STATE OF NEW HAMPSHIRE

BEFORE THE

PUBLIC UTILITIES COMMISSION

Public Service Company of New Hampshire d/b/a Eversource Energy
and
Consolidated Communications of Northern New England Company, LLC d/b/a Consolidated Communications

Joint Petition to Approve Pole Asset Transfer

Docket No. DE 21-020

Opposition of the Office of the Consumer Advocate to Petitioners' Motion for Confidential Treatment

The Office of the Consumer Advocate ("OCA"), a party to this docket, respectfully requests that the Commission deny the motion filed on January 31, 2022 in this proceeding for confidential treatment of certain materials filed with the Commission. In support of its position, the OCA states as follows:

I. Introduction

The Joint Petitioners, Public Service Company of New Hampshire d/b/a Eversource Energy ("PSNH") and Consolidated Communications of Northern New England Company, LLC d/b/a Consolidated Communications ("Consolidated") instituted this docket in 2021 to seek Commission approval of an agreement whereby PSNH would acquire certain utility pole assets from Consolidated and then recover all of the applicable costs from PSNH customers. At the time of the filing, PSNH's witnesses testified that the transaction would add $9.4 million to the

electric distribution utility's revenue requirement in 2021, $8.2 million in 2022, and $11.3 million in 2023. Direct Testimony of Douglas P. Horton and Erica L. Menard (tab 1) at Bates 48, lines 20-21 and Bates 49, lines 1-2 (noting that these amounts were "subject to change"). According to Eversource, Consolidated has refused to pay PSNH since 2018 for its share of vegetation management costs associated with the poles to the extent they are presently jointly owned by the two companies. Testimony of Lee G. Lajoie (tab 1) at Bates 19, lines 6-8. The agreement struck by the Joint Petitioners would nevertheless resolve their dispute over the vegetation management expenses and, as already noted, all costs incurred by PSNH in taking over Consolidated's aging pole plant in the PSNH service territory would be borne by PSNH customers. Nevertheless, astonishingly, the Joint Petitioners now come before the Commission and, invoking RSA 91-A:5, IV and N.H. Code Admin. Rules Puc 203.08(b), seek to shield from public disclosure all of the key details of the deal, including but not limited to the purchase price agreed to by PSNH. This flies in the face of the meaning and intent of the state's Right to Know Law, RSA 91-A, and the Commission should therefore deny the motion in its entirety.

II. The Requisite Three-Step Analysis

The New Hampshire General Court declared in 1967 that "[o]penness in the conduct of public business is essential to a democratic society." RSA 91-A:1. Therefore, "[e]very citizen during the regular or business hours of all public bodies or agencies, and on the regular business premises of such public bodies or agencies, has the right to inspect all governmental records in the possession, custody, or

control of such public bodies or agencies." RSA 91-A:4, I. However, certain government records are "exempted" from the public disclosure requirement, *see* RSA 91-A:5, including "confidential, commercial, or financial information," *id.* at paragraph IV.

For an instrumentality of government to withhold information from public disclosure pursuant to this exemption, the agency must conduct a three-step analysis: (1) "evaluate whether there is a privacy interest at stake that would be invaded by the disclosure," then (2) "assess the public's interest in disclosure," and, finally, (3) "balance the public interest in disclosure against the government's interest in nondisclosure and the individual's privacy interest in nondisclosure." *Union Leader Corp. v. Town of Salem*, 173 N.H. 345, 355 (2020) (citation omitted). The requested nondisclosure fails at each step of this analysis.

III. The Joint Petitioners Assert No Cognizable Privacy Interest

In an effort to limn the privacy interest that is allegedly at stake here, the Joint Petitioners note that "Consolidated has engaged in similar asset transactions in other jurisdictions previously and may engage in similar transactions in the future." Motion at 3. According to the Joint Petitioners, "should any of the redacted terms of the Agreement by made available to the public, Consolidated would be placed at a competitive disadvantage vis-à-vis its ability to negotiate fees, pricing, and contractual terms with other parties in other locations." *Id.* at 3-4.

"The burden of proving whether information is confidential rests with the party seeking to avoid disclosure." *Professional Fire Fighters of New Hampshire v.*

New Hampshire Local Government Center, 163 N.H. 613, 614 (2012) (citation omitted). The Joint Petitioners have fallen well short of demonstrating a privacy interest worthy of recognition under RSA 91-A:5. Consolidated was once a public utility rate-regulated by the Commission in its capacity as a provider of basic local exchange service. But, pursuant to RSA 378:1-a, Consolidated plays that role no longer. Its service territory is now non-exclusive. *See* RSA 374:22-g (providing for such non-exclusivity for telephone franchise areas "[t]o the extent consistent with federal law and nontwithstanding any other provision of law to the contrary"). Consolidated is not a New Hampshire company and, as is well-known to the Commission, it has not kept faith with its duty to maintain those poles in New Hampshire which it owns or co-owns, nor has it remained current on its financial obligations to electric utilities with respect to poles owned by *those* utilities. Although Consolidated claims it is "engaged in an intensely competitive industry," Motion at 5, nothing about this case implicates those competitive interests. In other words, though local telephone service may be an intensely competitive industry, the business of pole ownership is still a monopolist's game. It is understandable why Consolidated would want to keep the terms of its deal with Eversource (and ultimately with Eversource's ratepayers) a secret -- but that desire to protect its ability to maximize the return on Consolidated shareholder investment is not the sort of privacy interest the General Court sought to recognize when it adopted RSA 91-A:5.

The same is true of the Joint Petitioner's arguments about "confidential settlement terms of legally disputed claims." Motion at 5. According to the Joint Petitioners, "[a] lack of confidentiality in such negotiated terms may discourage future adverse claimants from making concessions in settlement negotiations or agreeing to specific provisions more favorable to one or both of the Joint Petitioners because public knowledge of such negotiating precedent would increase other parties bargaining leverage in future settlement negotiations." *Id.* What a mockery it would make of the Right-to-Know Law to conclude that Consolidated's desire to out-fox those with pole-related claims against Consolidated is a privacy interest worthy of protection under New Hampshire law, particularly when those parties against which Consolidated is negotiating are public utilities whose costs are charged to customers, all of whom have reasonably assumed that they have already paid the disputed costs via their telephone and electric bills.

IV. The Public Has a Keen Interest in Disclosure

Conversely, the public's interest in disclosure here is as high as it gets in proceedings before the Public Utilities Commission. "The purpose of the Right-to-Know Law is to provide the *utmost information* to the public about what its 'government is up to.'" *New Hampshire Right to Life v. Director, N.H. Charitable Trust Unit*, 169 N.H. 95, 111 (2016) (quoting *Union Leader Corp. v. City of Nashua*, 141 N.H. 473, 476 (1996) (other citations omitted; emphasis added); *see also Lamy v. Public Utilities Comm'n*, 152 N.H. 106, 111 (2005) (same). What the Commission is "up to" here is considering the extent to which Eversource's ratepayers should be

treated as a silent virtual party to a bargain Eversource has struck with Consolidated. Assuming *arguendo* that it may be consistent with the public good for Eversource to buy out Consolidated's interest in the utility poles within the Eversource service territory and thereby relieve Consolidated of its capacity to degrade the quality of electric service, it is the terms of the deal – the very information the Joint Petitioners wish to keep secret – that would truly reveal the extent to which the Commission is exercising its considerable discretion wisely. *See, e.g., Appeal of Lakes Region Water Co.*, 171 N.H. 515, 517 (2018) (referencing the "considerable deference" accorded by the New Hampshire Supreme Court to the Commission when the agency's "policy choices" are under appellate scrutiny) (citation omitted).

The Commission should also bear in mind that when it makes RSA 91-A:5 determinations it is also doing so on behalf of the Office of the Consumer Advocate. *See* RSA 363:28, VI (requiring the OCA to "maintain the confidentiality" of information obtained via adjudicative proceedings when the Commission deems such information to warrant that treatment). The public also has the right to know what the Office of the Consumer Advocate is "up to" – in this instance, defending the interests of residential utility customers whom the Joint Petitioners have placed in the crossfire of their longstanding dispute over maintenance of the utility poles that serve those customers.

V. The Balancing Test, Correctly Applied, Compels Deeming These Documents Subject to Disclosure

Given the lack of a cognizable privacy interest, or at most the existence of a weak and insubstantial one, and in light of the extremely high public interest in disclosure, any rational application of the New Hampshire Supreme Court's RSA 91-A:5 balancing test requires the Commission to declare unredacted copies of the documents covered by the pending motion to be public documents subject to disclosure upon request to the Commission, the Department of Energy, the OCA, and any other instrumentality of government that has them or may come into possession of them. The Joint Petitioners have not met the heavy burden they carry under RSA 91-A:5 to make the case for secrecy, and the Commission must adhere to the judicial mandate to advance "our state constitutional requirement that the public's right of access to government . . . records shall not be unreasonably restricted" and thus to construe the disclosure exemptions "restrictively" and "in favor of disclosure." *Seacoast Newspapers, Inc. v. City of Portsmouth*, 173 N.H. 325, 338 (2020) (citing Part I, Article 8 of the New Hampshire Constitution; other citations omitted).

VI. The Commission May Also Ignore the Balancing Test and Deny the Motion as a Matter of Agency Discretion

Finally, the Commission should remember that the balancing test analyzed above notwithstanding, the agency always has the discretion to make its records available for public inspection and copying. The Right-to-Know Law is a disclosure statute, not a privacy protection regime. *See Chrysler Corp. v. Brown*, 441 U.S.

281, 292 (1979) (concluding that the federal Freedom of Information Act is "exclusively a disclosure statute," the disclosure exemptions similar to those in RSA 91-A:5 notwithstanding); *see also Clay v. City of Dover*, 169 N.H. 681, 685-86 (2017) ("We also look to the decisions of other jurisdictions interpreting similar acts for guidance, including federal interpretations of the federal Freedom of Information Act (FOIA)," given that "[s]uch similar laws, because they are *in pari materia*, are interpretatively helpful, especially in understanding the necessary accommodation of the competing interests involved") (citation omitted). Although the issue has never been litigated, it is the respectful contention of the Office of the Consumer Advocate that because the Right-to-Know Law is a disclosure statute rather than a privacy statute, private business interests do not have standing to litigate, either at the PUC or in the Courts, to advance their interest in shielding from disclosure records they have disclosed to the Commission or the OCA. To the extent the rules of the Commission suggest otherwise, *see* N.H. Code Admin. Rules Puc 203.07 (governing requests for release of "Confidential Documents Submitted in Routine Filings") and 203.08 (governing motions for confidential treatment); those rules can and should be declared to be void in an appropriate case.

VII. Conclusion

"[T]he Right-to-Know Law is the crown jewel of Government transparency in New Hampshire." *Seacoast Newspapers*, 173 N.H. at 338. Granting the Joint Petitioners' Motion for Confidential Treatment here would treat that crown jewel as if were just an annoying pebble that can be kicked out of the way. The Commission

must deny the Motion for Confidential Treatment. As a matter of courtesy, the Commission should offer the Joint Petitioners the opportunity to avoid public disclosure of their information by withdrawing their petition altogether and requesting that the Commission close the docket.

WHEREFORE, the OCA respectfully request that this honorable Commission:

A. Deny the Motion for Protective Order and Confidential Treatment of Public Service Company of New Hampshire and Consolidated Communications of Northern New England Company, LLC; and

B. Grant such further relief as shall be necessary and proper in the circumstances.

Sincerely,

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Certificate of Service

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

Donald M. Kreis