILITIES – KEENE DIVISION**

**Order Denying Motions for Rehearing  
and Clarifying Certain Matters**

**ORDER NO. 26,294**

**September 25, 2019**

In this order, the Commission denies the motions for rehearing of Order No. 26,274 filed by Terry Clark and Liberty Utilities, and clarifies certain points in that Order.

**I. PROCEDURAL HISTORY**

On April 24, 2017, Liberty Utilities (EnergyNorth Natural Gas) Corp. d/b/a Liberty Utilities – Keene Division (Liberty or the Company) filed a Petition for Declaratory Ruling, and it subsequently submitted a Revised Petition for Declaratory Ruling (Petition), pursuant to N.H. Code Admin. Rules Puc 203 and Puc 207. Specifically, Liberty requested a ruling “that it need not seek permission under RSA 374:22 and RSA 374:26 to distribute natural gas in the City of Keene, because Liberty’s existing franchise to distribute ‘gas’ already includes ‘natural gas.’” Petition at 1.

On October 20, 2017, the Commission issued Order No. 26,065, granting the requested ruling with certain conditions related to engineering and operational safety.

On November 16, 2017, Terry Clark (Mr. Clark) a resident of Keene, and the NH Pipeline Health Study Group jointly filed a motion asking the Commission to reconsider Order No. 26,065. On November 20, 2017, Mr. Clark and the Pipeline Health Study Group filed an amendment to their motion. Liberty filed a timely objection.

On December 18, 2017, the Commission issued Order No. 26,087, granting in part the motion for reconsideration. The Commission subsequently issued an Order of Notice on March 1, 2018, scheduling a Prehearing Conference to be followed by a technical session in early April. The Order of Notice directed the parties to discuss a procedural schedule for submitting legal briefs.

Mr. Clark filed a petition to intervene on April 4, 2018. The Prehearing Conference was held as scheduled on April 6, 2018, and the Commission granted Mr. Clark's intervention with no objections. On April 10, 2018, Staff filed a proposed procedural schedule agreed to by all parties, and the Commission approved that schedule the following day. Both Mr. Clark and Liberty filed briefs and reply briefs on May 1 and May 15, 2018.

On October 5, 2018, the Commission's Safety Division filed an adequacy assessment (Assessment) of the Company's proposed compressed natural gas (CNG) installation for the Monadnock Marketplace in Keene. The Assessment identified multiple deficiencies in Liberty's installation plans and found the plans to be inadequate. On November 14, 2018, the Commission issued a secretarial letter directing Liberty to file a status report on its plans for the conversion of the Monadnock Marketplace. Liberty filed the requested report on December 7, 2018. On February 28, 2019, Liberty filed a response to Staff's Assessment, including copies of the Company's amended and annotated plans for the conversion of the Monadnock Marketplace.

On April 16, 2019, the Safety Division filed a memorandum stating that the Company's February 28 response, including its amended and annotated plans, addressed the comments and recommendations in the Assessment. Staff concluded that the Company's amended conversion plan complied with the requirements of Order No. 26,065, and Staff recommended that the

Commission accept the Company's filing and permit commencement of the proposed Monadnock Marketplace system conversion from propane-air to natural gas (Phase I).

On July 26, 2019, the Commission issued Order No. 26,274, affirming and clarifying its declaratory ruling in Order No. 26,065. On August 26, 2019, Mr. Clark filed a motion requesting that the Commission rehear or reconsider Order No. 26,065 (October 20, 2017) and Order No. 26,274 (July 25, 2019) (collectively, the Orders) and to clarify both Orders. On August 26, 2019, Liberty filed a motion for rehearing of certain portions of Order No. 26,274 to resolve claimed ambiguities and to address issues related to the reporting requirements imposed in that Order. On September 5, 2019, Liberty filed an objection to Mr. Clark's motion for rehearing, and, on September 11, 2019, Mr. Clark filed a reply to Liberty's objection.

The Orders, motions, and subsequent docket filings, other than any information for which confidential treatment is requested of or granted by the Commission, are available on the Commission's website at <http://www.puc.nh.gov/Regulatory/Docketbk/2017/17-068.html>.

## **II. POSITIONS OF THE PARTIES**

### **A. Terry Clark**

In his motion, Mr. Clark argued that the Orders are unlawful and unreasonable because they violate due process, ignore Commission rule requirements, are contrary to the public interest, and violate RSA 378:37, which requires each utility to file a least cost integrated resource plan (LCIRP). He further argued that the relief requested by Liberty should be considered only pursuant to a petition filed under RSA 374:22 and RSA 374:26.

Mr. Clark said that declaratory ruling petitions are governed by N.H. Code Admin. Rules Puc 207.01, and must be resolved through adjudicative proceedings in accordance with Puc 203. He noted that Puc 203.12 requires the publication of notice of a hearing to the public, and he



contended that the Commission issued Order No. 26,065 granting Liberty's Petition without notice or hearing. According to Mr. Clark, the Petition proposes a change in the character of Liberty's service within the City of Keene. He asserted that the Petition to convert the Keene system requires statutory approval, because it would result in a substantial change in operations and the exercise of rights and privileges "not theretofore actually exercised in the town."

*See* RSA 374:22.

Mr. Clark noted the Commission's statement in Order No. 26,065 that Liberty had indicated its intent to construct, operate, and maintain LNG facilities to serve Keene, and argued that as a result, there would be an "extensive whole-system" change comprising a "separate and distinct" natural gas system. He said that the Commission did not address his argument that the "separate and distinct" natural gas system would constitute "a change in the character of service," or otherwise require Commission approval under RSA 374:22. He further noted that Order No. 25,736 (November 21, 2014), issued in Docket No. DG 14-155, which authorized Liberty's acquisition of the Keene franchise, approved a settlement agreement (Keene Acquisition Settlement) requiring the Company to maintain the Keene franchise "as is" and to obtain prior permission from the Commission before making any changes to that franchise.

Mr. Clark contended that, based on Order No. 25,736, Liberty had no authority to undertake the proposed conversion under its existing franchise authority. According to Mr. Clark, the relief sought by Liberty in its Petition can be afforded only under RSA 374:22 and RSA 374:26. In his view, that determination can "only result from a full adjudicative proceeding, with notice, discovery, a hearing, testimony and other evidence.

Mr. Clark contended that Liberty's Petition cannot be granted because the conversion is part of its broader expansion plans to be considered in the context of its LCIRP filed under



RSA 378:37 and RSA 378:39 in Docket No. DG 17-152. He noted that, in that separate proceeding, he has challenged Liberty's LCIRP as contrary to the public interest and to the requirements of the state energy policy as codified in RSA 378:37. Mr. Clark also argued that, even if Liberty's plans are lawful, the Commission should defer to the jurisdiction of the Site Evaluation Committee (SEC) over the proposed energy facilities and therefore dismiss the Petition.

In his reply to Liberty's objection, Mr. Clark noted that the objection was filed two days late, and was untimely under Puc 203.07(f).<sup>1</sup> Mr. Clark raised arguments regarding Liberty's assertions of law and fact pertaining to the "single narrow issue" of rehearing, including his right to state every ground for rehearing, governing declaratory judgment law and with respect to due process requirements.

#### **B. Liberty**

Liberty requested rehearing of certain portions of Order No. 26,274 to resolve ambiguities, address issues related to reporting requirements, and clarify certain other directives. Liberty stated that it seeks clarification, in particular, of the use of the terms "conversion" and "expansion" in Order No. 26,274. Liberty argued that the conversion of its existing gas customers from propane-air to natural gas is necessary for reliability purposes, while expansion of the converted system to serve new customers would be justified on an economic basis.

Liberty also requested clarification regarding the Safety Division's future adequacy assessments and reporting requirements, and whether the Commission must approve the Safety Division's findings in order for Liberty to proceed with the conversion and expansion of the

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<sup>1</sup> Mr. Clark stated that he would not object to Liberty's late filing provided Liberty does not object to the filing of his reply. We grant Liberty a waiver of Puc 203.07(f), pursuant to our authority under Puc 201.05, having found the waiver meets the public interest standard as contemplated by that rule. We also accept Mr. Clark's reply.

Keene gas system at each phase. Liberty stated that neither of the Orders specified the “mechanics” of the assessment ordered by the Commission.

In addition, Liberty requested clarification of the Commission’s directive that it file a detailed report that includes all project costs to date and cost estimates for the overall conversion in its entirety, including the revenue requirement analysis that is required as part of the risk-sharing mechanism established in Docket No. DG 17-048, which was Liberty’s most recent general gas rate proceeding. In particular, Liberty requested clarification of the procedural requirements of that directive, such as with whom the report must be filed, whether the reports must be filed in advance of “conversion” phases or “expansion” phases, or both, and the starting point that would initiate the 180-day advance filing calculation.

Liberty also requested clarification of the directive requiring the “filing” of updated system maps and drawings pursuant to Puc 507.04 at the completion of each phase of conversion and expansion. Liberty noted that the rule requires maps or drawings to be on file at the Company’s principal office, and asked whether the maps and drawings must also be filed with the Commission, and, if so, with whom.

Liberty requested clarification of the directive in Order No. 26,122 (April 27, 2018), issued in DG 17-048, which requires the Company to provide updated discounted cash flow (DCF) analyses prior to the initiation of construction of each Keene system conversion and expansion phase. Liberty asked whether the Commission intends that to be a new requirement or merely a restatement of the requirement set forth in Order No. 26,122.

Liberty observed that the Commission’s determination that it has the right, with conditions, under existing franchise authority to serve compressed natural gas (CNG) to its Keene Division customers did not reference liquefied natural gas (LNG). According to Liberty,

the Company's plans for permanent facilities have always included both CNG and LNG, and it therefore requested clarification regarding that issue as a fundamental component of the relief it has sought in this proceeding.

Liberty also asked for clarification whether the Commission intended that it file a business plan and operations and maintenance plans for the "conversion" of existing propane-air customers or only for system "expansion" through the addition of new gas customers.

In its objection to Mr. Clark's motion for rehearing, the Company argued that Order No. 26,274 affirmed and clarified Order No. 26,065, which declared that Liberty has the authority to offer CNG and LNG services to Keene Division customers. The Company contends that, given the affirmation and clarification provided in Order No. 26,274, Order No. 26,065 is neither unlawful nor unreasonable, as Mr. Clark argues. Liberty further asserted that Mr. Clark's arguments fall outside the scope of the narrow legal issue raised in this proceeding.

According to Liberty, the Commission has already considered Mr. Clark's arguments pertaining to: (1) the change in character of service proposed in Keene; (2) the Keene Acquisition Settlement which bound Liberty to distribute propane-air in Keene; (3) whether Liberty should have sought franchise approval for the proposed conversion; (4) the jurisdiction of the SEC; (5) arguments under the LCIRP statute, RSA 378:39; and (6) due process requirements and procedural arguments.

### **III. COMMISSION ANALYSIS**

The standard for considering a motion for rehearing is well known, and was described earlier in this proceeding in Order No. 26,087. The Commission may grant rehearing or reconsideration for "good reason" if the moving party shows that an order is unlawful or unreasonable. RSA 541:3 and RSA 541:4; Order No. 26,087 at 3 (citations omitted). A



successful motion must establish “good reason” by showing that there are matters the Commission “overlooked or mistakenly conceived in the original decision,” or by presenting new evidence that was “unavailable prior to the issuance of the underlying decision.” *Id.* at 4. A successful motion for rehearing must do more than merely restate prior arguments and ask for a different outcome. *Id.*

We address below the motions filed by Liberty and Mr. Clark for rehearing or reconsideration of the Commission’s decision in Order No. 26,274.<sup>2</sup> We first address Mr. Clark’s motion, which seeks action on the merits of the Commission’s decision and clarification of certain directives in that Order. We then address Liberty’s motion, as it focuses on requests for clarification, or, in the alternative, rehearing, of certain findings and directives included in the Order.

Based on the process afforded to the parties in this limited proceeding and the filings made and reviewed by the parties, we deny rehearing of our decision in Order No. 26,274. We do, however, provide further clarification regarding the questions raised by Liberty in its motion.

*A. Clark Motion*

Mr. Clark requests rehearing or reconsideration of the Commission’s decision in Order No. 26,274, dismissal of this matter with an order that Liberty refile its Petition under RSA 374:22 and RSA 374:26, and/or clarification of the terms of the Order with respect to the involvement of Mr. Clark and the public in future approval proceedings and related Liberty filings in this matter.

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<sup>2</sup> To the extent that Mr. Clark’s motion seeks rehearing or reconsideration of Order No. 26,065, the time has run for any such rehearing or reconsideration request. We therefore need not and do not separately address those arguments.

As Liberty noted in its objection to Mr. Clark's motion, many of his arguments must fail because they fall outside the scope of the narrow legal issue decided in this proceeding and/or because the Commission has already considered and rejected them. In particular, this is a declaratory ruling proceeding in which we decided that no further statutory approvals were required under RSA 374:22 and RSA 374:26 because Liberty already has the franchise authority to provide natural gas service in its Keene Division. That is a legal issue that does not require the development of an extensive evidentiary record for its resolution. The other conditions and filing requirements imposed in the Orders are based on our plenary authority to regulate the provision of safe and reliable service by public utilities, and not on the specific provisions of RSA 374:22 and RSA 374:26.

Mr. Clark's remaining arguments not previously considered and those considered and rejected fail on their merits. We are not required to vacate our decisions regarding the proposed conversion of the Keene gas system from propane-air to natural gas in the form of CNG or LNG for a violation of due process because the process afforded the parties was commensurate with the requirements of due process under the circumstances. Given that the primary issue addressed in this proceeding was purely legal in nature, and not a question of fact, it was not necessary to provide for any additional process. Mr. Clark was granted intervention and was permitted to participate as a full party. He filed an initial brief and a reply brief addressing the franchise authority issue.

Based on our resolution of that legal issue on the record presented, there was no need for discovery, testimony, or an evidentiary hearing in this matter. We note that administrative agencies are granted some flexibility in fashioning appropriate procedures for adjudications. *See Mathews v. Eldridge*, 424 U.S. 319, 334 (1976). Nor was it necessary for Liberty to file a

petition under RSA 374:22 and RSA 374:26 as a result of our determination of the franchise authority issue. In this context, therefore, Mr. Clark's due process arguments are unavailing.

With respect to the Keene Acquisition Settlement, approved by the Commission in Order No. 25,736, the settlement by its terms "shall remain in effect until the Commission approves otherwise." In DG 17-048, we allowed Liberty to consolidate the Keene Division into the rest of the Liberty gas system. *See* Order No. 26,122 at 37-38. As a result, to the extent that the Keene Acquisition Settlement had limited Liberty's existing franchise rights to the distribution of propane-air, that order "approve[d] otherwise."

In addition, we decline to dismiss this matter on the merits as contrary to the public interest under the LCIRP statute, RSA 378:37-39, or out of deference to the jurisdiction of the SEC, as requested by Mr. Clark. Liberty's LCIRP has been filed and will be evaluated in DG 17-152; and any application submitted to the SEC with respect to the proposed Keene system conversion facilities, if required, will be addressed by that committee subject to its separate rules and procedures. We therefore deny Mr. Clark's request for rehearing or reconsideration.

We do, however, further clarify the provisions of Order No. 26,274 with respect to the involvement of Mr. Clark and members of the public in future approval proceedings and related Liberty filings regarding the Keene system conversion. As noted below, each of the required reports and filings mandated by Order No. 26,274 must be filed in this docket. As a result, upon each filing, members of the public will have the opportunity to submit comments to the Commission on the submissions made should the Keene gas system conversion from propane-air to natural gas progress. Similarly, the public may comment on the reports filed by the Safety Division.



As emphasized in Order No. 26,122 in DG 17-048 pertaining to, among other issues, Liberty's requests to convert the Keene gas system and to spread the costs of the proposed conversion among all of its New Hampshire gas customers, Liberty must justify the cost-effectiveness and ensure just and reasonable rate impacts for each phase of conversion and expansion of the Keene gas system. Those matters are relevant to each of Liberty's gas customers and must be vetted through each stage of Liberty's efforts to convert or expand its system and recoup the costs of such conversion or expansion.

*B. Liberty Motion*

Liberty seeks reconsideration of Order No. 26,274 and clarification of the Commission's intent with respect to a number of specific filing and reporting requirements. Liberty expresses confusion with the use of the terms "conversion" and "expansion" in Order No. 26,274, offering its preferred definitions of those fundamental terms, and it lays out nine requests for clarification of directives established in that Order. We first address the conversion/expansion question and we then clarify the requirements imposed on Liberty before the Company can proceed with any phase of the conversion/expansion.

In Order No. 26,122, there is no meaningful difference between conversion and expansion costs as it relates to Liberty's decision to supply Keene Division customers with natural gas in place of propane-air. We do not recognize the Company's distinction between the terms "expansion" and "conversion," for the following reasons. Liberty has consistently maintained that conversion of Keene system operations to natural gas would benefit all Liberty customers and lead to revenue growth and lower rates, providing economic benefits to all Liberty customers. Order No. 26,122 issued in DG 17-048 is clear on that point:

We will permit the consolidation of Keene Division distribution rates with those of EnergyNorth, subject to the following conditions designed to protect EnergyNorth's distribution customers from potential over-capitalization that could lead to cross subsidization.

...

For any of the expansionary Phases planned by Liberty within the City of Keene, prior to beginning construction of *any* Phase, Liberty must secure a customer commitment level that will produce at least 50 percent of the revenue requirement associated with the new facilities from those customers in 10 years, as calculated in present value terms.

...

We reject the Company's argument that the current cost of converting a small portion of the Keene System to CNG is necessary for reliability and safety reasons or is economically justified on its own terms. Furthermore, Liberty testified that the conversion could lead to additional growth, and it is therefore appropriate to include the cost of the initial conversion to CNG in the risk sharing mechanism.

See Order No. 26,122 at 38, 39 (*emphasis added*), 41, respectively.

Accordingly, the economic analysis needed to determine the potential benefit or harm of converting any part of the Keene system must take into account all costs related to the conversion, including those of the necessary expansion, and the incremental revenue resulting from related expansion in each phase of the conversion.

For the reasons set forth above, we reject Liberty's argument that "conversion" costs are distinct from "expansion costs," as addressed in the directives of Order No. 26,122. The interchangeability of "conversion" and "expansion" costs was a settled issue in that proceeding and the time has run for Liberty to pursue rehearing on that point. The Commission's prior Orders require Liberty to provide detailed information demonstrating its plans will provide safe and adequate service at just and reasonable rates. We understood there would be no new customer commitments if Liberty simply converted its system from propane air to natural gas. We made no finding that a conversion of the entire distribution system in Keene, without expansion, was necessary. We did, however, understand Liberty had begun construction to serve



the Monadnock Marketplace, referred to as Phase 1. We therefore reiterate and clarify that before Liberty begins to convert and expand any phase of its distribution system it must make several filings and obtain approvals, as outlined below. The requirements listed below do not follow the exact sequence of the questions raised by Liberty in its Motion, rather, they address each question in accordance with the categorization of filings required of Liberty.

*1. Liberty Report of Final Plans Submitted for Review by Safety Division*

We clarify that, before proceeding with any phase of the conversion/expansion of the Keene system from propane-air to natural gas, Liberty must file detailed and final plans for engineering, construction, installation, testing, operations, public awareness, maintenance, emergency response, procedures, and schematics, including qualifications and training of personnel, in sufficient detail as requested by the Safety Division.

*2. Safety Division Assessment of Final Plans*

We clarify that the Safety Division must file with the Commission an adequacy assessment for each phase of the proposed conversion/expansion of the Keene gas system from propane-air to natural gas (including CNG or LNG). Each filing must comprise a full report containing a finding of adequacy similar to the one filed by the Safety Division in this docket with respect to Phase I.

*3. Commission Approval of Assessment*

We further clarify that the Commission must affirmatively approve each adequacy assessment filed by the Safety Division, prior to the commencement of construction on each successive phase of the conversion/expansion. Phase I of the conversion/expansion received such approval in Order No. 26,274.

#### 4. Detailed Cost Reporting and DCF Analyses

In DG 17-048 (Order No. 26,122) the Commission authorized Liberty to consolidate the Keene Division's distribution rates with those of EnergyNorth. The Commission acknowledged the unknown economic viability and cost structure of Liberty's conversion/expansion plans and imposed specific requirements to ensure that expected growth revenue from the conversion/expansion would benefit all Liberty customers. With one limited exception, prior to beginning construction of any phase of the conversion/expansion, Liberty is required to secure a customer commitment level that will produce at least 50 percent of the revenue requirement associated with the new facilities needed for that phase from those customers within 10 years, calculated on a present value basis.<sup>3</sup>

We clarify that before initiation of construction for each phase of the Keene system conversion/expansion, Order No. 26,122 requires Liberty to file a detailed report of its business plan. The business plan shall include all conversion/expansion project costs, as well as detailed projected cost estimates for all conversion/expansion projects to be included in the revenue requirement analysis required as part of the risk-sharing mechanism. The business plan must be supported by updated DCF analyses based on detailed engineering plans and customer commitments that will produce at least 50 percent of the revenue requirement associated with the new facilities. As established in DG 17-048, such DCF analyses are the first step in gaining approval for each phase of the conversion/expansion and will be used to demonstrate that Liberty's New Hampshire ratepayers are not burdened with unfair or unwarranted costs.

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<sup>3</sup> As noted below, Liberty was not required to demonstrate that it had customer commitments to satisfy 50 percent of the revenue requirement prior to the initiation of construction for the Monadnock Marketplace.

5. Risk-Sharing Mechanism

We confirm that the risk-sharing mechanism applies separately to each phase of Liberty's planned conversion/expansion of the Keene system. The requirement to obtain at least 50 percent of the revenue requirement associated with the investment before construction begins does not apply to Phase I, as that phase was already under construction to serve the Monadnock Marketplace. Although the customer commitment requirement does not apply to the start of construction for the Monadnock Marketplace, the cost of that phase is to be included as part of the risk sharing mechanism.

6. Filing of Updated System Maps and Drawings

Updated system maps and drawings must be filed with the Commission's Safety Division within 90 days of the completion of each successive phase of conversion/expansion of the Keene system. That requirement will apply to each phase of the proposed conversion/expansion, including Phase I.

7. CNG versus LNG

We clarify that the Commission's ruling in Order No. 26,065 that Liberty need not seek permission under RSA 374:22 and RSA 374:26 to distribute natural gas in Keene was intended to include natural gas in both CNG and LNG forms.

8. Timing for Liberty's Plan Filing Requirements

In Order No. 26,274, the Commission required Liberty to file a detailed and comprehensive supplemental report for each phase of the Keene system conversion/expansion. As requested by Liberty, we clarify that the Commission's intent was to require Liberty to file a comprehensive report of the costs associated with the Company's efforts to convert the initial portion of the system to CNG (at the Monadnock Marketplace) within 90 days of issuance of that

Order. The Commission also required that the detailed cost reports discussed in section 4 above, be filed 180 days before construction begins for any other phase of the conversion/expansion.

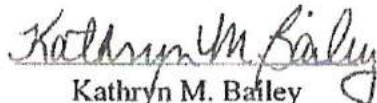
In light of the clarifications provided above, we deny Liberty's request for rehearing or reconsideration regarding those points.

**Based upon the foregoing, it is hereby**

**ORDERED**, that the motions for rehearing or reconsideration are **DENIED**; and it is


**FURTHER ORDERED**, that requests for clarification are **GRANTED**, as discussed in the body of this order.

By order of the Public Utilities Commission of New Hampshire this twenty-fifth day of September, 2019.

  
Kathryn M. Bailey  
Commissioner

  
Michael S. Giaimo  
Commissioner

Attested by:

  
Debra A. Howland  
Executive Director



**PROVISIONS OF CONSTITUTIONS, STATUTES  
AND RULES INVOLVED IN CASE**

**Statutes**

*New Hampshire Statutes*

RSA 362:2:

362:2 Public Utility. –

I. The term "public utility" shall include every corporation, company, association, joint stock association, partnership and person, their lessees, trustees or receivers appointed by any court, except municipal corporations and county corporations operating within their corporate limits, owning, operating or managing any plant or equipment or any part of the same for the conveyance of telephone or telegraph messages or for the manufacture or furnishing of light, heat, sewage disposal, power or water for the public, or in the generation, transmission or sale of electricity ultimately sold to the public, or owning or operating any pipeline, including pumping stations, storage depots and other facilities, for the transportation, distribution or sale of gas, crude petroleum, refined petroleum products, or combinations of petroleum products, rural electric cooperatives organized pursuant to RSA 301 or RSA 301-A, and any other business, except as hereinafter exempted, over which on September 1, 1951, the public utilities commission exercised jurisdiction.

II. For the purposes of this title only, rural electric cooperatives for which a certificate of deregulation is on file with the public utilities commission pursuant to RSA 301:57 shall not be considered public utilities; provided, however, that the provisions of RSA 362-A:1, 362-A:2, 362-A:3, 362-A:4, 362-A:5, 362-A:6, 362-A:7, 362-A:8, 363-B, 371, 374:2-a, 374:26, 374:48-56, 374-A, 374-C, 374-F, and 378:37 shall, unless otherwise provided herein, be applicable to rural electric cooperatives, without regard to whether a certificate of regulation or deregulation is on file with the public utilities commission. The provisions of RSA 374-A and the provisions of RSA 374-F:3, V(b) and (f) and RSA 374-F:7 shall be applicable to rural electric cooperatives for which a certificate of deregulation is on file with the public utilities commission to the same extent as municipal utilities.

RSA 365:21:

365:21 Rehearings and Appeals. – The procedure for rehearings and appeals shall be that prescribed by RSA 541, except as herein otherwise provided. Notwithstanding RSA 541:5, upon the filing of a motion for rehearing, the commission shall within 30 days either grant or deny the motion, or suspend the order or decision complained of pending further consideration, and any order of suspension may be upon such terms and conditions as the commission may prescribe.

RSA 374:22:

374:22 Other Public Utilities. –

I. No person or business entity, including any person or business entity that qualifies as an excepted local exchange carrier, shall commence business as a public utility within this state, or shall engage in such business, or begin the construction of a plant, line, main, or other apparatus or appliance to be used therein, in any town in which it shall not already be engaged in such business, or shall exercise any right or privilege under any franchise not theretofore actually exercised in such town, without first having obtained the permission and approval of the commission.

II. No permission or approval under this section shall be required to be obtained by a foreign electric utility as defined in RSA 374-A:1 in connection with its participation in an electric power facility as defined in said section where the electric utility having the largest financial interest therein and the utility or utilities having primary responsibility for the construction or operation of the facility are domestic electric utilities as defined in said section or have obtained such permission.

III. No water company shall obtain the permission or approval of the commission to operate as a public utility without first satisfying any requirements of the department of environmental services concerning the suitability and availability of water for the applicant's proposed water utility.

RSA 374:26:

374:26 Permission. – The commission shall grant such permission whenever it shall, after due hearing, find that such engaging in business, construction or exercise of right, privilege or franchise would be for the public good, and not otherwise; and may prescribe such terms and conditions for the exercise of the privilege granted under such permission as it shall consider for the public interest. Such permission may be granted without hearing when all interested parties are in agreement.

RSA 378:37:

378:37 New Hampshire Energy Policy. – The general court declares that it shall be the energy policy of this state to meet the energy needs of the citizens and businesses of the state at the lowest reasonable cost while providing for the reliability and diversity of energy sources; to maximize the use of cost effective energy efficiency and other demand side resources; and to protect the safety and health of the citizens, the physical environment of the state, and the future supplies of resources, with consideration of the financial stability of the state's utilities.



RSA 378:38:

378:38 Submission of Plans to the Commission. –

Pursuant to the policy established under RSA 378:37, each electric and natural gas utility, under RSA 362:2, shall file a least cost integrated resource plan with the commission within 2 years of the commission's final order regarding the utility's prior plan, and in all cases within 5 years of the filing date of the prior plan. Each such plan shall include, but not be limited to, the following, as applicable:

...

VI. An assessment of the plan's long- and short-term environmental, economic, and energy price and supply impact on the state.

...

RSA 491:22:

491:22 Declaratory Judgments. –

I. Any person claiming a present legal or equitable right or title may maintain a petition against any person claiming adversely to such right or title to determine the question as between the parties, and the court's judgment or decree thereon shall be conclusive. The taxpayers of a taxing district in this state shall be deemed to have an equitable right and interest in the preservation of an orderly and lawful government within such district; therefore any taxpayer in the jurisdiction of the taxing district shall have standing to petition for relief under this section when it is alleged that the taxing district or any agency or authority thereof has engaged, or proposes to engage, in conduct that is unlawful or unauthorized, and in such a case the taxpayer shall not have to demonstrate that his or her personal rights were impaired or prejudiced. The preceding sentence shall not be deemed to convey standing to any person (a) to challenge a decision of any state court if the person was not a party to the action in which the decision was rendered, or (b) to challenge the decision of any board, commission, agency, or other authority of the state or any municipality, school district, village district, or county if there exists a right to appeal the decision under RSA 541 or any other statute and the person seeking to challenge the decision is not entitled to appeal under the applicable statute. The existence of an adequate remedy at law or in equity shall not preclude any person from obtaining such declaratory relief. However, the provisions of this paragraph shall not affect the burden of proof under RSA 491:22-a or permit awards of costs and attorney's fees under RSA 491:22-b in declaratory judgment actions that are not for the purpose of determining insurance coverage ...

RSA 541:3:

541:3 Motion for Rehearing. – Within 30 days after any order or decision has been made by the commission, any party to the action or proceeding before the commission, or any person directly affected thereby, may apply for a rehearing in respect to any matter determined in the action or proceeding, or covered or included in the order, specifying in the motion all grounds for rehearing, and the commission may grant such rehearing if in its opinion good reason for the rehearing is stated in the motion.

RSA 541:6:

541:6 Appeal. – Within thirty days after the application for a rehearing is denied, or, if the application is granted, then within thirty days after the decision on such rehearing, the applicant may appeal by petition to the supreme court.

### **Rules**

Puc 102.07:

Puc 102.07 “Hearing” means a properly noticed session held in a contested case before the commission or its designee which provides for opportunity for any party, intervenor or commission staff to present evidence and conduct cross-examination. “Hearing” also includes any pre-hearing conferences conducted pursuant to Puc 203.14.

Puc 203.09:

Puc 203.09 Discovery. (a) The petitioner, the staff of the commission, the office of consumer advocate and any person granted intervenor status shall have the right to conduct discovery in an adjudicative proceeding pursuant to this rule ...

Puc 203.12:

Puc 203.12 Notice of Adjudicative Proceeding.

(a) The commission shall give notice of a pre-hearing conference, or of a hearing in a case for which no pre-hearing conference has been scheduled, which shall contain the information required by RSA 541- A:31, III, namely:

- (1) A statement of the date, time, place and nature of the hearing;
- (2) A statement of the legal authority under which the hearing is to be held;
- (3) A reference to the particular statutes and rules involved, including this chapter;
- (4) A short and plain statement of the issues presented; and
- (5) A statement that each party has the right to have an attorney represent them at the party’s own expense.

(b) The commission shall direct the petitioner or other party to the docket to disseminate a notice issued pursuant to this section to the general public by causing the notice to be published in a newspaper of general circulation serving the area affected by the petition or by such other method as the commission deems appropriate and advisable in order to ensure reasonable notification to interested parties.

Puc 203.15:

Puc 203.15 Prehearing Conference.

(a) In order to facilitate proceedings and encourage informal disposition, the presiding officer shall, upon motion of any party, or upon the presiding officer's own motion, schedule one or more prehearing conferences.

(b) The commission shall provide notice to all parties prior to holding any prehearing conference.

(c) Prehearing conferences shall include consideration of any one or more of the following:

- (1) Offers of settlement;
- (2) Simplification of the issues;
- (3) Stipulations or admissions as to issues of fact or proof, by consent of the parties;
- (4) Limitations on the number of witnesses;
- (5) Consolidation of examination of witnesses by the parties; and
- (6) Any other matters which aid in the disposition of the proceeding.

(d) Initial prehearing conferences convened at the commencement of proceedings shall also include consideration of any one or more of the following:

- (1) Statement of preliminary, non-binding positions and other issues of concern of the parties identified after initial review of the filing;
- (2) Consideration of any petitions for intervention and any objection filed thereto;
- (3) Changes to standard procedures desired for discovery or during the hearing, if requested by a party;
- (4) Establishment of a procedural schedule to govern the remainder of the proceeding; and
- (5) Motions for confidential treatment of matters raised in the proceeding and otherwise to facilitate discovery.

(e) The commission shall issue and serve upon all parties a prehearing order addressing the matters raised at any prehearing conference.

Puc 203.18:

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.



Puc 203.20:

Puc 203.20 Settlement and Stipulation of Facts. (a) All participants in settlement conferences shall treat discussions at settlement conferences as confidential and shall not disclose the contents of such discussions to third parties or seek to introduce them into evidence. (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 ...

Puc 203.23:

Puc 203.23 Evidence.

...

(c) Pursuant to RSA 365:9 and RSA 541-A:33, II, the rules of evidence shall not apply in proceedings before the commission.

(d) The commission shall exclude irrelevant, immaterial or unduly repetitious evidence ...

Puc 203.25:

Puc 203.25 Burden and Standard of Proof. Unless otherwise specified by law, the party seeking relief through a petition, application, motion or complaint shall bear the burden of proving the truth of any factual proposition by a preponderance of the evidence.

Puc 207.01:

Puc 207.01 Declaratory Rulings.

(a) A person seeking a declaratory ruling on any matter within the jurisdiction of the commission shall request such ruling by submitting a petition pursuant to Puc 203.

(b) Such a petition shall be verified under oath or affirmation by an authorized representative of the petitioner with knowledge of the relevant facts.

(c) The commission shall dismiss a petition for declaratory ruling that:

(1) Fails to set forth factual allegations that are definite and concrete;

(2) Involves a hypothetical situation or otherwise seeks advice as to how the commission would decide a future case; or

(3) Does not implicate the legal rights or responsibilities of the petitioner;  
or

(4) Is not within the commission's jurisdiction.

(d) Except for a petition dismissed pursuant to subsection (c), the commission shall conduct an adjudicative proceeding on a petition for declaratory ruling in accordance with Puc 203.