

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

**NORTHERN UTILITIES, INC.
2015 Summer Cost of Gas**

Docket No. DG 15-090

Staff's Response to Marketers' Opposition to Settlement Agreement

Commission Staff, through counsel, respectfully responds to the *Opposition to Settlement of Sprague Operating Resources LLC and Global Montello Group Corp.*

Sprague Operating Resources LLC and Global Montello Group Corp. (the Marketers) informed the Commission that they did not sign the written settlement agreement, which is consistent with the oral agreement presented to the Commission on June 2, 2015, because, “there arose a bona fide question of whether Northern actually does not have the ability to protect sales customers.” The Commission granted leave for the Marketers to file an opposition to the settlement and directed the Marketers to limit their filing to “evidence on the factual question of ‘whether Northern actually does not have the ability to protect sales customers.’” July 30, 2015, Secretarial Letter. The Commission also granted Northern and Staff the opportunity to respond to the Marketers’ opposition. *Id.*

The Marketers filed their opposition on August 14, 2015.

Staff’s position is that: (1) the Marketers’ opposition does not contain “evidence” on the question posed but merely their inadmissible interpretation of confidential settlement discussions; (2) whether Northern has the ability to “protect sales customers” is not and never was a term or condition of the settlement; (3) the Marketers affirmatively agreed to the settlement and specifically forfeited any right to include such a term or condition at the June 2 hearing; and (4) the Commission should

approve the settlement agreement as filed because it is consistent with what all parties stated at the hearing.

The Marketers Did Not Present Evidence of Northern's Ability to Protect Sales Customers.

Most of the Marketers' filing contains a restatement of their underlying positions related to the PNGTS refund rather than evidence on the issue specifically framed by the Commission. The Marketers ignored the directive that the "filing shall be limited to evidence on the factual question of 'whether Northern actually does not have the ability to protect sales customers.'" The Commission should disregard the Marketers' filing to the extent it goes beyond the narrow issue identified.

The Marketers' limited discussion of the proper issue is not evidence, but consists of counsel's interpretation of inadmissible settlement discussions and should be disregarded. The operative paragraph begins with the following sentence: "In advance of a June 2, 2015, hearing on the matter, the parties met and discussed whether a settlement was possible." Opposition at 2. The rest of the paragraph contains an interpretation of those confidential settlement negotiations, which are inadmissible. "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." Puc 203.20(a).

Fryeburg did not request confidential treatment before submitting this evidence for our consideration. We will treat the parties' communications as confidential, pursuant to Puc 203.20(a), and we will require the parties to protect this evidence from public disclosure. We do not address here the propriety of filing such materials in the first instance.

Fryeburg Water Co. Inc., Order No. 24,978 at 7-8 (June 12, 2009). The text in the Marketers' opposition should also be treated as confidential and disregarded.

Staff is bound by the confidentiality afforded settlement discussions and thus cannot and will not respond to the Marketers' characterization of those talks. The Commission should not

sanction a party's breach of the confidentiality governing settlement discussion. Confidentiality encourages full and frank discussion of the issues, often including admissions of one's weaknesses. The incentive evaporates if parties believe their discussions could be introduced as evidence.

Absent the Marketers' characterization of the confidential settlement discussion, the only other possibly relevant information that the Marketers presented is the following:

In drafting the written agreement, Northern refused to state that its CIS [Customer Information System] did not have the ability to identify migrating customers so that it could keep them from eroding the refund benefit that would otherwise flow to sales customers. Northern's failure to confirm this fundamental precept of settlement, although asked numerous times, eroded the marketers' confidence in the settlement.

Opposition at 2-3. This is not "evidence" on the "bona fide" question of whether Northern actually does not have the ability to protect sales customers." Rather, it is a complaint that Northern refused to include the challenged language in the Agreement. "Evidence" would be admissible information that tends to prove Northern's ability to identify migrating customers. It was the Marketers' claim. They carried the burden of establishing facts in support of the claim. They presented no supporting evidence.

The Marketers Agreed to the Settlement Without Reference to Migrating Customers.

The other flaw in the Marketers' opposition is that Northern's alleged inability to identify migrating customers was never part of the settlement. The Marketers did not insist on this being a term or condition of the settlement when they had the opportunity to do so at hearing, and the Marketers agreed to the settlement expressly without a resolution of this issue.

Early in what was expected to be a contested hearing on Northern's proposal to distribute the PNGTS refund, the Marketers announced their agreement with Northern's modified plan:

MS. FRENCH: Well, actually, we're willing to move toward the position that Northern and the OCA and the Staff have come to, on the condition that we can get all of our -- all of the work that we've created here, because this may be an issue that can repeat itself in the future, that we could put our testimony and our data responses into the record.

But both Global and Sprague have indicated a willingness just to go forward on the 50-30-20 proposal ... we just did not have the opportunity to tell the other Parties that, because we were gaining those assents.

Transcript of June 2, 2015, hearing (Tr.) at 13. Note that nothing is said about Northern's ability to track migrating customers.

In light of this statement by counsel, the hearing turned to a discussion of how and when the agreement could be put in writing, Tr. at 14 - 15, an agreement to offer the joint testimony of all parties in support of the oral agreement while everyone was present, Tr. at 15 - 16, and then the testimony itself, Tr. at 17 - 40. Northern's witness began by listing the terms of the settlement:

Q. [...] Is it your understanding that there has been a settlement agreement reached among the parties as to how to accomplish that?

A. (Kahl) Yes.

Q. And, is it your understanding that the settlement involves implementing the same allocation that was recently ordered by the Maine Public Utilities Commission in Docket Number 2015-00041?

A. (Kahl) Yes. That's correct.

Q. Okay. And, that order was issued on May 12th, 2015. And, is it your understanding that what that order stated was that Northern Utilities shall return to sales service customers the applicable Portland Natural Gas Transmission System refund amount by reducing the demand costs over a three-year period, in the proportion of 50 percent in the first year, 30 percent in the second year, and 20 percent in the third year?

A. (Kahl) Yes. That's correct.

Q. And, is it your understanding that the settlement agreement that's been reached among the Parties in this docket is that those proportions would apply not just to sales service customers, but also to the refund for delivery service customers?

A. (Kahl) That is my understanding.

Q. And, in terms of the interest rate that would be applicable, it would be the -- on the balances, it would be the interest calculated at Northern's short-term borrowing rate, is that correct?

A. (Kahl) That is correct.

Q. And, is it also your understanding that, as part of the settlement agreement, the Parties have agreed to enter into the record the testimony -- the testimonies that have been previously prefiled of the Office of Consumer Advocate and Intervenor Global/Sprague?

A. (Kahl) Yes.

Q. And, as well, enter into the record the responses of Sprague to the data requests of Northern and the Staff?

A. (Kahl) Yes.

Q. And, in order to implement this settlement agreement, to the extent that the Commission determines that a waiver is required from its tariff provision regarding a refund of over-collections, is the Company asking for that waiver?

A. (Kahl) Yes. It is asking for that.

Tr. at 22-23. The witness for the Marketers unequivocally agreed with these terms without mention of Northern's ability or inability to identify migrating customers:

BY MS. FRENCH: Q. Mr. Roberts, isn't it true that Sprague and Global, or Sprague anyway, and I can represent that Global agrees with this, would support the settlement as described by the Company?

A. (Roberts) That is correct.

Tr. at 24. Commissioner Honigberg polled each party at the close of the joint testimony to remove any doubt:

Thank you. I heard Mr. Frink say it, but I just want to confirm that everybody else agrees, that the settlement is fair to all the parties, although not what they necessarily wanted, fair, and produces just and reasonable rates. Mr. Brennan, you're satisfied on that?

A. (Brennan) Yes. We agree that it is a fair and reasonable settlement.

Q. Mr. Roberts?

A. (Roberts) We agree.

Q. And, do the Company's witnesses agree?

A. (Kahl) Yes.

A. (Wells) Yes.

Tr. at 38-39. Again, there is no mention of Northern's ability to track migrating customers.

Counsel's closing statement accepted the settlement while expressly acknowledging that Northern's ability to track migrating customers "is not necessarily part of this settlement."

And, part of the concerns with the original proposal was that Unitil doesn't have the ability currently to stop migrating customers from taking advantage of a price decrease and moving over to sales service. So, part of what we're hoping is that we would be looking to Northern to implement the functionality that would allow it to control this type of behavior in the future, so that gaming can't occur.

But we understand that's not necessarily part of this settlement, and we understand and do agree that this is a reasonable outcome, given the differing positions of all the parties. Thank you.

Tr. at 42 (emphasis added). If Northern's current inability to stop migrating customers was a material condition for the Marketers' participation, they had several opportunities above to put it on the record. They did not do so.

The Marketers' failure to include Northern's ability to identify migrating customers as a term or condition of the settlement at the time the settlement was reached is dispositive. The Marketers only raised the issue after-the-fact when presented with a written document that closely tracked the terms of the oral settlement as quoted above. That was too late. In light of the Marketers' failure to present any evidence on the issue and the fact that Northern's inability

to identify migrating customers was never a term or condition of the agreement, Staff asks the Commission to override the Marketers' opposition and approve the settlement agreement.

Respectfully Submitted
Staff of the New Hampshire Public Utilities Commission

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I certify that today, August 24, 2015, I have electronically provided a copy of this response to the service list.

/s/ Michael J. Sheehan
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