STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

DG 08-009

ENERGYNORTH NATURAL GAS, INC. d/b/a NATIONAL GRID NH

Notice of Intent to File Rate Schedules

Order Authorizing Recovery of Rate Case Expenses and Granting Motions for Confidential Treatment

O R D E R N O. 25,064

January 15, 2010

I. Recovery of Rate Case Expenses

On June 26, 2009, EnergyNorth Natural Gas, Inc. d/b/a National Grid NH (the Company) filed a summary of rate case expenses and supporting documentation for review by Staff and the Office of the Consumer Advocate (OCA). The expenses for which recovery was sought totaled $802,635. On October 15, 2009, Audit Staff issued its final audit report regarding rate case expenses, noting a reduction of $1,541 to correct for a Company error and concluding that rate case expenses of $801,094 were materially accurate based on its review of the supporting documents and Company audit responses. In *EnergyNorth Natural Gas, Inc. d/b/a National Grid NH*, Order No. 25,032 (October 29, 2009), the Commission approved the inclusion of the unadjusted total of rate case expenses in the Company's 2009-2010 Local Distribution Adjustment clause (LDAC) rate, subject to final review and approval.

EnergyNorth Natural Gas, Inc. d/b/a National Grid NH, Order No. 25,044 (November 13, 2009) denied the Company's motion for rehearing and/or reconsideration of Order No. 24,972 (May 29, 2009) (order approving increase in permanent rates). On December 3, 2009, Staff filed a report regarding the review of rate case expenses that set forth the recommendations

of Staff, the OCA and the Company regarding rate case expense recovery and described Staff's assessment in connection with the recommendations.

The report noted that Staff and the OCA had issued numerous data requests to the Company, including questions regarding the Company's procurement policies and procedures pertaining to the retention of outside service providers, the contractual arrangements made by the Company for engaging the consultants and attorneys used in this case, expense reimbursement policies for Company employees, adherence to the Company's policies and the contracts, and details regarding specific expenses.

According to the report, while there are differences of opinion among the parties and Staff regarding the necessity, amount and/or reasonableness of certain expenses, they agreed, as a compromise of all rate case expense issues, to recommend that the Company be allowed to recover a total of $788,416 in rate case expenses, a reduction of $14,219 from the amount originally requested. In addition, the Company will not seek to recover any rate case expenses related its motion for rehearing (McLane invoices dated July 6, 2009 through November 11, 2009, totaling approximately $36,500).

Staff explained that, with this reduction, ratepayers will only be charged standard transportation costs incurred by Company personnel and will not be charged for alcohol, legal fees billed above 2008 hourly rates, legal fees and expenses incurred to date related to the Company's motion for rehearing, and expenses related to the Commission audit. Under the agreement, the Company retains the right to seek recovery of future rate case expenses related to its response (if any) to the Commission denial of its motion for rehearing; however, if recovery of such expenses is requested, the other parties are free to take whatever position(s) they believe

are appropriate. In addition, the Company agreed, upon request of a party at an early stage of the next rate case, to provide to the Staff and parties: (i) evidence that the Company's procurement policies and procedures have been complied with and that such policies and procedures are no less strict than those currently in effect (PP-303S for competitively bid procurements and PP-307 for any non-competitive procurements); and (ii) copies of the contracts with outside consultants and attorneys upon which claims for rate case expense recovery will be based.

Staff stated that since this compromise resolution is the product of settlement negotiations, the content of such negotiations is privileged and all offers of settlement are without prejudice to the positions of the parties and Staff in any future proceedings. Staff also noted the parties' understanding that the Commission's acceptance of this recommendation does not constitute precedent or an admission by the parties or Staff in any future proceeding.

In the report, Staff explained its approach in reviewing the rate case expenses sought to be recovered. Staff stated that the expenses in this case are substantial. For purposes of this case, Staff accepted the Company's decision to obtain the services of outside consultants and attorneys. Staff noted, however, that some large utilities, such as Public Service Company of New Hampshire, choose to do all or substantially all of the work in-house and even if the choice to use outside services is made, utilities need to carefully consider the extent to which outside services should be relied on when ratepayer recovery of the costs is sought.

In Staff's view, obtaining competitive bids from outside consultants and attorneys can be an important element in containing rate case expense and the results of competitive bidding can provide an objective basis upon which to evaluate the reasonableness of rate case expenses. Staff stated that the Company's procurement policies and procedures appropriately reflect the

desirability of competitive bidding in most cases. According to Staff, the Company's policies and procedures for competitively bid procurements and non-competitive procurements are reasonable and, if strictly adhered to, should help ensure that rate case expenses approved for ratepayer recovery are prudently incurred and reasonable in amount.[1]

Staff stated that the Company engaged outside contractors on a competitive bid basis to provide rate case services for depreciation, revenue and expense lead/lag, marginal costs/rate design and cost of equity. Two firms, the McLane Law Firm (McLane) and Hewitt Associates (Hewitt), were engaged on sole source procurements. McLane's rate case expenses totaled $411,812 and Hewitt's totaled $13,485.

Staff did not question the Company's decision to engage McLane or Hewitt, noting that pursuant to the settlement agreement approved in *National Grid, plc*, Order No. 24,777 (2007), the Company was required to file a base rate case within six months of the closing of the merger of KeySpan Corporation and the Company's corporate parents, *i.e.*, by late February 2008. Staff reasoned that given the short amount of time after the merger in which the rate case was to be filed and McLane's and Hewitt's "historic knowledge of and familiarity with the Company and the relevant legal, regulatory and other issues,"[2] there was an adequate basis for engaging them on a sole source basis. Staff nevertheless expressed concern that the Company did not follow its policies and procedures of justifying the non-competitive procurements in writing and having a

[1] For procurements of $10,000 or more, those policies and procedures require the Company to "seek competitive bids (and acceptance of the lowest compliant bid) whenever possible, except where compelling reasons exist for single source action." The policies and procedures further require the Company to justify a non-competitive procurement in writing and to have a person with requisite Delegation of Authority approve the non-competitive procurement in advance. Once single source status is approved, the Company's purchasing agent is to negotiate pricing and other terms.

[2] According to Staff's report, the quoted language is based on the Company's response to Staff rate case expense data request 1-4.

person with Delegation of Authority approve the non-competitive procurements in advance of the engagements.

According to Staff, the Company engaged Hewitt to provide services related to the Company's pension plan pursuant to a general purpose engagement letter dated January 28, 2008 and engaged McLane pursuant to an engagement letter dated February 13, 2003 between McLane and KeySpan Corporation and its subsidiaries. Certain terms of the engagement were set forth in KeySpan Corporation's Guidelines for Outside Counsel attached to the letter. Among other things, the Guidelines specified that "[e]very engagement . . . of outside counsel in which the fees for the entire matter are expected to exceed $25,000 should be memorialized by a letter setting forth the terms and conditions of the engagement in a form acceptable to KeySpan." Staff stated that the Company did not execute a separate engagement letter as contemplated by the Guidelines.

Staff expressed concern that, because the Company did not obtain a separate engagement letter with pricing and other terms specific to the rate case, the Company failed to take advantage of an opportunity to negotiate the terms with the specific goal of containing and controlling rate case expenses. In addition, Staff was concerned that the terms of an engagement of this magnitude be clearly and completely documented before the engagement commenced.

Regarding future rate filings, Staff and the OCA strongly encouraged the Company to obtain and retain itemized receipts, not merely the credit card receipts required by the Company's expense reimbursement policy, in order to be able to demonstrate that such costs were prudently incurred and reasonable in amount. In addition, Staff and the OCA strongly encouraged the Company to provide, with their rate case expense filing, copies of all invoices for

outside rate case services based in whole or in part on hourly rate billing that detail the number of hours billed, the billing rate, and the specific nature of the services performed. Finally, Staff noted that it and the OCA expected the Company to be prepared to document and justify any ground transportation costs beyond the costs of buses or car rentals.

Finally, Staff's report recommended that the current LDAC rate remain in effect since the difference between the $788,416 of rate case expenses recommended for approval and the estimated rate case expenses of $802,365 used in calculating the LDAC rate is not material.[3] Staff noted that rate case expense recoveries should be reconciled with the approved rate case expense amount and the resulting over/under-recovery can be addressed as part of the Company's 2010-2011 winter cost of gas proceeding.

Pursuant to RSA 365:38-a, the Commission may allow recovery of costs associated with utility proceedings before the Commission, provided that recovery of costs for utilities and other parties shall be just and reasonable and in the public interest. The Commission has historically treated reasonable, prudently-incurred rate case expenses as a legitimate cost of business appropriate for recovery through rates. *See e.g., Aquarion Water Company of New Hampshire*, Order No. 25,053 (December18, 2009) at 3; *see also Lakes Region Water Company, Inc.*, Order No. 24,708 (2006) at 4. The Commission has described its review of rate case expenses as follows:

> "the Commission's review of a utility's request to recover the expenses of litigating a rate case requires the balancing of the utility's right to and opportunity to collect its legitimate costs with the Commission's responsibility to ensure the reasonableness of the expenses and that the utility is sufficiently motivated to control such expenses. 'If unreasonably

[3] The estimated rate case expense of $802,365 was netted against the temporary rate versus final rate (temporary rate reconciliation) over collection of $3,740,913 for a net credit of $2,938,277 which resulted in a credit to the LDAC rate of $0.0195 per therm. *See* Exhibit 2 in the Company's winter cost of gas proceeding, Docket No. 09-162, at 20, lines 17-20 (testimony of Anne Leary).

> incurred, if undue in amount, if chargeable to other accounts, they may to that extent be reduced.'" *Hampstead Area Water Co.*, Order No. 24,581 (January 20, 2006) at 2 (quoting *State v. Hampton Water Works,* 91 NH 278, 296 (1941)); *see also Unitil Energy Systems, Inc.*, Order No. 24,702 (November 22, 2006) at 3.

Consistent with that approach, we have reviewed the Company's request for recovery of rate case expenses and Staff's December 3, 2009 report. We conclude that the recommendations resolve the rate case expense issue in a manner that is just and reasonable and in the public interest and we will therefore approve them.

The recommendations reflect an agreement among the parties and Staff and thus we review them as we would a formal settlement agreement. As we have recently stated:

> "Pursuant to RSA 541-A:31, V(a), informal disposition may be made of any contested case at any time prior to the entry of a final decision or order, by stipulation, agreed settlement, consent order or default. N.H. Code Admin. Rules Puc 203.20(b) requires the Commission to determine, prior to approving disposition of a contested case by settlement, that the settlement results are just and reasonable and serve the public interest.
>
> In general, the Commission encourages parties to attempt to reach a settlement of issues through negotiation and compromise as it is an opportunity for creative problem solving, allows the parties to reach a result more in line with their expectations, and is often a more expedient alternative to litigation. *EnergyNorth Natural Gas, Inc. d/b/a National Grid NH*, Order No. 24,972 (May 29, 2009) at 48. However, even where all parties join a settlement agreement, the Commission cannot approve it without independently determining that the result comports with applicable standards. *Id*. The issues must be reviewed, considered and ultimately judged according to standards that provide the public with the assurance that a just and reasonable result has been reached. *Id*." *New Hampshire Gas Corporation*, Order No. 25,039 (October 30, 2009) at 13.

As indicated by the report, Staff's and OCA's review of the rate case expenses was thorough. We also note that the parties and Staff represent a diversity of interests, providing assurance that the result of the recommendations is just and reasonable and serves the public interest. In addition, the recommendations themselves appropriately reflect reductions in the amount to be recovered such that ratepayers will only be charged standard transportation costs

incurred by Company personnel and will not be obligated to reimburse the Company for alcohol, legal fees billed above 2008 hourly rates, legal fees and expenses incurred to date related to the Company's motion for rehearing, and expenses related to the Commission audit. Finally, the Company's agreement to provide detailed information regarding compliance with its procurement policies and arrangements with outside service providers at an early stage of the proceedings of the next rate case should help ensure that the subject of rate case expenses will receive attention by the parties before a majority of the expenses are incurred.

Based on figures included in the Company's 2009-2010 winter period cost of gas filing, DG 09-162, approximately $3.7 million is owed to customers in this proceeding as a result of reconciling permanent rates with temporary rates. The reconciliation amount is reduced to approximately $2.9 million when taking into account the $778,416 in rate case expenses. The bill impact of the $788,416 in rate case expenses on a typical residential heat customer's annual bill, using November 1, 2009 rates, is an increase of 0.4%, or approximately $6.66 for the year. The rate case expenses here appear high, but under the circumstances of this case, and in light of the agreement among the parties, we find them to be reasonable. Nevertheless, we are mindful of the level of rate case expenses as a general matter and the impact that such expenses can have on rates in particular instances. As a result, we direct Staff to review the level of rate case expenses in New Hampshire on an industry-by-industry basis over the past decade, with attention to factors such as use of inside versus outside counsel and experts, use of competitive bidding practices, and possible models in use elsewhere that could be informative for determining whether there are any identifiable trends in the rate impacts on utility customers. Staff shall file its report by June 30, 2010.

II. Motions for Confidential Treatment

The Company filed two motions for confidential treatment in connection with the review of rate case expenses. Both motions were based on the exemption in the Right to Know Law, RSA Ch. 91-A, for records pertaining to "confidential, commercial or financial information." See RSA 91-A:5, IV. No objections to the motions were received.

On September 14, 2009, the Company requested confidential treatment for certain billing information and responses to requests for proposals[4] included in its answer to a Staff data request asking for copies of the contracts between the Company and the outside rate case consultants and attorneys. The Company stated that it had a contractual obligation to keep confidential the billing information provided by consultants and experts in the request for proposal responses. In addition, the Company maintained that disclosure of this information would put its consultants at a competitive disadvantage by divulging to competitors the rates they charge for services and would adversely affect the Company because consultants would be discouraged from working with the Company if doing so would result in release of information that would give their respective customers an unfair advantage in future business transactions. The Company warned that public disclosure could cause fewer bidders to compete for consulting services in the future and ultimately customers would bear the burden of the lost savings that would otherwise result from a robust bidding process. The Company also asserted that the Company, the Commission and customers could be harmed to the extent that qualified consultants chose not to bid.

[4] The information, provided in answer to Staff 1-3 regarding rate case expenses, related to billing rates and certain dollar amounts that would allow a reader to estimate the billing rates of Management Applications Consulting, Inc. and Paul Moul Associates, two outside consultants for the Company.

Subsequently, on October 2, 2009, the Company requested confidential treatment for certain billing information[5] included in its answer to a Staff data request asking for a copy of the contract between the Company and Hewitt Associates. The Company maintained that disclosure of this information would put its consultant at a competitive disadvantage by divulging to competitors the rates it charges for services and would adversely affect the Company because consultants would be discouraged from working with the Company if doing so would result in release of information that would give their respective customers an unfair advantage in future business transactions. In addition, according to the Company, the information being protected would be of little interest to the public since it relates to the overall cost that Hewitt Associates bills to the Company's corporate parent for a broad array of services and the services that relate to the data request at issue are a very small subpart of that overall engagement. The Company maintained that providing such information on an unprotected basis would be of little or no benefit, but the Company's inability to protect confidential, competitively sensitive information of its service providers would harm them and could harm the Company as well.

As the Company notes, RSA 91-A:5, IV provides in part that records of "confidential, commercial, or financial information" are exempted from disclosure. The exemption for confidential, commercial, or financial information requires an "analysis of both whether the information sought is confidential, commercial, or financial information, and whether disclosure would constitute an invasion of privacy." *See Unitil Corp. and Northern Utilities, Inc.*, Order No. 25,014 (September 22, 2009) at 2.

[5] The information, provided in answer to Staff 2-3 regarding rate case expenses, related to billing rates and certain dollar amounts that either constitute Hewitt Associates' confidential fee quote for outside consulting services or would allow a reader to estimate the billing rates.

In determining whether commercial or financial information should be deemed confidential, we consider whether there is a privacy interest at stake that would be invaded by the disclosure; when commercial or financial information is involved, this step includes a determination of whether an interest in the confidentiality of the information is at stake. *Id*. at 2-3. Second, when a privacy interest is at stake, the public's interest in disclosure is assessed. *Id*. at 3. Disclosure should inform the public of the conduct and activities of its government; if the information does not serve that purpose, disclosure is not warranted. *Id*. Finally, when there is a public interest in disclosure, that interest is balanced against any privacy interests in non-disclosure. *Id*.

The Commission's rule on requests for confidential treatment, N.H. Code Admin. Rules Puc 203.08, similarly addresses this balancing test by requiring petitioners to: (1) provide the material for which confidential treatment is sought or a detailed description of the types of information for which confidentiality is sought; (2) reference specific statutory or common law authority favoring confidentiality; and (3) provide a detailed statement of the harm that would result from disclosure to be weighed against the benefits of disclosure to the public. N.H. Code Admin. Rules Puc 203.08(b); *see also Unitil Corp. and Northern Utilities, Inc.*, Order No. 25,014 (September 22, 2009) at 3.

The Company contends that competitive reasons justify confidential treatment of the information and has identified potential harms to outside consultants, the Company and its customers that could result from public disclosure of the information. We find these contentions to be credible and conclude that the Company and its service providers have an interest in the confidentiality of the information. *See* Order No. 25,014 at 2-3. On the other hand, the public

also has an interest in disclosure of the information since it has a bearing on the rates set by the Commission and paid by customers, and thus disclosing it would inform the public to some extent about the actions of the Commission. *Cf. Public Service Company of New Hampshire*, Order No. 24,333 (June 11, 2004) at 5 (public interest in disclosure of officer and director compensation recoverable through rates), cited with approval in *Public Service Company of New Hampshire*, Order No. 25,037 (October 30, 2009) at 9.

Balancing these interests, we conclude that the interest of the Company in the confidentiality of the information for which protection is sought outweighs the interest of the public in disclosure. First, we note the Commission has previously ruled that billing rate information is properly treated as confidential. *See Unitil Energy Systems, Inc.*, Order No. 24,742 (April 13, 2007) at 3-5. Moreover, redacted, publicly available versions of all the documents contain a good deal of information concerning the costs of the underlying engagements. In addition, much of the information sought to be protected in the motion filed on October 2nd does not relate to charges to be recovered from ratepayers in this docket. Finally, disclosing the information may place the Company and its service providers at a disadvantage with respect to those with whom it would do business, ultimately causing harm to the Company's ratepayers in future rate cases.

Consistent with Puc 203.08(k), our ruling granting the motions for confidential treatment is subject to the Commission's on-going authority, on its own motion, on the motion of Staff, or on the motion of any member of the public, to reconsider the Commission's determination.

Based upon the foregoing, it is hereby

ORDERED, that the recommendations set forth in Staff's report filed on December 3, 2009 are approved and the Company shall be allowed to recover $788,416 in rate case expenses through the LDAC charge; and it is

FURTHER ORDERED, that rate case expense recoveries shall be reconciled with the approved rate case expense amount and temporary rate reconciliation refunds reconciled with the temporary rate reconciliation over collection amount and the resulting over/under-recovery shall be addressed as part of the Company's 2010-2011 winter cost of gas proceeding; and it is

FURTHER ORDERED, that Commission Staff shall submit no later than June 30, 2010, a report on rate case expenses as delineated herein; and it is

FURTHER ORDERED, that the motions for confidential treatment are granted as set forth above.

By order of the Public Utilities Commission of New Hampshire this fifteenth day of January, 2010.

Thomas B. Getz
Chairman

Clifton C. Below (AWS)
Commissioner

Amy L. Ignatius
Commissioner

Attested by:

Debra A. Howland
Executive Director