

STATE OF NEW HAMPSHIRE  
BEFORE THE  
PUBLIC UTILITIES COMMISSION

RE: LIBERTY UTILITIES (ENERGYNORTH NATURAL GAS) CORP. D/B/A LIBERTY  
UTILITIES

DOCKET NO. DG 14-380

**OBJECTION TO MOTION TO COMPEL**

Liberty Utilities (EnergyNorth Natural Gas) Corp. d/b/a Liberty Utilities (“EnergyNorth” or the “Company”) hereby objects to the motion to compel filed by Pipeline Awareness Network for the Northeast, Inc. (“PLAN”) regarding the Company’s responses to PLAN data requests 2-26 through 2-32. In support of this objection, the Company states as follows:

1. PLAN requests that the Commission compel the Company to produce documents regarding negotiations that led up to the signing of the Precedent Agreement, documents regarding EnergyNorth’s consideration of the environmental impact of the NED project, and contracts and other documents relating to Liberty Utilities (Pipeline and Transmission) Corp.’s investment in Kinder Morgan Operating Limited Partnership A, which is the owner of the NED pipeline. As described in detail below, none of these requests are relevant to the Commission’s consideration of whether EnergyNorth’s contract with Tennessee Gas Pipeline Company, LLC is in the public interest, and thus PLAN’s motion should be denied.

**PLAN 2-26: Information on LDC Consortium Communications**

2. Data request PLAN 2-26 seeks documents regarding communications among utilities participating in the LDC Consortium that negotiated the standard form precedent agreement with Tennessee, documents between the LDC Consortium and Tennessee, a

description of the negotiation process, and the names of the ten individuals in the LDC Consortium working group.

3. Simply put, PLAN's request is not relevant to this proceeding because what is before the Commission is the executed Precedent Agreement, not the negotiations or communications that led up to that end result. As PLAN would have it, the Commission should compel the Company to produce all of the back-and-forth communications among the members of the LDC Consortium and Tennessee as the parties considered proposed terms and conditions of the contract. In essence, PLAN wants information to judge whether the Company could have struck a different deal.

4. In a case that is strikingly similar to this one, the Commission ruled that discovery of information relating to the negotiation of a supply contract was not relevant to the Commission's consideration of whether the final terms and conditions of the contract were in the public interest, and thus not subject to discovery. In *Public Service Company of New Hampshire*, Docket No. DE 10-195, the Commission considered a motion to compel PSNH to produce information "related to PSNH's negotiation of the PPA [Purchase Power Agreement] with Laidlaw." At issue in that docket was whether PSNH's entry into the PPA with Laidlaw for the purchase of output from Laidlaw's Berlin biopower facility was in the public interest. The Wood Fired Independent Power Producers, which were parties to that docket, sought production of a series of documents that is essentially identical to the type of discovery of documents sought by PLAN, including

- all documents PSNH examined in evaluating or determining to choose to negotiate and execute the power sales agreement with Seller
- all drafts of the PPA inclusive of those marked-up or commented upon by any PSNH or PSNH affiliate or employee or consultant of either

- ...a complete and detailed description of any and all specific price points in the negotiations and the basis for the changes in the proposed prices during the negotiations...
- all materials exchanged between PSNH and Laidlaw in relation to the negotiation process.

Order 25,174 (November 24, 2010) at 17-18.

5. In the face of that request seeking broad information on pre-execution of the PPA, the Commission ruled:

These questions request PSNH to provide information related to PSNH's negotiation of the PPA with Laidlaw. **We are required to review the PPA to determine if it is in the public interest in its final form. We will not compel production of documents related to the negotiation of the PPA.** Consistent with our order in Docket No. DE 03-166, *Public Service Co. of N.H.*, 'in contrast to the results of such negotiations, **we can conceive of no circumstances in which we would deem information about the negotiations themselves admissible.**' 89 NH PUC 226, 230(2004). We deny the motion to compel responses to the referenced data requests.

*Id.* at 18 (emphasis added). This is exactly the circumstance here, where PLAN seeks discovery of "all documentation and other materials relating to correspondence with and documentation received from the LDC Consortium with respect to the KM Pipeline and/or preparation of filing this proceeding," "the identity of the 10 individuals in the working group from the various member LDC Consortium as referenced in PLAN 1-3b," and "a complete description of the LDC Consortium negotiation process as referenced in PLAN 1-9. Please provide any documentation relating to the negotiations including minutes of meetings, handouts, and notes." Appendix B to PLAN Motion.

6. PLAN's attempt to distinguish *Re PSNH* because there is a consortium of companies here that conducted the negotiations with the counterparty— as opposed to one in the case of PSNH— is not persuasive. What the Commission was addressing in *Re PSNH* was the very issue here – that the Commission's role is to review the final contract, not what the contract might have been if negotiated differently, and not all of the options and alternatives that were

proposed, but ultimately rejected, during the course of the negotiations. PLAN's stated desire to "understand 'the context of' the consortium in which 'the terms and conditions of the PA were negotiated,'" PLAN Motion at 6, is not likely to lead to the discovery of admissible evidence as the Commission's inquiry is not focused on the back-and-forth of the negotiations between the contracting parties (here, EnergyNorth and Tennessee), but rather the final deal that was struck.

7. Similarly, PLAN's request for the names of the other utility representatives in the LDC Consortium plainly has no relevance to whether the terms and conditions of the Precedent Agreement are in the public interest (which is the scope of this case<sup>1</sup>). Knowing the names of those individuals will not lead to any further understanding of the plain meaning of the Precedent Agreement, and calls into question PLAN's intent in obtaining that information which appears to be nothing more than a fishing expedition and has nothing to do with this case before the Commission. Given that *Re PSNH*<sup>2</sup> is directly on point, the Commission should rely on that precedent and deny PLAN's motion to compel the Company to provide any further response to PLAN 2-26.

### **Environmental Impact of the NED Pipeline**

8. Despite the fact that this Commission has no jurisdiction over the siting of the NED pipeline or over environmental issues associated with it, PLAN now requests that the Commission compel the Company to provide information about "the relative environmental impacts of the KM Pipeline with respect to the other competing pipeline proposals." While the

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<sup>1</sup> The Order of Notice defined the scope as "whether EnergyNorth reasonably investigated and analyzed its long term supply requirements and the alternatives for satisfying those requirements, and whether EnergyNorth's entry into the Precedent Agreement with TGP for additional pipeline capacity is prudent, reasonable and otherwise consistent with the public interest." Order of Notice at 3.

<sup>2</sup> The Company's objection also asserted that the request is overly broad and unduly burdensome and that responsive documents may be protected by the attorney-client privilege. The Company submits that the Commission need not reach those issues to resolve this motion given the controlling precedent of *Re PSNH*.

Company initially asserted an objection to PLAN's request, it has determined that it has no responsive documents to this request. PLAN received the Company's objection on April 10 and waited 14 business days after receiving it and two business days before its motion to compel was due to make its "good faith effort to resolve the dispute informally" as required by Puc 203.09(i)(4). See PLAN Appendix A.

9. Setting that aside, the Commission should deny PLAN's attempt to inquire into environmental issues in PLAN 2-27 because any environmental issues associated with the NED pipeline are not before the Commission in this docket, and thus discovery associated with that topic is plainly not relevant. The Commission's order of notice identifies the scope of the docket as follows:

EnergyNorth's filing raises, inter alia, issues related to RSA 374:1 and 374:2 (public utilities to provide reasonably safe and adequate service at "just and reasonable" rates); RSA 374:4 (Commission's duty to keep informed of the manner in which all public utilities in the state provide for safe and adequate service); RSA 374:7 (Commission's authority to investigate and ascertain the methods employed by public utilities to "order all reasonable and just improvements and extensions in service or methods" to supply gas); and 378:7 (rates collected by a public utility for services rendered or to be rendered must be just and reasonable). These issues include whether EnergyNorth reasonably investigated and analyzed its long term supply requirements and the alternatives for satisfying those requirements, and whether EnergyNorth's entry into the Precedent Agreement with TGP for additional pipeline capacity is prudent, reasonable and otherwise consistent with the public interest. In addition, in the event the Commission's investigation is not completed before July 1, 2015 and EnergyNorth elects not to terminate the agreement before that date, the filing raises the issue of who bears the risk of an imprudence finding.

Order of Notice at 3. Not surprisingly, there is no mention of environmental issues in the order. That is because the focus of this docket is whether the proposed rates that will result from the Precedent Agreement are just and reasonable, and whether entering into the Precedent Agreement will ensure for adequate capacity to serve the Company's customers. In the Commission's own words, "[t]his proceeding does not concern and will not result in any

approval of, or permissions for, siting or construction of TGP's NED project. Those matters are pending determination by other regulatory agencies, including the Federal Energy and Regulatory Commission (FERC)." Order 25,767 at 3.

10. Furthermore, the Commission put PLAN on notice when it granted its intervention in this proceeding that it was denying:

...its intervention on behalf of landowners along the proposed TGP route who are not EnergyNorth customers. Only EnergyNorth-customer members possess "rights, duties, privileges, immunities or other substantial interests [that] may be affected by the proceeding." RSA 541-A:32, I (b). It will be EnergyNorth customers who will bear the costs of the Precedent Agreement if the Commission approves it. PLAN's landowner members possess no such direct interest or cost responsibility; their interests, while important, are not pertinent to the Commission's determinations in this proceeding. Consequently, it is likely that the participation of PLAN landowner members would "impair the orderly and prompt conduct of [these expedited] proceedings." RSA 541-A:32, II. To ensure an orderly and focused proceeding, **we limit PLAN's participation to the interests of its EnergyNorth-customer members in the prudence, justness and reasonableness of the Precedent Agreement and its associated costs, to EnergyNorth and its customers.**

*Id.* at 4 (emphasis added). Thus, PLAN's line of inquiry in 2-27 not only falls outside the scope of this docket but is outside the scope of its permitted intervention since any questions related to the environmental impact of the NED pipeline *vis à vis* other pipeline proposals<sup>3</sup> is clearly unrelated to whether the Precedent Agreement is prudent or results in just and reasonable rates, and appears to relate to the interest of its landowner members.

11. PLAN's assertion that environmental implications were raised in the Precedent Agreement is nonsensical. PLAN cites Bates p. 51 and pp. 98 – 99 of the Company's initial filing yet there is nothing on Bates page 51 on environmental issues other than a reference to a

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<sup>3</sup> PLAN 2-27 is based on a discussion that occurred at a technical session in this docket, which is not part of the record in this case. Furthermore, to the extent that a Company witness responded to an inquiry at a technical session or made a comment does not make the subject matter relevant. If that were the case, any topic raised by a witness at a technical session would open the door to discovery, regardless of whether it was relevant to the Commission's consideration of the matter at hand. If the Commission were to adopt such a policy, it would have a chilling effect on participation in technical sessions, where parties would be reluctant to speak given that any discussion could lead to new topics for discovery in the docket.

“Reservation Rate Adjustment” which is explained on Bates pages 98 and 99. The Reservation Rate Adjustment addresses capital cost overruns and underruns and defines “actual project costs” and “estimated project costs” on Bates pages 98 and 99. Both of those definitions have a reference to environmental expense, among many other expenses, in the definition of actual and estimated project costs. PLAN’s assertion that such mention now requires the Company to provide all environmental analyses is patently absurd. Nothing in the definitions provides further discussion of environmental cost; rather, that cost is only mentioned in a long list of project costs. PLAN is attempting to elevate this mention into something that it isn’t. The Precedent Agreement deals with the contractual obligations of the parties, and has nothing to do with environmental issues. For all of these reasons, the Commission should deny PLAN’s request to compel production of any information in response to data request 2-27.

### **APUC and Northeast Expansion, LLC**

12. In data requests PLAN 2-28 through 32<sup>4</sup>, PLAN seeks the Operating Agreement for Northeast Expansion, LLC which owns the NED Pipeline, the terms and conditions of APUC’s investment in Northeast Expansion, LLC, any approvals, risk assessments, powerpoints, or other submittals to APUC’s board or any APUC affiliate’s board regarding Northeast Expansion, LLC, and information about “APUC’s strategic initiatives” regarding connection of its generation and distribution business. In sum, PLAN seeks a wide range of documents regarding APUC’s investment in Northeast Expansion, LLC and its strategic plans regarding generation and distribution activities.

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<sup>4</sup> The Company objected to PLAN 2-32 but also answered that it had no responsive documents. Thus, there is nothing to compel in regard to the response.

13. These data requests are focused on the development of the NED pipeline and the corporate affairs of Northeast Expansion LLC, which are far ranging and well beyond the Commission's consideration of whether the Precedent Agreement between Tennessee and EnergyNorth is just and reasonable and in the public interest. On this basis alone, PLAN's motion should be denied as seeking information that is not relevant to the extent it is focused on the business transaction relating to the construction of the pipeline. Further, Northeast Expansion, LLC is not a party to this docket, and is not a counterparty to the Precedent Agreement with the Company. Rather, the Precedent Agreement is between EnergyNorth and Tennessee Gas Pipeline Company, LLC, which has no common ownership or affiliated interest with EnergyNorth and is solely owned by Kinder Morgan. Thus, any inquiry into the corporate affairs of Northeast Expansion, LLC is beyond the purview of this docket, and frankly, beyond the control of the Company.

14. To the extent that PLAN seeks discovery about the affiliate relationship between EnergyNorth and Liberty Utilities (Pipeline and Transmission) Corp., or the investment strategy or initiatives of APUC, it is a red herring. In this case, there is no transaction with an affiliate<sup>5</sup> – the transaction is between EnergyNorth and Tennessee. The mere fact of EnergyNorth's affiliate's investment in the entity that owns the NED pipeline does not make that issue (the terms and conditions of that investment) relevant to whether EnergyNorth's contract with Tennessee is in the public interest. Rather, the Commission must focus on the terms and conditions of the Precedent Agreement and whether those terms are in the public interest. Those

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<sup>5</sup> However, even if there were an affiliate agreement here, which there is not, the Commission rules would not prohibit it. Rather, the rules prescribe terms for such agreements, requiring that agreements for "products and services which are price regulated by a state or federal agency shall be priced at the tariffed or regulated rate." *See* Puc 2105.09(a)(5). Here, though not an affiliate agreement, the amounts paid by EnergyNorth to Tennessee will be subject to FERC approval.

terms can be judged for what they are on their face: whether they are market based and appropriate for the amount of capacity to be purchased, and appropriate for the needs of the Company's customers over the term of the Precedent Agreement. The Commission can measure those terms against both price and non-price factors associated with other capacity options considered by the Company. But what should not be taken into consideration are the terms and conditions of the investment made by another entity in Northeast Expansion, LLC, an arrangement that has absolutely no relevance to the terms and conditions of the Precedent Agreement. Simply put, there is no relevance to an inquiry that does anything other than judge the terms and conditions of the Precedent Agreement and whether they are in the public interest based on what the market has to offer.

15. For all of the reasons stated above, the Company requests that the Commission deny Plan's Motion to Compel.

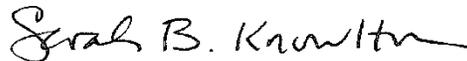
WHEREFORE, EnergyNorth respectfully requests that the Commission:

- A. Deny Plan's Motion to Compel, and;
- B. Grant such other relief as is just and equitable.

Respectfully submitted,

LIBERTY UTILITIES (ENERGYNORTH NATURAL GAS) CORP. D/B/A LIBERTY UTILITIES

By its Attorney,



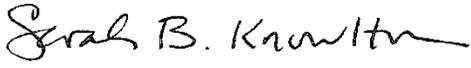
Date: May 11, 2015

By: \_\_\_\_\_

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Certificate of Service

I hereby certify that on May 11, 2015, a copy of this Objection to Motion to Compel has been forwarded to the service list in this docket.



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Sarah B. Knowlton