

STATE OF NEW HAMPSHIRE  
PUBLIC UTILITIES COMMISSION

DG 10-034

NORTHERN UTILITIES, INC.

Petition for Approval of Fourth Amendment of Agreement  
with Foss Manufacturing Company, LLC

Order *Nisi* Granting Petition and Motion for Confidential Treatment

O R D E R N O. 25,085

March 25, 2010

**I. PROCEDURAL AND FACTUAL BACKGROUND**

On February 16, 2010, the petitioner, Northern Utilities, Inc., (Northern or Company), filed a petition seeking the Commission's approval to amend its October 1999 special contract for firm gas transportation with Foss Manufacturing Company, LLC (Foss). The original special contract between Northern and Foss was for a five-year term ending February 28, 2005, and was approved by the Commission in *Northern Utilities, Inc.*, Order No. 23,381 (January 6, 2000). That contract was renewed for an additional five years in 2005, subject to minor amendments, and was approved by the Commission in *Northern Utilities, Inc.*, Order No. 24,478 (July 1, 2005). The current petition seeks approval for an amendment of the special contract to extend it for two years upon the expiration of the current contract on February 28, 2010. With its petition, Northern submitted the pre-filed testimony of Michael Smith, Senior Business Development Executive with Northern. Additionally, Northern has moved for confidential treatment of certain information included in its filing and in responses to Staff's data requests, and more particularly, pricing and cost information, customer-specific marginal cost information and financial analyses relating to Foss's gas usage and fuel supply alternatives.

Foss is a manufacturer of specialty fibers and engineered fabrics employing more than 300 people in its Hampton, New Hampshire facility. Foss has been a customer of Northern's since 1988. In May 1999, Foss moved to transportation service on Northern and began purchasing its natural gas from a third-party supplier. At that time, Foss had various fuel alternatives and its fuel switching capabilities had reduced its use of natural gas, particularly during the winter months. With the intent of securing more of Foss's load on a year-round basis, the parties negotiated the original transportation special contract in 1999. Northern states that its intent in entering into the special contract was to provide service to Foss at a competitive price while minimizing the risks to the Company and its other customers.

In approving the original special contract, the Commission noted that while some upgrades to Northern's system were required to serve Foss's load, the investment was not substantial. *See* Order No. 23,381 at 2. According to the Commission, even with those investments, the cost to serve Foss at competitive rates would be below the long-run marginal cost to Northern, and Foss's contribution to Northern's fixed costs would reduce upward pressures on rates for all customers. *Id.* at 3, 4-5. While the originally negotiated contract was designed to run for a five-year period, and to then continue for successive one-year periods unless terminated by Foss or Northern, *id.* at 3, the Commission rejected that provision and ordered that any extension after the initial five-year period must be approved by the Commission. *Id.* at 6-7. Northern thereafter filed its first amendment to the special contract to comply with the Commission's order.

In 2005, the parties filed the proposed second amendment to the special contract seeking to extend the special contract for an additional five-year period. *See* Order No. 24,478 at 1. The new contract was also to include an inflation adjustment clause. *Id.* Due to the timing of

Northern's filing to extend the contract, it also included a Letter Agreement in which the parties agreed to continue the terms of the special contract, subject to recoupment at the tariff rate should the Commission reject the proposed extension. *Id.* Following discovery from Staff, Northern and Foss filed a third amendment to their contract to increase the applicable rates. *Id.* at 3. The contract extension, with its proposed amendments, was approved for an additional five years. *Id.* at 6.

## **II. PETITION TO AMEND AND POSITIONS OF NORTHERN AND STAFF**

### **A. Northern**

Northern now petitions for a fourth amendment to the special contract to continue it for an additional two years, effective March 1, 2010. It does not propose to amend any other portions of the agreement. As with its prior petition, since this petition was filed less than a month before the expiration of the current contract, Northern and Foss have entered into a Letter Agreement providing for the continuation of the current contract subject to recoupment at the applicable tariff rates should the Commission not approve the petition.

Northern bases its current petition on a request by Foss to continue the special contract. *See* Petition Schedule 1-6, Letter from Foss Manufacturing. Foss informed Northern that should the contract not be continued, and tariff rates applied, Foss's operations and job security at its Hampton facility would be compromised. Foss noted that it has taken steps to upgrade its facility to remain competitive, but that absent continuation of the special contract rates, it would lose its competitive capabilities and may be forced to eliminate jobs at its facility.

Along with its petition, Northern submitted an update to its most recent marginal cost study. *See* Petition Schedule 1-9. According to its study, the costs of continuing to serve Foss will exceed Northern's marginal costs. Moreover, because the costs would be subject to the

contract's escalation clause, Northern contends that the revenues would continue to exceed the marginal costs for the term of the contract. Foss will continue to be subject to all transportation delivery service minimum monthly charges, per term rates and customer charges called for in the special contract.

Additionally, Northern contends that because Foss has the ability to use alternative sources of energy, offering it a competitive rate will help to retain its load on Northern's system. Northern contends, therefore, that special circumstances exist which justify the extension of the special contract, and that the extension is just and consistent with the public interest.

Finally, Northern moves for confidential treatment of various portions of its filing and data responses. Specifically, Northern seeks to protect information in the contract regarding: the monthly customer charge, the minimum monthly charge, the negotiated unit charges, the minimum transportation obligation and the minimum payment obligation. Northern also seeks protection for its marginal cost of service study analysis relating to Foss. Lastly, Northern seeks protection for certain financial information provided it by Foss.

Northern contends that the information it seeks to protect is competitively sensitive commercial information, which is exempt from disclosure under RSA 91-A:5, IV. *See also* N.H. Code Admin. Rules Puc 203.08. Northern contends that disclosure of this information will result in harm to it in that it will be disadvantaged in its bargaining position with other customers seeking special contracts when those customers have alternative service options. Thus, Northern argues, disclosure would impair its future bargaining position and ability to obtain the highest possible contributions to its fixed costs. Moreover, Northern notes that similar information has been granted protection in the Commission's prior reviews of the special contract between these parties. *See Northern Utilities, Inc.*, Order No. 23,370; *see also* Order No. 24,478 at 5-6.

**B. Staff**

On March 18, 2010, Staff filed its recommendation on Northern's petition. Staff recommended that the special contract extension be granted because the amended contract satisfied the criteria identified by the Commission as important in analyzing a special contract. As to specific criteria, Staff's recommendation notes that the rates under the special contract exceed Northern's marginal cost of continuing to serve Foss. Moreover, retaining Foss will help to control costs for other customers, and it will do so for a sufficient term for both Northern and Foss to evaluate their long-term positions. According to Staff's recommendation, because the costs and rates under the special contract are subject to escalation factors tied to inflation, it is assured that Northern's revenues will continue to exceed marginal costs. Thus, because the rates exceed the costs to serve, and because retaining this load benefits all firm customers, Staff supports the extension. In addition, Staff noted that the terms of the special contract would promote the use of natural gas in place of fuel oil, Foss's alternative fuel, thereby providing an environmental benefit as natural gas is a cleaner burning energy source than oil. Staff also noted that the agreement provides some discretion in adjusting the rates in the special contract and therefore recommended that Northern notify the Commission in writing of any rate adjustments, and to include supporting documentation and an explanation with its notification of the adjustments. According to Staff, the supporting documentation should include an updated schedule 1-9, pages 1 and 2, in the revised format, as filed in this docket.

**III. COMMISSION ANALYSIS**

RSA 378:18 authorizes the Commission to approve a special contract when "special circumstances exist which render . . . such departure from the general schedules just and consistent with the public interest." We review the Company's filing with this in mind, giving

consideration to the policy precepts established in *Generic Discount Rates*, 77 NH PUC 650, 654-55 (1992) and *Generic Discounted Rates Docket*, 78 NH PUC 316, 316-17 (1993). Based upon our review of the record and for the reasons described below, we find that special circumstances exist that justify the departure from standard tariff rates and render the special contract just and reasonable and consistent with the public interest.

Foss represents an important load for Northern and offers a meaningful contribution to Northern's fixed costs. This contribution, in turn, lowers costs for other customers. Moreover, we note that Foss is, as stated in Staff's recommendation, an important employer in the seacoast area and that a key to its continued operations is the ability to control its energy costs. While Foss has taken meaningful steps to mitigate its energy use, it is nevertheless concerned about its energy costs. In order to address these concerns, both parties seek to extend the mutually beneficial special contract between them. Northern has noted that Foss has the ability to use alternative fuels when economically advantageous. Therefore, continuation of their arrangement is essential for the retention of Foss as a customer. The agreement they seek to continue has been in place since 1999, and the fourth amendment alters only the duration of the agreement.

Northern's petition indicates, and Staff has confirmed, that the annual revenues received from the contract have surpassed Northern's long-run marginal costs. Given the nature of the escalator clause of the agreement, this will remain the case. This means that for the term of the proposed contract extension Northern will recover sufficient revenue to more than cover its costs to serve Foss, even at the reduced contract rate. Thus, with a relatively small change to the duration, Northern and Foss have agreed to the continuation of an agreement that will benefit both companies. We note also that, in addition to providing a contribution to Northern's fixed costs, retention of Foss actually reduces the obligations of others and that keeping Foss will

make it more likely that Northern can achieve its allowed rate of return. In sum, Northern and Foss have both analyzed the benefits of the special contract and found it beneficial. We agree that because it is beneficial to both firms as well as Northern's other customers, the special contract should be extended.

Regarding the term of the contract, we note that it is only for two years. While this is shorter than the prior terms of this contract, we find it reasonable in that it will allow both parties time to consider other options to meet Foss's long-term energy needs. Additionally, Northern has noted that since the agreement does not undercut the commodity costs, it does not gain an unfair advantage over other area suppliers in retaining Foss as a customer. For these reasons, pursuant to RSA 378:18 we approve the extension of the special contract.

We caution, however, that Northern has an obligation to file such requests sufficiently in advance of the expiration of the underlying contract to allow for adequate review by Staff. Accordingly, we will expect the Company to be more diligent in timely filing any future contract amendment requests.

Regarding Northern's requests for confidentiality, the information it seeks to protect in its filing and responses to data requests from Staff reflects both Northern and Foss's analysis of various financial aspects of their relationship as well as Foss's natural gas usage. Northern contends that disclosure of this information will be competitively harmful in that it will imperil its bargaining position with other customers seeking special contracts, as well as make it more likely that competitive suppliers in Northern's service territory will be able to undercut Northern's customer-specific proposals. In addition, Northern argues for confidential treatment of information related to Foss' business in order to protect its customer's competitive position.

RSA 91-A:5, IV states, in relevant part, that records of “confidential, commercial, or financial information” are exempted from disclosure. *See Unital Corp. and Northern Utilities, Inc.*, Order No. 25,014 (Sept. 22, 2009) at 2. 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. *Unital Corp. and Northern Utilities, Inc.*, Order No. 25,014 (Sept. 22, 2009) 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.* This is similar to the Commission’s rule on requests for confidential treatment. *See* N.H. Code Admin. Rules Puc 203.08; *see also Unital Corp. and Northern Utilities, Inc.*, Order No. 25,014 (Sept. 22, 2009) at 3.

Here, Northern seeks protection of information that could place it at a competitive disadvantage in relation to other potential customers who may seek special contracts, as well as to competitors in Northern’s service territory, and could ultimately prove detrimental to Northern’s customers and asserts the competitive interest of its customer, Foss, in the confidentiality of certain information related to Foss’ business. As such, Northern and Foss have an interest in the confidentiality of the information.

Regarding the public interest in disclosure, much of the information for which Northern seeks protection consists of financial information relating to Foss, and Foss’s gas usage. The bulk of this information would reveal information about Foss and indirectly about Northern, but would shed little light on the Commission’s activities.

However, we do conclude that there is a public interest in information about the prices and terms in the special contract because this information bears directly upon the finances of the utility and its ability to meet its costs and thus would shed light on the Commission's ruling in this docket. In weighing these interests, we conclude that the privacy interest in non-disclosure outweighs the interest in disclosure. Disclosing the information would likely lead to the erosion of Northern's ability to maintain a strong position in negotiating contracts. It would also allow competitive energy suppliers to understand Northern's costs and possibly undercut them. Therefore, Northern's interest in protecting this information, and by extension its competitive position, is high. On the other side, while there is a public interest at stake in understanding the financial picture of a public utility, disclosing this information will not provide much information about the utility, but instead will reveal only some information about its negotiation of this contract. Also, while it would to some degree reveal the Commission's analysis, that analysis is limited to the contract and not the larger financial strength of the utility. Therefore, disclosure will not be particularly informative. Accordingly, as the Company's interest outweighs that of the public, we grant the Company's requests for confidential treatment.

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

**ORDERED *NISI***, that subject to the effective date below, the proposed special contract is APPROVED subject to the terms and conditions set forth herein; and it is

**FURTHER ORDERED**, that Northern shall notify the Commission in writing prior to adjusting the special contract rate, notification to include an updated schedule 1-9, pages 1 and 2, and an explanation for the change; and it is

**FURTHER ORDERED**, that the motion for confidential treatment is GRANTED as set forth above; and it is

**FURTHER ORDERED**, that the Petitioner shall cause a copy of this Order *Nisi* to be published once in a statewide newspaper of general circulation or of circulation in those portions of the state where operations are conducted, such publication to be no later than April 5, 2010 and to be documented by affidavit filed with this office on or before April 23, 2010; and it is

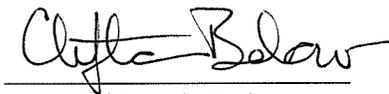
**FURTHER ORDERED**, that all persons interested in responding to this Order *Nisi* be notified that they may submit their comments or file a written request for a hearing which states the reason and basis for a hearing no later than April 12, 2010 for the Commission's consideration; and it is

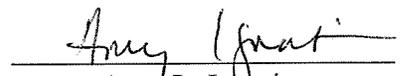
**FURTHER ORDERED**, that any party interested in responding to such comments or request for hearing shall do so no later than April 19, 2010; and it is

**FURTHER ORDERED**, that this Order *Nisi* shall be effective April 23, 2010, unless the Petitioner fails to satisfy the publication obligation set forth above or the Commission provides otherwise in a supplemental order issued prior to the effective date.

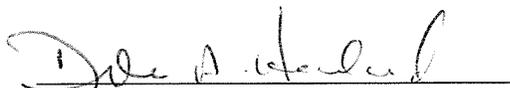
By order of the Public Utilities Commission of New Hampshire this twenty-fifth day of March, 2010.

  
Thomas B. Getz  
Chairman

  
Clifton C. Below  
Commissioner

  
Amy L. Ignatius  
Commissioner

Attested by:

  
Debra A. Howland  
Executive Director

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WITH THE EXCEPTION OF DISCOVERY, FILE 7 COPIES (INCLUDING COVER LETTER) TO:**  
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