

**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**

**O R D E R N O. 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.

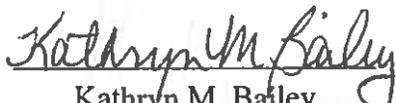
In light of the clarifications provided above, we deny Liberty's request for rehearing or reconsideration regarding those points.

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

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

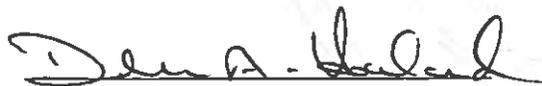
**FURTHER ORDERED**, that requests for clarification are **GRANTED**, as discussed in the body of this order.

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:

  
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