THE STATE OF NEW HAMPSHIRE

BEFORE THE

PUBLIC UTILITIES COMMISSION

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE d/b/a EVERSOURCE ENERGY

Docket No. DE 16-241

PETITION FOR APPROVAL OF GAS INFRASTRUCTURE CONTRACT

OPPOSITION OF THE OFFICE OF CONSUMER ADVOCATE TO MOTION FOR PROTECTIVE ORDER AND CONFIDENTIAL TREATMENT

I. Introduction

On February 18, 2016, Public Service Company of New Hampshire d/b/a Eversource Energy (Eversource) filed a petition for approval of a Precedent Agreement with Algonquin Gas Transmission, LLC ("Algonquin") for firm gas transportation and storage services. Appended to the petition was a motion by PSNH pursuant to Rule Puc 203.08 and the New Hampshire Right-to-Know Law, RSA 91-A, for a protective order that would provide for the confidential treatment of extensive portions of PSNH's filing. For the reasons that follow, the Office of Consumer Advocate (OCA) opposes the motion and requests that the Commission deny it in whole or in part.

II. The Legal Standard under Puc 203.08 and RSA 91-A:IV, 5

Puc 203.08 provides that the Commission "shall upon motion issue a protective order providing for the confidential treatment of one or more documents upon a finding that the document or documents are entitled to such treatment pursuant to RSA 91-A:5, or other applicable law." In this instance, PSNH relies exclusively on RSA 91-A:5, which allows agencies and other instrumentalities of government to withhold from public disclosure certain records that would otherwise be subject to inspection and copying. The rule further contains specific requirements for what the movant must provide in support of its motion:

> (1) The documents, specific portions of documents, or a detailed description of the types of information for which confidentiality is sought;
>
> (2) Specific reference to the statutory or common law support for confidentiality; and
>
> (3) A detailed statement of the harm that would result from disclosure and any other facts relevant to the request for confidential treatment.

In this instance, the motion contains a list of eight exhibits for which Eversource seeks confidential treatment, along with those portions of its witnesses' prefiled testimony that discuss the information that Eversource seeks to shield from public disclosure. The request, in essence, is that the Commission make public only redacted versions of the exhibits and associated testimony, with Eversource having pre-selected the redactions.

According to PSNH, in the aggregate these proposed redactions would provide for the non-disclosure of "the prices, terms, and evaluation of the prices" specified in the Precedent Agreement (also referred to as the "ANE [Access Northeast] Contract," at issue in the docket. In support of its request, PSNH relies

exclusively on RSA 91-A:5, IV, which (in relevant part) allows agencies to withhold from public disclosure "confidential, commercial, or financial information." Given that the information at issue here clearly fits within the rubric of the disclosure exemption, the question becomes whether disclosure would be an invasion of privacy – and inquiry that requires a three-step analysis. *Professional Firefighters of New Hampshire v. Local Government Center, Inc.*, 159 N.H. 699, 707 (2010) (citations omitted); *Liberty Utilities*, Order No. 25,868 (Docket DG 15-289, February 19, 2016) at 5-6. The three steps are: (1) a determination of "whether there is a privacy interest at stake that would be invaded by the disclosure," (2) an assessment of "the public's interest in disclosure," and (3) an effort to "balance the public interest in disclosure against the government's interest in nondisclosure and the individual's privacy interest in nondisclosure." *Professional Firefighters*, 159 N.H. at 707 (citations omitted). PSNH's claim of entitlement to confidential treatment is wanting at all three steps, particularly given that "whether information is exempt from disclosure because it is private is judged by an objective standard and not a party's subjective expectations." *Id.* (citations omitted).

III. The Asserted Privacy Interest

In support of its claim that there is a privacy interest at stake, Eversource (1) notes that its affiliates in Massachusetts have sought confidential treatment of "essentially identical information" in a parallel docket pending before the Massachusetts Department of Public Utilities, (2) recites that the contract terms at issue "are the result of a competitive solicitation for proposals and subsequent

contract negotiation," and (3) claims that public disclosure of the data "would make it more difficult for the Company to attract bidders and to negotiate successfully in the future with potential contract partners." Eversource Motion at 3, Paragraph 3.

These conclusory assertions do nothing more than reveal Eversource's subjective expectations and perhaps those of its counterparty as well. Obviously, the fact that Eversource affiliates have made the same argument about confidentiality in Massachusetts cannot be determinative of the outcome under RSA 91-A:5, IV. More importantly, although it is a truism to the point of triteness that information asymmetry will always benefit a negotiating party with superior access to information, the RSA 91-A:5, IV exemption would be almost limitless if a company could invoke it successfully, as Eversource attempts here, merely by pointing out that less disclosure of previously agreed-to terms will give it an edge in future negotiations.

But even that contention is unpersuasive here, given the unique nature of the agreement for which approval is sought. To put it another way, if Eversource is correct – i.e., that committing all of its retail customers to 20 years of paying for supply of natural gas capacity will "directly and effectively address" the problem of "significant natural gas capacity constraints . . . and the detrimental impact those constraints have on electricity prices and reliability," Eversource Petition at 3, Paragraph 4 – then Eversource will have few if any occasions to negotiate similar deals in the future.[1]

[1] The same, of course, cannot be said of Algonquin. But Algonquin is not a party to the motion and Eversource has not purported here to assert anything other than Eversource's own confidentiality interests.

In that sense, the present situation is wholly unlike the one the Commission confronted when it issued a recent decision cited by Eversource, *Liberty Utilities*, Order No. 25,861 (Docket DG 15-494, January 22, 2016) . *See* Eversource Motion at 3, Paragraph 3. In that proceeding, which concerns a proposed Supply Path Precedent Agreement between a gas distribution utility (Energy North Natural Gas d/b/a Liberty Utilitie), and a wholesale supplier (Tennessee Gas Pipeline Company), the Commission granted an unopposed motion for confidential treatment because the material in question was "similar to information filed by utilities and routinely kept confidential by the Commission's rules." *Id.* at 5 (citing Rule Puc 201.06(a)(26)(b) (protecting "pricing and delivery special terms of [gas] supply agreements"). There is nothing routine about the contract under consideration here and no Commission rule providing for confidential treatment of similar information in other contexts.

IV. The Public's Interest in Disclosure

With respect to the public's interest in disclosure, the Eversource motion is almost shockingly dismissive. According to Eversource, "to the extent there is any public interest [in disclosure of the terms of the Precedent Agreement] it is minimal. . . . There may be a public interest in the rates ultimately paid by customers resulting from the ANE Contract" but "the pricing and terms received and evaluated would be, at best, minimally informative to the public." Eversource Motion at 4-5, Paragraph 4. This appears to ignore the fact that, in this proceeding, PSNH is seeking approval of an automatic cost recovery mechanism for retail distribution rates and, indeed, is

seeking confidential treatment of the information specifying the retail rate impacts of the proposed agreement. *See* Joint Direct Testimony of Christopher J. Goulding and Lois B. Jones, with accompanying (redacted) exhibits. Thus there would be no future proceeding in which the public could educate itself about the effect on retail rates of the Precedent Agreement and its sequelae.

Moreover, even if Eversource were not seeking automatic cost recovery here, the Commission should reject the notion advanced by Eversource that the public has no interest in disclosure of information about third-party transactions that come before the Commission for approval. In the context of the Commission's work and mission, that would be confidentiality run riot and would limit the public's scrutiny of Commission proceedings to dockets in which adjustments to retail rates are under examination. One cannot square such a notion with the New Hampshire Supreme Court's admonition to interpret the Right-to-Know Law with "a view to providing the utmost information in order to best effectuate the statutory and constitutional objective of facilitating access to all public documents." *Professional Firefighters of New Hampshire v. Local Government Center, Inc.*, 163 N.H. 613, 614 (2012) (citations omitted); *see also Union Leader Corp. v. City of Nashua*, 141 N.H. 473, 475 (1996) ("construe provisions favoring disclosure broadly and exemptions narrowly") (citations omitted). Indeed, as the Court has admonished, an "expansive construction" of the phrase "confidential, commercial, or financial information" in RSA 91-A:5, IV must be avoided, less the disclosure exemption "swallow the rule" in a manner that is "inconsistent with the purposes and objectives" of RSA chapter 91–

A. *Union Leader Corp. v. New Hampshire Housing Finance Authority*, 142 N.H. 540, 553 (1997) (citations omitted).

In seeking to denigrate and dismiss the public's interest in disclosure, Eversource draws a distinction between its activities in negotiating the Precedent Agreement and the Commission's activities in reviewing it, arguing that the public's interest in disclosure relates to the former rather than the latter. *See* Eversource Motion at 4, Paragraph 4 ("The Company received and evaluated information does not shed any light on the Commission's work but rather on Eversource's negotiations"). The Commission should reject such a simplistic distinction. It is indeed well-established that "[t]he public interest that the Right–to–Know Law was intended to serve concerns informing the citizenry about the activities of their government" and "[i]f disclosing the information does not serve this purpose, disclosure will not be warranted even though the public may nonetheless prefer, albeit for other reasons, that the information be released." *Lamy v. New Hampshire Public Utilities Commission*, 152 N.H. 106, 111 (2005) (citations and internal quotation marks omitted). Thus, in *Lamy*, private customer information in the records of a utility, disclosed to the Commission in routine fashion, fell within the RSA 91-A:IV, 5 disclosure exemption because it shed no light on the Commission's activities even though the requestor hoped to use the information to conduct his own investigation of the Commission's responses to safety issues. *Id.* at 111-113.

The contrast between the *Lamy* scenario and the present circumstances is instructive. This case does not involve so routine and mundane a utility activity as investigating customer complaints of voltage variations on a single distribution

circuit in a Manchester suburb. Rather, here the activities of the Commission and the Petitioner are notably entwined, given that Eversource negotiated the ANE Contract against the backdrop of, and to a significant extent in response to, the Commission-initiated Investigation into Potential Approaches to Ameliorate Adverse Wholesale Electricity Market Conditions in New Hampshire in Docket No. IR 15-124. *See* Order No. 25,850 (January 19, 2016) at 1 (accepting report of Commission Staff produced after "a series of collective stakeholder meetings with interested persons and organizations, including the three New Hampshire EDCs, and [bilateral meetings with] with certain stakeholders to clarify their proposals for resolving gas constraint issues and related data responses"). While reserving legal and policy judgment on the merits of a proposal such as the one made by Eversource here, the Commission nevertheless directed Eversource to make any such proposals following an open and competitive bidding process that would seek proposals from utility affiliates and non-affiliates alike and from all types of natural gas and natural gas storage providers. *Id.* at 5. In these circumstances, public scrutiny of the documents Eversource has provided with its petition would most assuredly shed light on both what Eversource did and what the Commission "is up to." *Cf. Lamy*, 152 N.H. at 111 ("Here, disclosure of the names and addresses will not tell the public anything directly about what the PUC 'is up to.'").

V. The Balancing Test

Finally, even assuming that Eversource has stated a cognizable interest in non-disclosure, the public's interest in disclosure as described above is so

significant that any reasonable balancing of the two as required by the New Hampshire Supreme Court must result in a decision rejecting the motion for confidential treatment. The magnitude of what Eversource is proposing here is ably described in the Eversource filing, particularly at pages 9 through 14 of the pre-filed direct testimony of Eversource witness James G. Daly. On behalf of Eversource, he posits what Eversource is proposing here as "the most direct and effective alternative to ensure reliability and lower electricity prices" in light of the region's growing dependence on natural gas-fired generation capacity that is in the hands not of utilities but merchant generators. Daly Testimony at 14, lines 9-11. The utility is not merely proposing to commit its electric customers to 20 years of paying for natural gas pipeline capacity; it is proposing to do so in a paradigm-shifting manner that would mark a major retrenchment from the driving assumption of the 1996 Restructuring Act that "[t]he most compelling reason to restructure the New Hampshire electric utility industry is to reduce costs for all consumers of electricity by harnessing the power of competitive markets," RSA 374-F:1, I, as opposed to the notions of guaranteed cost recovery that marked the development of the electric industry in the 20th Century.

The OCA would also like to remind the Commission, respectfully, that it too is a government instrumentality and, therefore, the public's right to know what the OCA is "up to" is also relevant to any determination made by the Commission pursuant to RSA 91-A. Since the OCA cannot reject public inquiries about its work in this docket with reference to the principles of quasi-judicial neutrality that guide the Commission, and because the OCA's ability to represent residential ratepayers is

materially advanced through an ability to collaborate freely and communicate openly with members of the public who share the OCA's interest in skeptically evaluating Eversource's proposal, subjecting virtually every material aspect of the Eversource filing to confidential treatment would significantly hamper our office's effort to advance the interests of residential utility customers in a thorough and accountable fashion. We believe these considerations further tip the scale of the Commission's determination toward disclosure.

VI. Conclusion

In conclusion, the OCA reminds the Commission that Eversource has no statutory entitlement to the confidential treatment it requests here. *See Chrysler Corp. v. Brown*, 441 U.S. 281, 292-93(1979) (concluding that the federal Freedom of Information Act "by itself protects the submitters' interest in confidentiality only to the extent that this interest is endorsed by the agency collecting the information"); *38 Endicott Street North, LLC v. State Fire Marshal*, 163 N.H. 656, 660 (2012) ("In interpreting provisions of the New Hampshire Right–to–Know Law, we often look to the decisions of other jurisdictions interpreting similar provisions of other statutes for guidance, including federal interpretations of the federal Freedom of Information Act (FOIA).") (citations omitted).[2] The Commission has the statutory

[2] A recent decision of the Commission casts doubt on whether it views the RSA 91-A:5, IV disclosure exemption as discretionary. *See Valley Green Natural Gas LLC*, Order No. 25,868 (Docket DG 15-155, February 17, 2016) at 6 (referring to a petitioner's "rights to the protection of is confidential information" and concluding that an intervenor's participatory rights secured by the Administrative Procedure Act are not "intended to eliminate anyone's rights under RSA 91-A"). The Commission should consider taking this opportunity to clarify its views on this

discretion to reject Eversource's motion to clothe the better part of this proceeding in secrecy and should do precisely that in light of the magnitude of this case. Alternatively, at the very least the Commission should embark on a meticulous, line-by-line examination of precisely what information Eversource is seeking to shield here from public scrutiny and should exempt from disclosure only that information for which Eversource can describe with particularity (as opposed to with generalities) a cognizable harm that disclosure would inevitably produce. The OCA would be pleased to assist the Commission with this process if it would be useful.

For the foregoing reasons, the OCA respectfully requests that the Commission deny the Eversource Motion for Protective Order and Confidential Treatment.

Respectfully submitted,

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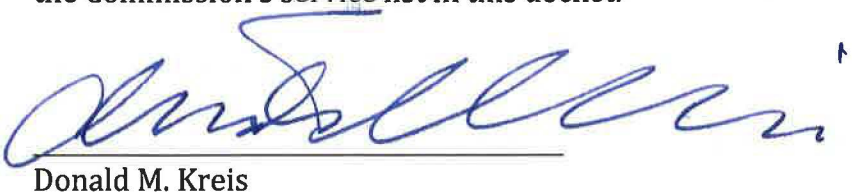
subject in a manner that does not mislead utilities and other petitioners into claiming a "right" to confidential treatment secured by the Right-to-Know Law.

I hereby certify that I have served the foregoing document on all persons listed in the Commission's service list in this docket.



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