

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DG 17-152

**LIBERTY UTILITIES (ENERGYNORTH NATURAL GAS) CORP.
D/B/A LIBERTY UTILITIES**

Least Cost Integrated Resource Plan

Order Denying Motion to Compel

ORDER NO. 26,307

November 6, 2019

This order denies a motion to compel filed by intervenor Terry Clark.

I. PROCEDURAL HISTORY

Liberty Utilities (EnergyNorth Natural Gas) Corp. d/b/a Liberty Utilities (Liberty, or the Company) is seeking Commission approval of its Least Cost Integrated Resource Plan (LCIRP) pursuant to RSA 378:38, filed on October 2, 2017. On May 11, 2018, the Commission issued Order No. 26,134, granting intervention status to, among others, Terry Clark (Mr. Clark) as a resident of Keene, where Liberty provides gas service.

Liberty supplemented its LCIRP on April 30, 2019, and on June 28, 2019, in response to Commission decisions regarding the adequacy of the Company's initial LCIRP filing.¹ During the course of discovery in this proceeding, Liberty responded to numerous data requests from participating parties, including Mr. Clark's Data Request No. 5-26 (Clark 5-26), propounded on August 1, 2019.

¹ See, e.g., Order No. 26,225 (3/13/19) denying a motion by Mr. Clark to dismiss the proceeding and Liberty's LCIRP, and directing Liberty to submit additional information addressing specific elements of RSA 378:38 and :39 in support of its LCIRP; and Order No. 26,286 (8/12/19) denying Motions to Strike and Motion to Find Supplemental Filing Non-Compliant.

Clark 5-26 reads as follows:

Please state how the inclusion of the projected emissions from the Epping LNG facility in Paul J. Hibbard's emissions calculations and assessments would change them (including relevant tables and figures) and Mr. Hibbard's conclusions.

On August 23, 2019, Liberty provided the following response to Clark 5-26:

Mr. Hibbard has not estimated emissions from the Granite Bridge LNG facility as the Granite Bridge LNG facility is not a component of the Company's resource portfolio during the LCIRP forecast period.

Beyond the August 23 response, Mr. Clark received no further information from Liberty concerning Clark 5-26. As a result, on September 11, Mr. Clark filed a motion to compel a response to Clark 5-26. Liberty objected to Mr. Clark's motion on September 20, and Mr. Clark filed a reply to Liberty's objection on September 24.

The motions and related docket filings, other than any information for which confidential treatment is requested of or granted by the Commission, are posted on the Commission's website at: <http://puc.nh.gov/Regulatory/Docketbk/2017/17-152.html>.

II. POSITIONS OF THE PARTIES

A. Mr. Clark

Mr. Clark argued that Liberty failed to provide the information requested in Clark 5-26. Mr. Clark maintained that he is entitled to the requested information under N.H. Code Admin. Rule Puc 203.09(a), which gives any person granted intervenor status the right to conduct discovery in an adjudicative proceeding. Mr. Clark maintained that the Commission does not follow technical rules of evidence, and, therefore, only information that is "irrelevant, immaterial or unduly repetitious" is barred under RSA 541-A:33, II and Puc 203.23.

Mr. Clark maintained that the requested information is plainly relevant and material to this proceeding and must be assessed under RSA 378:38, VI, as it concerns the short- and

long-term environmental and health impacts of Liberty's LCIRP planning. Mr. Clark added that his request is not unduly repetitious because it is the only request for such information.

Mr. Clark argued that Liberty's position, that the proposed LNG facility is outside the five-year planning window of 2017-2022 covered by the LCIRP, is without merit. According to Mr. Clark, the timing of the projected service date suggests that the facility will be built within the term of the LCIRP, as the LCIRP states that the LNG facility is slated to be in-service no later than 2023, which would require completion or substantial completion by the end of 2022. Mr. Clark added that the proposed LNG facility is the source of supply for the proposed Granite Bridge pipeline and therefore must be reviewed and subject to discovery in this proceeding.

Mr. Clark noted that Docket No. DG 17-198 contemplates an in-service date for an LNG facility within the five-year LCIRP window which is contrary to Liberty's position that the emissions impact information requested in Clark 5-26 is outside that timeframe. Mr. Clark also noted that Commission approval of the LNG facility in that docket would substantially add to the Company's rate base, while RSA 378:40 prohibits the raising of rates outside of an approved LCIRP.

B. Liberty

Liberty acknowledged that the information would be subject to discovery if it existed, but argued that the information does not exist because the LNG facility was not included in the Company's LCIRP, and that the issue was not discussed in Mr. Hibbard's testimony because he did not estimate emissions from the LNG facility. The Company further stated that it would not ask for Mr. Hibbard's opinion relating to emissions from the LNG facility at hearing. Liberty contended that, in discovery related to an expert's opinion, a litigant can request only the disclosure of the expert's opinions and the information that supports those opinions. The

Company argued that it cannot be compelled to create new information that it does not already have, and that there are no facts or data to be produced in response to Clark 5-26. Liberty concluded that the motion to compel should be denied, as Mr. Clark may not compel the Company to formulate and offer an opinion that Liberty chose not to develop or present, or compel the Company to conduct the supporting analysis.

III. COMMISSION ANALYSIS

To prevail on his motion, Mr. Clark must demonstrate that he seeks information or facts that are admissible or reasonably calculated to lead to the discovery of admissible evidence. *Valley Green Natural Gas, LLC*, Order No. 25,867 at 4 (February 17, 2016), citing *Public Service Co. of N.H.*, Order No. 25,646 (April 8, 2014) (citations omitted). “Discovery is not the time to argue policy or advocate for the final result, but to merely seek and respond to factual matters that may lead to admissible evidence.” *Id.*, citing *City of Nashua*, Order No. 24,485 at 4 (July 8, 2005). Discovery is “an important procedure ‘for probing in advance of trial the adversary’s claims and his possession or knowledge of information pertaining to the controversy between the parties.’” *See, e.g., Yancey v. Yancey*, 119 NH 197, 198 (1979).

In ruling on a motion to compel, the Commission “enjoy[s] broad discretion in the management of discovery.” *Valley Green Natural Gas, LLC*, Order No. 25,867 at 5, citing *Public Service Co. of N.H.*, Order No. 24,342 at 23 (June 29, 2004) (quoting *YYY Corp. v. Gazda*, 145 N.H. 53, 59 (2000)). We weigh “the effort needed to gather [the requested information], the availability of the information from other sources, and other relevant criteria.” *Id.*, citing *Public Service Co. of N.H.*, Order No. 25,595 at 2-3 (November 15, 2013); *City of Nashua*, Order No. 24,485 at 4.

Through Clark 5-26, Mr. Clark requested that the Company “state how the inclusion of the projected emissions from the Epping LNG facility in Paul J. Hibbard’s emissions calculations and assessments would change [those calculations and assessments] (including relevant tables and figures) and Mr. Hibbard’s conclusions.”² Liberty declined to provide the requested information, arguing that its witness, Mr. Hibbard, does not have the information, that he cannot render an opinion on information he does not have, and that he cannot be made to develop the requested information through discovery.

The statute governing utility LCIRPs requires the Commission to consider potential environmental, economic, and health-related impacts of each proposed option included in a utility’s LCIRP. *See* RSA 378:39. Here, Mr. Clark seeks Liberty’s calculation and analysis of the environmental impacts of the proposed LNG storage facility included in Liberty’s LCIRP. *See* Liberty LCIRP at 49 (Bates Page 53) (identifying the possibility of “increasing *on-system LNG storage* and vaporization capacity *with additional infrastructure to access new gas supplies* as a gas supply option for the Company’s long-term gas supply portfolio” (emphasis added)).

For purposes of our analysis here, we take administrative notice of the parallel proceeding in Docket No. DG 17-198 concerning Liberty’s *Petition to Approve Firm Supply and Transportation Agreements and the Granite Bridge Project*. In that docket, Liberty requested a Commission determination that Liberty’s decision to build an on-system LNG facility is prudent. Docket No. DG 17-198, *Petition* at 1. Liberty projected an in-service date of November 2022 for the proposed LNG storage facility, which would imply, as Mr. Clark noted, installation and operation of the facility within the five-year planning period covered by the LCIRP. Docket No. DG 17-198, *Fleck/Dafonte Testimony* at 13 of 23 (Bates Page 017).

² *See* Clark Motion to Compel at 1.

Based on Order No. 26,225 denying a motion to dismiss Liberty's LCIRP, Liberty provided an analysis and assessment of projected carbon emissions impacts related to the proposed "Granite Bridge Project" through the testimony of Mr. Hibbard. Mr. Hibbard testified that he "reviewed the two options presented and reviewed by Liberty to meet the resource needs identified in its LCIRP." Hibbard Testimony at Bates Page 008 (page 4 of 33). He identified those options as the "expansion of service through the Concord Lateral, and development and operation of the Granite Bridge Pipeline ("Granite Bridge," or "Project")." *Id.* at Bates Page 010 (page 6 of 33). We note that the proposed LNG storage facility that is the subject of Mr. Clark's data request was mentioned in the LCIRP as an integral element of the Granite Bridge Project in combination with the Granite Bridge Pipeline, as cited above.

We have already permitted two supplemental filings from Liberty to support its LCIRP. Liberty has confirmed that it chose not to assess the projected carbon emissions of the proposed LNG storage facility in the supplemental filing required by Order No. 26,225. Liberty carries the burden of proof for the approval of its LCIRP, as well as the risk associated with not having an approved LCIRP on file.³ While the information requested in Clark 5-26 appears relevant to the proceeding and could lead to the discovery of admissible evidence, we decline to require Liberty to create information that is responsive to the discovery request at this point in the proceeding if such information was never assessed and, in fact, does not exist, as Liberty has argued.

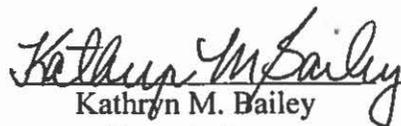
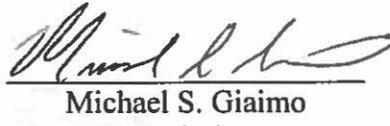
In our final review of the LCIRP, we will weigh the absence of the requested emissions assessment associated with the LNG facility as merited in light of the statutory requirements. Accordingly, we exercise our discretion and deny the motion to compel. For the same reasons, we deny Mr. Clark's request to schedule a hearing.

³ The Commission's Order approving Liberty's last LCIRP was issued on February 9, 2015. *See* Order No. 25,762 in Docket No. DG 13-313. That LCIRP was filed on November 1, 2013.

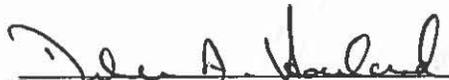
Based upon the foregoing, it is hereby

ORDERED, that Terry Clark's motion to compel and order Liberty to respond to Data Request Clark 5-26 is DENIED.

By order of the Public Utilities Commission of New Hampshire this sixth day of November, 2019.

	
Kathryn M. Bailey Commissioner	Michael S. Giaimo Commissioner

Attested by:


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