

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

Docket No. DG 18-092

Liberty Utilities (EnergyNorth Natural Gas) Corp. d/b/a Liberty Utilities

**Petition for a License to Construct and Maintain a Natural Gas Pipeline beneath the
Ashuelot River in Keene**

**INTERVENOR, TERRY CLARK'S, MOTION FOR
RECONSIDERATION, CLARIFICATION AND/OR IN LIMINE**

Intervenor, Terry Clark ("Clark"), by and through undersigned counsel, Richard M. Husband, Esquire, hereby moves for reconsideration, clarification and/or an evidentiary ruling *in limine* with respect to the Public Utility Commission ("Commission")'s October 11, 2018 Secretarial Letter issued in this proceeding, and certain apparent rulings made thereunder (the "October 11, 2018 Order").

1. Liberty Utilities (EnergyNorth Natural Gas) Corp. d/b/a Liberty Utilities ("Liberty Utilities") commenced this proceeding by a [petition](#) filed under [R.S.A. 371:17](#) on May 31, 2017. *See* [petition, preamble](#). The petition requests that the Commission grant Liberty Utilities a license to maintain and construct a natural gas pipeline beneath the Ashuelot River in the City of Keene. *Id.*
2. R.S.A. 371:17 provides:

"371:17 Licenses for New Poles. – Whenever it is necessary, in order to meet the reasonable requirements of service to the public, that any public utility should construct a pipeline, cable, or conduit, or a line of poles or towers and wires and fixtures thereon, over, under or across any of the public waters of this state, or over, under or across any of the land owned by this state, it shall petition the commission for a license to construct and maintain the same. For the purposes of this section, "public waters" are defined to be all ponds of more than 10 acres, tidewater bodies, and such streams or portions thereof as the commission may prescribe. Every corporation and individual desiring to cross any public water or land for

any purpose herein defined shall petition the commission for a license in the same manner prescribed for a public utility.”

Id.

3. However, paragraph 8 of the petition filed in this matter acknowledges that the requirements of [R.S.A. 371:20](#) must also be met for the petition to be approved, as the Commission held is necessary under [Order No. 25,572](#):

“To obtain the license, Liberty must demonstrate that the proposed crossing is ‘necessary for Liberty to meet the reasonable requirements of reliable service to the public as required by RSA 371:17, and that the requested license[s] may be exercised without substantially affecting the public rights in the waters in question, as required for approval under RSA 371:20.’ Order No. 25,572 at 3.”

[Petition, at 8.](#)

4. R.S.A. 371:20 provides:

“371:20 Hearing; Order. – The commission shall hear all parties interested; and, in case it shall find that the license petitioned for, subject to such modifications and conditions, if any, and for such period as the commission may determine, may be exercised without substantially affecting the public rights in said waters or lands, it shall render judgment granting such license. Provided, however, that such license may be granted without hearing when all interested parties are in agreement and in cases involving filings made under RSA 371:17-a and RSA 371:17-b. The executive director of the commission may issue licenses under RSA 371:17-a and RSA 371:17-b.”

Id.

5. A pre-hearing conference, followed by a technical session, was held in this matter on September 5, 2018.
6. The October 11, 2018 Order allows Clark and the Ashuelot River Local Advisory Committee (the “ARLAC”) intervention status in this proceeding.
7. Clark, the ARLAC and Staff have all served, and received responses to data requests, and , under the approved schedule for this matter, a second round of data

requests may be served by October 18, 2018, with responses due November 1, 2018. A (second) technical session will follow on November 8, 2018.

8. The hearing in this matter is scheduled for November 20, 2018, beginning at 10:00 a.m.
9. Clark submits this motion with respect to issues raised by the last paragraph of the October 11, 218 Order, which states:

“At the hearing, the Commission brought the parties’ attention to the limited scope of review in crossing proceedings. Under RSA 371:20, the Commission examines whether the license requested by a utility ‘may be exercised without substantially affecting the public rights in said waters.’ Northern Pass Transmission, LLC, Order No. 25,910 (June 28, 2016) at 11. As in Northern Pass Transmission, LLC, the Commission will not adjudicate environmental concerns that are appropriately decided by other agencies. *Id.*”

Id.

10. [Order No. 25,910 \(June 28, 2016\)](#) , concerning the Northern Pass Project (“Northern Pass Order”), reaffirms that petitioners in crossing proceedings must meet the requirements of **both** R.S.A. 371:17 and R.S.A. 371:20 for license approval.
11. The Northern Pass Order found that satisfaction of the R.S.A. 371:17 “necessary” requirement was a “threshold eligibility requirement” for approval of a crossing license. [Id. at 9.](#) Proof of the utility’s **actual need** for the proposed crossing to provide service makes complete sense, given both the environmental concerns with river crossings and the presumed ability of the utility to recover the crossing costs, as a “necessary cost” of doing business, from customers.
12. It was only after noting “the unique set of facts” of the case, including the necessity of Site Evaluation Committee (“SEC”), as well as Commission,

approval, that the Northern Pass Order found the requirements of R.S.A. 371:17 to be satisfied. [*See id. at 9-10.*](#) **Indeed, the Northern Pass Order was specifically conditioned on SEC approval.** [*See id. at 10*](#) (“Therefore, subject to SEC approval, NPT meets the threshold requirement under RSA 371:17, and is eligible to request crossing licenses.”).

13. The Northern Pass Order also held, again consistently with [Order No. 25,572](#), that the requirements of R.S.A. 371:20 must additionally be satisfied for crossing license approval:

“In order to grant a license to cross public water or lands, the Commission must find that the licensed use ‘may be exercised without substantially affecting the public rights in said waters or lands.’ RSA 371:20.”

Id. at 10. Again, especially given the environmental concerns posed by river crossings, it makes perfect sense that a successful crossing applicant would have to demonstrate that the crossing may be accomplished without “substantially affecting the public rights in said waters”—including those rights that would be affected by pollution of the water caused by the crossing.

14. The Northern Pass Order found the requirements of R.S.A. 371:20 to also be satisfied, pursuant to language which seems to be the focus of the last paragraph of the October 11, 2018 Order:

“Without definitively holding that environmental and aesthetic issues are beyond the scope of impacts to public use to be considered under RSA 371:20 in crossing licenses, we hold on the facts of these cases before us, that the Commission's review under RSA 371 :20 will focus on the functional use and safety of the proposed crossings. We leave the environmental and aesthetic issues to the SEC. Thus, as stated earlier, any licenses we grant in these cases will be contingent on SEC approval of the Northern Pass Project. If, as a result of the SEC process, any of the proposed crossings are reconfigured, we will require resubmission of amended plans for our review.

Based upon the foregoing, it is hereby
ORDERED, the scope of our consideration of the proposed
crossings over public lands and waters pursuant to RSA 371:17 and RSA 3
71:20, shall be consistent with the above discussion ...”

[Northern Pass Order at 11.](#)

15. The October 11, 2018 Order may be interpreted to mean that, under the Northern Pass Order, the entire focus of this proceeding is limited to consideration of the “functional use and safety of the proposed crossings” under the requirements of R.S.A. 371:20, and that environmental concerns may not be considered.
16. Besides the fact that the “necessary” requirement of R.S.A. 371:17 must also be met in this proceeding, as discussed above, the Northern Pass Order cannot be read to limit the scope of review in this proceeding to the “functional use and safety” of the proposed crossing under R.S.A. 371:20, and to eliminate any review of environmental concerns, for several reasons.
17. First, the Northern Pass Order expressly limits the opinion to the (unique) facts of that case, [see id. at 11](#)—which, again, includes mandatory SEC review and approval not found here.
18. Second, the Northern Pass Order only discusses the “functional use and safety” limitation as part of an R.S.A. 371:20 analysis, *see id.* at 11, not the required R.S.A. 371:17 analysis. *Id.*
19. Third, while there may be a reasonable argument for such a limitation on the scope of Commission review under both statutes *if* there is otherwise a competent review, including environmental concerns, of a proposed river crossing by another state agency—as is the case in the Northern Pass Order—such a limitation cannot be read into R.S.A. 371:17 and R.S.A. 371:20 to apply to the facts of this case as

there will be no other agency review of the proposed proceeding. Not only is there no scheduled SEC review for the proposed crossing, there will also clearly not be any independent review by the Department of Environmental Services (“DES”), as is established by the by the ARLAC petition to intervene. [*See id.*](#), ¶

3. Reading such a statutory limitation into the Commission’s review of the petition on the facts of this case results in an impermissible narrowing and rejection of the statutory mandate the Commission must follow. While it may have been better for the Legislature to assign the obligations of R.S.A. 371:17 and R.S.A. 371:20 to the DES rather than the Commission, R.S.A. Chapter 371 plainly concerns Commission statutes and obligations and the clear statutory obligations imposed on the Commission under R.S.A. 371:17 and R.S.A. 371:20 cannot be ignored.

20. Third, the Northern Pass Order only discusses the “functional use and safety” limitation as part of an R.S.A. 371:20 analysis, *see id.*, not the required R.S.A. 371:17 analysis. *Id.* While the limitation, again, may not be properly read into either R.S.A. 371:20 or R.S.A. 371:17, there is absolutely no arguable basis under the Northern Pass Order, or otherwise, to limit the R.S.A. 371:17 analysis here to a “functional use and safety” review. Whether the proposed crossing and its potential negative environmental impacts is really “necessary” is an important threshold question here that should be asked and answered. As the purpose of the crossing is ostensibly to provide a “second pipe” to service customers while the current pipe is shut down and repaired, it should be asked: How many times has the petitioner actually accomplished repairs this way, versus some other way?

Why cannot the current pipe just be shut down and repaired during the summer, when there is no need for it to carry gas for heat? Is the proposed crossing really about repairing the existing propane-air system, or starting construction on the new natural gas system that has not even been approved yet? Unless there is a real actual need for the proposed new pipeline to service current customers under the current operating system, the crossing license at issue should be denied under that key threshold inquiry.

21. Discovery has been served on the “need” and environmental issues discussed above and Clark intends to pursue more discovery on these issues and to inquire into them at the November 20, 2018 hearing in this matter—if the Commission deems it permissible. Plainly, from its petition to intervene and the data requests it has served to date in this proceeding, the ARLAC intends to press at least environmental concerns in this proceeding, as well.
22. For the foregoing reasons, Clark urges that the Commission reconsider its rulings under the last paragraph of the October 11, 2018 Order to the extent that they are inconsistent with Clark’s positions set forth above and/or that the Commission clarify its rulings if they are consistent with Clark’s positions. Alternatively, Clark requests that the Commission issue an *in limine* ruling on the evidentiary issues presented herein, to allow the parties a better opportunity to prepare for the November 20, 2018 hearing in this matter.

WHEREFORE, for the reasons expressed, Clark respectfully requests that the Commission:

- A. Grant this motion and reconsider, clarify and/or issue an *in limine* evidentiary ruling on the October 11, 2018 Order and issues set forth herein with respect to the same—specifically including whether the “necessary” requirement of R.S.A. 371:17 will be considered in this proceeding, whether environmental concerns may be explored , and what the scope of review will be on those and other matters at the November 20, 2018 hearing; and
- B. Schedule a hearing on this matter; and
- C. Grant such other and further relief as is just, lawful and otherwise appropriate.

Respectfully submitted,

Terry Clark,

By his Attorney:

Dated: October 15, 2018

//s//Richard M. Husband, Esquire
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CERTIFICATE OF SERVICE

I hereby certify that I have, on this 15th day of October, 2018, submitted seven copies of this motion to the Commission by hand delivery, with copies e-mailed to the petitioner and the Consumer Advocate. I further certify that I have, on this 15th day of October, 2018, served an electronic copy of this motion on every other person/party identified on the Commission’s service list for this docket by delivering it to the e-mail address identified on the Commission’s service list for the docket.

//s//Richard M. Husband, Esquire
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