

**STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION**

DOCKET NO. DG 23-087

**Petition of Northern Utilities, Inc. for Approval of
Empress Capacity Agreements**

**Assented-To Motion for Protective Order and
Confidential Treatment Regarding Discovery Responses**

NOW COMES Northern Utilities, Inc. ("Northern" or "the Company") and, pursuant to RSA 91-A:5, IV and N.H. Admin. Rule Puc 203.08, respectfully moves the New Hampshire Public Utilities Commission (the "Commission") to issue a protective order according confidential treatment to certain information described below and submitted herewith. Specifically, Northern requests that the Commission issue an order extending the protective treatment previously requested in connection with the Company's initial filing and the Settlement Agreement between Northern and the New Hampshire Department of Energy (the "Department") to certain confidential and / or proprietary commercial information submitted in the course of discovery in this matter, as well as the confidential attachment to the Settlement Agreement among the parties. Northern has conferred with counsel for the Department and the Office of the Consumer Advocate, who assent to the relief requested in this motion.

In support of this Motion, Northern states as follows:

1. In connection with its initial filing in this case, Northern submitted a Motion for Confidential Treatment seeking protective treatment of certain commercial terms of the firm transportation and precedent agreements (the "Empress Capacity Agreements") at issue in this case, as well as descriptions of and discussion of such terms in the prepared testimony of the

Company's witness. Northern's motion further requested that such treatment be extended to any discovery, testimony, position statement argument, or briefing relative to the confidential information. No party objected to the Company's motion at the prehearing conference on November 9, 2023. This motion remains pending.

2. On January 16, 2023, Northern submitted a Motion for Confidential Treatment seeking protective treatment of certain confidential commercial, proprietary, and competitively sensitive information contained in the Settlement Agreement between Northern and the Department. As of this writing, no party has objected to the motion, which remains pending.

3. During the discovery phase of the above-captioned docket, the Company submitted confidential information in connection with the following data request responses (including attachments unless otherwise indicated): DOE 1-1; DOE 1-2; DOE 1-7; DOE 1-8; DOE 1-10 (attachment), DOE 1-13 (response and attachment); DOE 1-24; DOE Technical Session ("TS") 1-6. When submitting these responses, the Company indicated that it a good faith basis for seeking confidential treatment of the confidential materials pursuant to Puc 203.08 and intended to submit a motion for confidential treatment regarding the documents at or before the commencement of the hearing in this docket. Northern made an oral motion at the January 18, 2024 hearing, and files the instant motion to document and detail that request.

4. The type of confidential information that is included in the above-referenced data requests is already subject to Protective Orders in a concurrently pending Maine Public Utilities docket, 2023-00254. ME PUC 2023-00254, Amended Protective Orders 1 & 2 (November 5, 2023). DOE 1-2 requested copies of all discovery submitted in Maine Public Utilities Commission Docket 2023-00254. Due to the volume of material submitted in response to DOE 1-2, and the fact that the confidential discovery provided in connection with this response are

already subject to protective order, the Company is not attaching materials submitted in response to DOE 1-2 to this motion. With regard to other data requests, attachments, position statements and testimony, the Company (or party filing the testimony or position statement) has provided redacted versions, suitable for public review, unless confidential information is inextricably intertwined with information that is not confidential such that providing a redacted version is not possible, as is the case with certain designated confidential spreadsheets and tables.

5. The Commission held a hearing on a Settlement Agreement submitted by the Parties to this Docket on January 18, 2024. At the commencement of the hearing, the Company had not submitted a motion for confidential treatment in connection with the above-referenced data request responses. The confidential information contained in the Company's responses pertain to the commercial terms of the Empress Capacity Agreements or confidential, proprietary, and competitively sensitive information related to the Empress Capacity Agreements. As noted above, Northern made an oral motion at the January 18, 2024 hearing, and files the instant motion to document and detail that request. The Company requests that the Commission extend the confidential treatment requested in connection with the Company's initial filing and the Settlement Agreement to confidential portions of discovery submitted in this matter.

6. Granting the waiver serves the public interest in that the purpose of the rule – delineating and maintaining the appropriate balance between confidential commercial information and publicly available information is satisfied by allowing the motion. The waiver will not disrupt the orderly and efficient resolution of matters before the Commission.

7. The Company specifically requests that confidential treatment be extended to certain information submitted in connection with Northern's confidential responses to the

following data requests. Confidential information in the following responses and / or attachments have been highlighted or redacted in accordance with Puc 201.04(b), with the exception of confidential live excel files which cannot be redacted:

- a. DOE 1-1, which requests “all Tables and Graphs in live digital format, with supporting data” in connection with the Company’s initial filing. Attachment 2 to the Company’s response includes excel versions of confidential tables and graphs used by the Company in its initial petition. These “live” versions contain models and formulae that are confidential and proprietary to the Company.
- b. DOE 1-2 requests copies of “all data request (i.e., interrogatory) responses the Company has or will file in the parallel Maine docket, Case Number 2023-00254.” The Company provided all such responses, several of which (CLF 001-006 (Response and Attachment 1, CLF 001-007 (Attachment 1), EXM 001-001, EXM 001-005, EXM 001-010 (Attachment 1), EXM 1-13 (Attachment 1), EXM 1-21 (Attachment 1), OPA 001-009 (Attachment 1), OPA 001-013, OPA 1-14 (Attachment 1), OPA 001-015, ODR 1-9 (Attachment 1), ODR 1-10 (Attachment 1)) contain confidential commercial information related to the underlying Precedent Agreements in this matter, descriptions of the Company’s analytical and evaluative processes and supply portfolio, and other proprietary and confidential information, and, as described above, are subject to Protective Orders.
- c. DOE 1-7 requests, *inter alia*, supporting analysis for Northern’s assessment of the probability that TransCanada Pipeline Limited (“TCPL”) would cancel the project and trigger termination costs. The Company’s response includes confidential, proprietary, and competitively sensitive information about TCPL’s risk mitigation approach. The Company understands this information to be confidential commercial information that is competitively sensitive and proprietary to TCPL.
- d. DOE 1-8 requests information regarding “risk analysis (es) regarding the potential cancellation of the Project.” The Company’s response includes information regarding the estimated liability limited to which the Company is subject under the 2027 TCPL Precedent Agreement. This information is confidential commercial information that is competitively sensitive and proprietary to Northern and TCPL.
- e. DOE 1-10 requests information regarding any liability for costs assumed by the transporter due to cancellation. The Company’s Confidential Attachment 1 to this response comprises an “Estimated Exposure Profile.” This information is confidential commercial information that is competitively sensitive and proprietary to Northern and TCPL.
- f. DOE 1-13 requests information regarding “decision points” and the decision-making process that the Company will use to determine whether to proceed with

the Empress Capacity Agreements. The Company's response and Attachment 1 include descriptions of confidential commercial terms in the Precedent Agreements, as well as confidential descriptions of the Company's internal decision-making process relative to those confidential commercial terms.

- g. DOE 1-24 requests information regarding the estimated liability limited to which the Company is subject under the 2027 TCPL Precedent Agreement. The Company's response includes information regarding the estimated liability limited to which the Company is subject under the 2027 TCPL Precedent Agreement. This information is confidential commercial information that is competitively sensitive and proprietary to Northern and TCPL.
- h. DOE TS 1-6 requests, *inter alia*, "a narrative response and any cost-benefit analysis based on the percentage of the 12,500 Dth/day Northern proposes that New Hampshire would accept, ranging from 40% (or any lower percentage) up to 100% of the supply." Attachment 1 to the Company's response is an analysis showing the effects of adding Empress Capacity on NH allocated demand and commodity costs. This confidential analysis, which is provided in "live" excel format containing models and formulae, is confidential and proprietary to the Company.

8. In determining whether confidential, commercial or financial information within the meaning of RSA 91-A:5, IV is exempt from public disclosure, the Commission employs the analysis articulated in *Lambert v. Belknap County Convention*, 157 N.H. 375 (2008) and *Lamy v. N.H Public Utilities Commission*, 152 N.H. 106 (2005). Under this analysis the Commission first determines "whether the information is confidential, commercial or financial information, 'and whether disclosure would constitute an invasion of privacy.'" *Unitil Energy Systems, Inc.*, DE 10-055, Order No. 25,214 at 35 (April 26, 2011) (citing *Union Leader Corp. v. New Hampshire Housing Finance Authority*, 142 N.H. 540, 552 (1997) (emphasis in original); *see also Re Northern Utilities, Inc.* DG 12-031, Order No. 25,330 at 5 (February 6, 2012) ("In determining whether confidential, commercial, or financial information should be deemed confidential, we first consider whether there is privacy interest that would be invaded by the disclosure."). When a privacy interest is at stake, the public's interest in disclosure is assessed. *Id.* (citing *Unitil Corp. and Northern Utilities, Inc.*, Order No. 25,014, 94 NH PUC 484, 486 (2009)). 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.*

9. Applying this three-part test, the first inquiry is whether there is a privacy interest in the confidential and / or proprietary commercial information included in the above-referenced data request responses and attachments for which the Company seeks protective treatment. As Northern noted in its initial motion for protective treatment in this matter, the Company has an expectation of privacy in key terms such as pricing and related commercial provisions in supply agreements based on existing Commission practice. For example, in *Liberty Utilities*, Docket DG 14-380, in which the Commission considered a precedent agreement between Liberty Utilities and the Tennessee Gas Pipeline Company, L.L.C., the Commission held that the Company had a reasonable expectation of privacy in similar terms contained in that agreement. *See* February 19, 2015 Secretarial Letter in DG 14-380. Commission rules also recognize the need to protect gas supply contracts through their explicit acknowledgment that “pricing and delivery-related special terms of supply agreements” provided in cost of gas proceedings are accorded confidential treatment. *See* Puc 201.06(a)(26)(b). Based on the Commission’s established treatment of pricing and delivery-related special terms in similar dockets as well as cost of gas proceedings, the Company has a reasonable expectation of privacy that the same type of information will be accorded confidential treatment here.

10. Several of the Company’s responses to DOE discovery, other parties’ testimony or position statements, and email communications among the parties, contain descriptions and / or analysis of such terms, as well as the Company’s decision-making process with respect to events occurring under such terms, and merit the same confidential treatment already granted by

the Commission in this docket. Several of the Company's responses also contain proprietary and confidential financial and commercial information, including information regarding the Company's internal commercial decision-making processes and information regarding the Company's analytical and evaluative processes and supply portfolio. Several of the responses also include information that is confidential and proprietary to Northern's pipeline counterparties, or the bidding process, and is subject to an expectation of confidentiality.

11. The next step in the analysis is to consider whether there is a public interest in disclosure of the information, including whether release of the information lends any insight into the workings of government as it relates to this case. Here, public disclosure of the capacity supply pricing and delivery-related terms, or Northern's descriptions, analysis, and evaluation of such terms as reflected in the above-referenced data requests, would not materially advance the public's understanding of the Commission's analysis in this proceeding. Release of the pricing and delivery-related terms, either directly or indirectly through discovery responses, does not shed any light on the Commission's work but rather the Company's contracting approach. Similarly, information that is confidential to Northern – e.g., the Company's internal decision-making processes regarding contractual commitments, descriptions of the Company's analytical and evaluative processes and supply portfolio, confidential work product inherent in "live" excel files, and commercial information provided to Northern by counterparties with an expectation of privacy – is not probative of the Commission's work but rather the Company's confidential commercial analyses and strategies.

12. The public's interest is in understanding the Commission's review of the proposed contracts and why the contracts are in the public interest. The Company's expectation is that the work that the Commission undertakes to review the transaction at issue in this case

will be publicly available and as a result, the Commission's work will be available for public scrutiny. Even if one were to conclude that there is a public interest in disclosure of the pricing, delivery-related and financial terms of the Empress Capacity Agreements, or the Company's internal confidential information and analyses, the harm that could occur as a result of that disclosure is well outweighed by the privacy interests at stake. It would be highly disadvantageous to the Company's negotiating position if any future suppliers were aware of the pricing and other key terms upon which the Company was willing to conduct business, or of its analytical and evaluative processes. Disclosure would impair the respective bargaining positions of Northern's counterparties, who entered the Empress Capacity Agreements with an expectation of privacy and confidentiality relative to certain commercial terms. As a result, Northern's ability to negotiate favorable terms with such counterparties, or similarly situated entities, may be harmed. The harm caused by disclosure would ultimately accrue to the Company's customers, since the cost associated with any capacity arrangement are charged to customers through the Company's cost of gas charge. Thus, the Company submits that there is no public interest in disclosing these key contract terms or the other confidential information described herein.

13. The confidential information described above has been made available to the Department of Energy Staff, and the Office of the Consumer Advocate notwithstanding any Commission order granting confidential treatment. Moreover, the Company has only redacted so much information as is necessary to protect its privacy interests and those of its contractual counterparties.

14. Northern has conferred with counsel for the Department of Energy Staff and the Office of the Consumer Advocate, who assent to the relief requested in this motion.

15. Northern requests that the Commission issue an order protecting the above-

described information from disclosure and prohibiting copying, duplication, dissemination or disclosure of it in any form.

WHEREFORE, Northern respectfully requests that the Commission:

- A. Issue an appropriate order that exempts from public disclosure and otherwise protects the confidentiality of the information designated by the Company as confidential in the documents referenced above; and
- B. Grant such additional relief as is just and appropriate.

Dated at Hampton, NH on this 19th day of January, 2024.

Respectfully submitted,

NORTHERN UTILITIES, INC.

By Its Attorney,



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