DE 16-241

STATE OF NEW HAMPSHIRE

BEFORE THE

PUBLIC UTILITIES COMMISSION

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

Petition for Approval of Gas Infrastructure Contract with Algonquin Gas Transmission, LLC

Docket No. DE 16-241

Opposition of the Office of Consumer Advocate to Algonquin Gas Transmission LLC Motion for Protective Order and Confidential Treatment

NOW COMES the Office of the Consumer Advocate ("OCA"), a party in this docket, and requests that the Commission deny the Motion for Protective Order and Confidential Treatment filed on March 9, 2016 by putative intervenor Algonquin Gas Transmission, LLC ("Algonquin"). In support of this opposition the OCA states as follows:

1. Public Service Company of New Hampshire d/b/a Eversource Energy ("Eversource") instituted this proceeding on February 18, 2016 to seek Commission approval of a novel arrangement whereby Eversource, in concert with other electric utilities around New England both affiliated and unaffiliated with Eversource, would acquire significant quantities of firm natural gas capacity from Algonquin for a period of 20 years beginning in 2018 as part of Algonquin's Access Northeast ("ANE") project. None of the electric

utilities own natural gas generation facilities; the purpose of the proposed contract is to make natural gas more readily available to merchant generators and thus potentially to reduce wholesale electricity prices and enhance reliability. Eversource proposes to pass the cost of this firm capacity on to all of its customers, regardless of which retail energy suppliers they use and regardless of whether the acquisition of the firm capacity proves economical as wholesale market conditions evolve.

2. Eversource accompanied its petition with a Motion for Confidential Treatment and Protective Order requesting that the Commission shield from public disclosure essentially all of the material terms of the proposed agreement. In essence, Eversource argued that disclosure of the contract terms would "make it more difficult for the Company to Attract Bidders and to negotiate successfully in the future," that "to the extent there is any public interest [in disclosure] it is minimal," and thus that when balancing these two interests as required by the Right to Know Law (RSA 91-A) and applicable caselaw, the information should remain secret. Eversource Motion for Protective Order and Confidential Treatment at 3-4.

3. OCA submitted an opposition to the Eversource motion on February 29, 2016, contending that Eversource had failed to state a cognizable privacy interest, that the public's interest in disclosure is anything but minimal, and that, upon application of the appropriate balancing test, the motion for confidential treatment should be denied. *Inter alia*, the OCA opposition noted that Eversource had not asserted any privacy interests on behalf of Algonquin.[1]

[1] Eversource filed a pleading replying to the OCA opposition (along with a motion seeking leave to submit such a pleading) on March 4, 2016. We do not purport in this submission to offer a surrebuttal to the arguments in Eversource's March 4 submission. However, in the interest of clarity, the OCA notes that in its March 4 filing Eversource all but concedes that its initial claims of entitlement to confidential treatment were overbroad. *See*

4. Algonquin filed its own motion for a protective order and confidential treatment "[i]n order to remedy the OCA's alleged deficiency in the Eversource Motion" by seeking to assert its own interest in non-disclosure. Algonquin's arguments are no more persuasive than Eversource's are and, therefore, the OCA is taking this opportunity to respond to Algonquin's arguments for confidentiality. The OCA incorporates by reference here the arguments it offered in opposition to the Eversource motion; what follows is limited to responding to the allegations Algonquin has made that differ from or add to what Eversource has already asserted.

5. In its motion, Algonquin points out that its putatively confidential information "was provided to Eversource in response to an October 23, 2015 Request for Proposals ("RFP") with the understanding that such information would be maintained as confidential based, in part, on the Commission's practice of protecting similar types of information." Algonquin Motion at 4-5, paragraph 15. There is no authority for the proposition that Eversource could make binding RSA 91-A confidentiality determinations merely by promising to maintain the privacy of information in responses to its solicitation. Moreover, the Precedent Agreement arising out of Algonquin's

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Motion for Leave to Reply and Reply to Opposition of the Office of Consumer Advocate to Motion for Protective Order and Confidential Treatment (March 4, 2016) at 3 n.2 ("by this submission Eversource does not intend to foreclose the possibility that there might be potential, reasonable changes in the scope of the information for which confidential treatment is sought as the docket proceeds"). OCA further wishes to clarify that in its March 4 pleading Eversource has incorrectly alleged that our office might believe it is "without the ability or authority to keep information confidential if it is requested by or allegedly relevant to, some member of the public." *Id.* at 13. Parties to Commission proceedings must provide the OCA with copies of confidential documents and the OCA is, in turn, obliged to "maintain the confidentiality of such information." RSA 363:28, VI. Obviously, this includes information for which a party has requested confidential treatment while such request is pending before the Commission.

Additionally, and again in the interest of clarity, the OCA would like to correct a misstatement of its position that appears in the Algonquin motion. On page 6 at footnote 19 of its motion, in the course of claiming that disclosure of the material at issue here would harm its position in future negotiations, Algonquin alleges that the OCA has "conced[ed] that Algonquin is subject to such potential harm from the disclosure of the Confidential Information." This is incorrect. The quoted portion of the OCA's pleading merely concedes that, unlike Eversource, Algonquin is likely to negotiate natural gas agreements in the future.

successful proposal to Eversource explicitly contemplates that although the Precedent Agreement is confidential, Eversource could submit the document to the Commission (where, obviously, it becomes a public record subject to RSA 91-A) as long as the submission is accompanied by a request for confidential treatment and protective order.[2] Thus, to the extent information from the RFP process is now under review for potential confidential treatment, the parties' understandings during the RFP process are irrelevant. Although past Commission practice may have caused the parties to assume certain information would be confidential pursuant to RSA 91-A, this too is irrelevant to the Commission's pending determination under the Right-to-Know Law. *See, e.g., Professional Firefighters of New Hampshire v. Local Government Center, Inc.,* 159 N.H. 699, 707 (2010) "whether information is exempt from disclosure because it is private is judged by an objective standard and not a party's subjective expectations") *Id.* The balancing test adopted by the New Hampshire Supreme Court and reiterated in numerous cases, including those cited by Algonquin and Eversource, would be meaningless if the parties could simply rely on previous Commission RSA 91-A determinations. For the reasons already explained in the OCA opposition to the Eversource motion, the public's interest in disclosure is unusually and notably high here. Algonquin and Eversource should have anticipated that information which might be confidential in another context might be subject to public disclosure here given the controversial and novel idea that electric customers in a restructured state should pay for 20 years' worth of firm natural gas capacity for the use of merchant generators.

[2] The Precedent Agreement is Attachment EVER-JGD-1 to the Eversource Petition; the referenced language appears at pages 33-34.

6. The privacy interests asserted by Algonquin in arguing for non-disclosure are somewhat more detailed but ultimately no less conclusory than the analogous contentions of Eversource. Algonquin makes two distinct arguments: (1) that the proposed redactions concern "sensitive pricing data, delivery information, and contract terms" that, if revealed to competitors, would harm Algonquin by allowing them to "adjust their pricing and contracting terms to the competitive disadvantage of Algonquin" without giving Algonquin a reciprocal degree of access to information from the competing firms, and (2) because "other New England states intend to conduct RFPs for natural gas capacity contracts," disclosure of Algonquin's pricing and strategy for the ANE Project as reflected in Algonquin's agreement with Eversource would give competitors a "distinct advantage in responding to the RFPs in other states because they will have access to information about Algonquin's response strategy" without providing Algonquin reciprocal access to information from competitors. Algonquin Motion at 5, paragraphs 16-17. The latter possibility, Algonquin contends, could impede the ability of the ANE Project to obtain contracts in other New England states and have a "chilling effect" on future solicitations by New Hampshire utilities, thus "possibly" increasing rates for utility customers. *Id.* at paragraph 18.

7. There is no reported decision of the New Hampshire Supreme Court recognizing or even discussing the privacy interests asserted here by Algonquin. What the Court has made crystal clear, however, is that (1) when the issue is maintaining the secrecy of government records concerning "confidential, commercial, or financial information" as that phrase appears in the disclosure exemptions enumerated in RSA 91-A:5, IV, "[a]n expansive construction of these terms must be avoided" lest the exemption "swallow the

rule," and therefore that (2) "the party resisting disclosure must *prove* that disclosure 'is likely . . . to cause substantial harm to the competitive position of the person from whom the information was obtained.'" *Union Leader Corp. v. New Hampshire Housing Finance Authority*, 142 N.H. 540, 552, 554 (citing *National Parks and Conservation Ass'n v. Kleppe*, 178 U.S. App. D.C. 376, 547 F.2d 673, 677-78, (D.C. Cir. 1976) (other citations omitted; emphasis added).[3]

8. Neither Algonquin nor Eversource have offered any such proof of substantial competitive harm. The pleadings of both counterparties make reference to previous confidentiality decisions of the Commission, which demonstrate only that conclusory allegations of competitive harms have sufficed in the past when left unchallenged. As the OCA explained in response to the Eversource confidentiality motion, the stakes in this case are too high to allow the arguments for secrecy to go unexamined here.

9. In his prefiled direct testimony, Eversource witness James G. Daly is asked to identify the "key aspects" of his company's agreement with Algonquin. He mentions six: (1) cost and cost caps, (2) "regulatory approvals," (3) "other provisions," (4) right of first refusal and discount for contract extensions, (5) sunset date, and (6) a most-favored-nation provision. Testimony of James G. Daly, February 18, 2016 ("Daly Testimony") at 19-21. Eversource and Algonquin are requesting that fully four of these key aspects of what is before the Commission remain fully shielded from public scrutiny. Indeed, the only two the companies deem suitable for airing in public are the regulatory approvals (by which the companies simply mean that Eversource has a contractual right to terminate the agreement if the Commission does not issue a decision by October 1, 2016), and the

[3] Alternatively, a party resisting disclosure can prove that treating the information as public will impair the government's ability to obtain similar information in the future. *Union Leader Corp.*, 142 N.H. at 554. That is not an issue here.

"other provisions" (i.e., that the agreement "requires Algonquin to propose a FERC tariff change to allow capacity-release allocations to specific gas-fired generation" and "provides for a process to adjust the final allocations of volumes associated with the contracts" with Commission approval). Daly Testimony at 20, lines 1-10.

10. There are various planned redactions scattered throughout the Eversource filing that seem arbitrary and unlikely to have competitive implications. For example, the contract itself (referred to as the "Precedent Agreement") contains more than three pages describing the commencement date, and possible adjustments to the commencement date, for each of the ANE Project's four phases. *See* Attachment EVER-JDG-1 at 11-14. These provisions make clear that the parties plan for phase 1 to be on line as of November 1, 2018, phase 2 by November 1, 2019, phase 3 by November 1, 2020 and phase 4 by May 1, 2021. What the contracting parties seek to shield as secret are drop-dead dates for completion of each phase. *See id.* at 14 ("Under no circumstances shall the Phase 1 Service Commencement Date, Phase 2 Service Commencement Date, Phase 3 Service Commencement Date, and Phase 4 Service Commencement Date be later than [four redacted dates], respectively, unless otherwise agreed in writing by both Parties."). Similarly, the parties seek to redact deadlines for Algonquin's (1) receipt of all necessary government approvals, property rights, permits, and (2) completion of construction. *Id.* at 17, 18, 21-22. Certain details of the parties plans for mutual assurance of creditworthiness are targeted for redaction. *Id.* at 24, 26, and 27.

11. The proposed redactions of Attachment EVER LBJ-2 remain of particular concern to the OCA. This four-page exhibit estimates the effect on retail bills for Eversource customers in New Hampshire under four scenarios in years 2022-24. The only datum that the

movants deem suitable for public disclosure is the estimated reduction in wholesale electricity costs, which was derived from the ICF International Report issued in December 2015 (on behalf of the utilities contracting with the ANE Project) and appended to the prefiled testimony of Kevin Petak of ICF International. The remainder of the data in Attachment EVER-LBJ-2 comes from another exhibit – Attachment EVER-CJG-1 – setting forth the estimated effects of the cost recovery mechanism Eversource is proposing for Commission approval under the LGTSC (longterm gas transportation and storage contracts) tariff appearing in draft form as Attachment EVER-LBJ-1. The prefiled testimony accompanying these exhibits refers to a redacted range of "[a]verage bill reductions by sector" across all of the scenarios, *see* Joint Testimony of Christopher J. Goulding and Lois B. Jones at page 6, lines 5-12, but as to the magnitude of the expected savings – presumably a major basis of Eversource's claim that the Precedent Agreement warrants Commission approval – Algonquin and Eversource are effectively asking New Hampshire citizens to trust them, to trust the OCA (as the advocate for residential utility customers with access to the unredacted data), and ultimately to trust the Commission.

12. Nothing in the Eversource motion for confidential treatment explains why Eversource has a cognizable privacy interest in these exhibits. In an effort to cure this deficiency, Eversource in its reply pleading claims that the information in EVER-LBJ-2 "*might* be used to calculate information in the confidential bid" that led to the Precedent Agreement, *see* Motion for Leave to Reply and Reply to Opposition to the Office of Consumer Advocate to Motion for Protective Order and Confidential Treatment at 9, paragraph 9 (emphasis added), but offers no explanation of how such reverse-engineering could be

accomplished. Algonquin likewise does not purport to address the information in EVER-LBJ-2, perhaps because the connection between estimated retail bill impacts for New Hampshire electric customers and Algonquin's ability to make deals as a wholesale seller of natural gas capacity is too attenuated to be plausible.

13. There is no doubt that all of the requested redactions would be convenient for both Eversource and Algonquin, but it is notable that neither firm has provided so much as an affidavit, much less any empirical evidence or reasoned explanation, for why disclosure of the information targeted for redaction would cause cognizable competitive harm within the meaning of the applicable RSA 91-A jurisprudence. Although both Algonquin and Eversource appear to treat their asserted competitive harms as the Right-to-Know equivalent of *res ipsa loquitur*,[4] theirs is hardly the consensus view.

14. For example, only days ago a Hearing Officer of the New Mexico Public Regulation Commission ruled that key terms of a coal purchase agreement entered into by a public utility was subject to public disclosure. Quoting a 2011 order of her agency, the Hearing Officer observed that "pricing information generally has no economic value after a contract is awarded. Price information tailored to the specifics of one project will likely reveal little about the pricing proposed for a subsequent contract for a different scope of work for a different company at a future time." Order Denying PNM's Request for

[4] *See, e.g., Smith v. Coca Cola Bottling Co.*, 97 N.H. 522, 523-24 (1952) (noting that in the negligence context, invoking the doctrine of *res ipsa loquitur* requires a showing that "(1) the accident must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff"). *Res ipsa loquitur* is really just a principle that allows "circumstantial evidence" of negligence – something bad happened, ergo there may have been negligence – to raise a legitimate issue of fact at a civil trial. *Id.* at 524. Here, Algonquin and Eversource actually propose a kind of reverse *res ipsa* here; they want the circumstantial evidence to support a presumption of harm.

Confidential Treatment in N.M. Public Regulation Commission Docket No. 15-00261-UT, March 11, 2016, at 7.[5]

15. As the Revenue Watch Institute (now known as the Natural Resource Governance Institute) noted in a 2009 report calling for more disclosure around the globe of contracts involving extractive industries (including natural gas), "[g]iven how open the definition of 'commercially sensitive information is,' a potentially limitless amount of information could fall within it." Peter Rosenblum and Susan Maples, "Contracts Confidential: Ending Secret Deals in the Extractive Industries," Revenue Watch Institute (2009) at 34.[6] The authors of the report add: "Since the financial terms of many deals are known within the industry, the argument that contract transparency would cause competitive harm seems weak." *Id.* at 39. "Two categories of information present strong arguments for redaction. Knowledge of future transactions is widely regarded as commercially sensitive information . . . . and the potential harm caused by disclosure would likely be discrete enough to meet the 'actual harm' test of FOI legislation [i.e., the Right-to-Know Law and its analogs in other jurisdictions]. The same is true of a trade secret, which by its very nature will not be in the public domain, since its economic value is derived from the fact that it is not widely known in the industry."[7] *Id.*

16. The authors of the Revenue Watch report likewise reject the claim, advanced here by Algonquin, that when transparency is "piecemeal" (e.g., because New Hampshire law

[5] This order is available at https://perma.cc/RL29-UCPF.

[6] This report is available at https://perma.cc/H3SE-ZZ2R.

[7] Neither Algonquin nor Eversource have argued that their proposed redactions constitute trade secrets. In New Hampshire, a trade secret is specifically defined as "information, including a formula, pattern, compilation, program, device, method, technique, or process, that: (a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy." RSA 350-B:1, IV.

might require or justify more disclosure than that which is applicable elsewhere), "it will disadvantage transparent companies over non-transparent ones, since non-transparent companies may gain information and use it against transparent competitors." *Id.* at 43. According to the authors, "[t]he arguments warning of disparities between transparent and non-transparent companies only further support consistent application of transparency rules. . . . [M]ost competitors, transparent or not, are already the best informed. It is unlikely that contract transparency will result in a race to the bottom. . . . The most likely long-term outcome is contracts that fall within a flexible and reasonable rate of return for both parties . . . , an outcome that is desirable for serious investors, governments, and citizens." *Id.* "Companies currently have a strategic advantage over governments, with greater access to information, and to contracts in particular. Contract transparency would erode this advantage." *Id.* at 46.

17. The authors of the Revenue Watch report were concerned primarily with contracts that multinational oil and gas companies execute with governments in developing nations with resources to be exploited. But the same principles apply here, perhaps with even more force because the government is one step removed from contractual arrangements that involve essential public services. The point, ultimately, is that the Commission should not accept conclusory and self-serving claims of competitive harm from firms that have an economic incentive to perpetuate secrecy.[8]

18. As a 2009 report commissioned by the National Association of Regulatory Utility Commissioners and the U.S. Agency for International Development concluded in the

[8] For an example of non-conclusory assertions of competitive harm , *see Boeing Corp. v. U.S. Department of Air Force*, 616 F.Supp.2d 40 (D.D.C. 2009), a case arising under the analogous provision of the federal Freedom of Information Act.

context of wholesale electricity markets, "[a] critical aspect of transparency is that it eliminates (or every substantially reduces) differences in available information between dominant and smaller market participants, thus increasing the trust and confidence needed for both to engage in trade and make decisions. The combined result is more cost-effective investment and operating decisions, reduced risk premia, greater market confidence, increased market liquidity and efficiency, and lower barriers to entry. All these factors should contribute to lower electricity costs to consumers and greater confidence that the markets can be allowed to develop under independent regulation, rather than being subject to unpredictable external intervention." Liz Hooper, Paul Twomey and David Newbery, "Transparency and Confidentiality in Competitive Electricity Markets," June 2009, at 3-4.[9]

19. In short, Algonquin's claims of competitive harm are no more persuasive than Eversource's. Both rely on speculation rather than evidence. Their logic, if accepted, would justify finding a privacy interest in almost anything that is the product of negotiation.

20. Even if the Commission disagrees, it must balance the privacy interest against the public's interest in disclosure. Here, apart from the novelty and significance of the Precedent Agreement as previously described in our opposition to the Eversource confidentiality motion, the Commission should further consider that the public's interest in disclosure of this information is extraordinarily high in light of a key fact that Eversource omitted from its petition. According to the prefiled testimony of Eversource witness James M. Stephens, the ANE Project is "sponsored by affiliates of Spectra Energy, Eversource Energy and National Grid." Prefiled Direct Testimony of James M.

[9] This report is available at https://perma.cc/3AND-BFYG.

Stephens at 61, lines 6-7; *see also* "Report on Investigation into Potential Approaches to Mitigate Wholesale Electricity Prices" in Docket IR 15-124 (September 15, 2015) at 15 (identifying Spectra, Eversource and National Grid as "joint owners" of the ANE Project). This "sponsorship" is not limited to Eversource having entered into the Precedent Agreement with Algonquin, which is an indirect subsidiary of Spectra Energy Partners, LP. Rather, it is the OCA's understanding that Algonquin and an affiliate of Eversource (Eversource Gas Transmission LLC) each hold a 40 percent interest in the ANE Project (with a subsidiary of National Grid, National Grid Algonquin LLC) owning the remaining 20 percent interest. This suggests the Commission should treat the Precedent Agreement as an affiliate transaction. *See* RSA 366:1, II(b) (defining "affiliate" in part as "[e]very person who . . . is either directly or indirectly through intermediate persons, or otherwise, actually exercising any substantial influence over the policies and actions of a public utility, whether or not in conjunction with one or more persons"). The Commission wisely contemplated such a possibility and directed Eversource to conduct a competitive solicitation, see Order No. 25,860 (Docket IR 15-124, January 19, 2016) at 4-5, the adequacy of which the instant proceeding will presumably test if necessary. The point for present purposes is that much more is at stake here than merely Eversource's commitment to saving money for customers at wholesale and to advancing the cause of resource adequacy; the ANE Project is clearly part of the long-term business strategy of Eversource's ultimate parent company.

21. In conclusion, the OCA again reminds the Commission that while RSA 91-A:5, IV allows the agency to shield information from public disclosure in certain circumstances, the determination is within the Commission's discretion. No party has argued here that

the law *requires* the redactions Eversource and Algonquin have requested. The asserted competitive harms are speculative if not imagined, the public's interest in disclosure is high in light of the potentially paradigm-shifting nature of the proposed contract, and thus the outcome of the required balancing test clearly leads to full disclosure.

WHEREFORE, the OCA respectfully requests that the Commission deny the pending motions of Algonquin and Eversource for confidential treatment of certain material contained in the Eversource petition and supporting materials.

Respectfully submitted,

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Certificate of Service

I hereby certify that a copy of this Objection was provided via electronic mail to the individuals included on the Commission's service list for this docket.

Donald M. Kreis