

BEFORE THE NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION

_____)	
Eversource Energy Petition for approval of Gas)	
Infrastructure Contract with Algonquin Gas)	
Transmission, LLC)	DE 16-241
_____)	
)	

NEXTERA ENERGY RESOURCES, LLC’S OBJECTION TO
MOTIONS FOR CONFIDENTIAL TREATMENT

Pursuant to New Hampshire Public Utilities Commission (“Commission”) Code Admin. Puc Rule 203.07, NextEra Energy Resources, LLC (“NEER”) hereby objects to the Motion for Protective Order and Confidential Treatment Regarding Proposed Contract Between Public Service Company of New Hampshire D/B/A Eversource Energy and Algonquin Gas Transmission, LLC (the “Eversource Motion”) and the Algonquin Gas Transmission, LLC Motion for Protective Order and Confidential Treatment (the “Algonquin Motion”) (together, the “Motions”).

The core of this case is whether Eversource can obtain approval from the Commission to have ratepayers take on the risk of the company’s share of \$3.2 billion to develop natural gas pipeline infrastructure for an Eversource affiliate. This request comes on the heels of Eversource requesting in Docket No. DE-14-238 that the Commission approve complete divestiture of its generation assets and thereby remove generation asset risk from New Hampshire electricity ratepayers. Eversource’s request in this proceeding raises important and complex questions as to whether the proposed use of ratepayer funds to subsidize certain gas generators is consistent with the competitive market mandated by RSA 374-F.

The Eversource and Algonquin Motions seek to withhold from everyone except the Commission and Office of Consumer Advocate (“OCA”) (the “redacted information”) the

fundamental terms of the actual contracts for which Eversource and Algonquin seek the Commission's approval. To the extent that certain of the redacted information meets the standard for confidential treatment, NEER has no objection to executing a reasonable nondisclosure agreement with appropriate safeguards to ensure that confidential information remains so. Eversource and Algonquin's Motions, however, should be denied because they would prohibit access to the information necessary for NEER to participate meaningfully in this proceeding.

BACKGROUND

On February 18, 2016, Public Service Company of New Hampshire d/b/a Eversource Energy ("Eversource") filed a petition for approval of its proposed gas infrastructure contract with Algonquin Gas Transmission, LLC for the Access Northeast project (the "Petition" or "Eversource's Petition"). Eversource redacted the material portions of the prefiled testimony and exhibits that accompanied its Petition and filed the Eversource Motion requesting that the Commission issue a protective order "preventing disclosure of the information in the Confidential Attachments and the related confidential testimony." (Eversource Motion at 4). In its Motion, Eversource argues that it has a protectable privacy interest in the information, that the public's interest in the information is minimal, and that the balance of interests favors nondisclosure of the information. (*Id.* at 2-3). Eversource did not describe the parameters of the protective order it was requesting in the Motion; only that the redacted information should be accorded confidential treatment. (*Id.* at 4).

On March 10, 2016, Algonquin filed its Motion, making the same arguments concerning the redacted information, but also "request[ing] the Commission issue a protective order restricting disclosure of the Confidential Information to the Commission and the OCA."

(Algonquin Motion at 6-7). The basis for Algonquin’s extreme proposal to prevent other parties from gaining access to the material information for this case is that “[s]uch restrictions will ensure that the Confidential Information is adequately protected while still enabling the public's interest in a full examination of relevant information in the docket to be satisfied.” (Algonquin Motion at 6-7). It is unclear from Algonquin’s Motion whether this assertion is based on the belief that other parties would not adhere to a reasonable nondisclosure agreement, a belief that all of the interests that may be substantially affected by this proceeding would be adequately protected with access restricted to only the Commission and OCA, or some combination of both.

Algonquin suggests in the alternative that it would allow access to “non-competitor parties” that execute an NDA. (Algonquin Motion at 7). To the extent NEER would not qualify under Algonquin’s unarticulated definition of “non-competitor parties,” NEER objects to this prohibition.

OCA opposed the Eversource Motion, arguing that Eversource met none of the three conjunctive prongs of the test that must be met to withhold information from the public. While Eversource’s suggestion that the public has only a “minimal” interest in access to information concerning 20-year pipeline infrastructure contracts that they are being asked to fund is dubious, NEER takes no position on whether some or all of the redacted information qualifies for protection from the public at large. As set out in its Petition to Intervene in this proceeding, NEER has significant background and experience in the electricity and gas markets in New England, including in New Hampshire. To participate meaningfully in this proceeding NEER must have access to the redacted information to bring that background and experience to bear both to represent its own interests as well as adequately develop the record for the Commission’s consideration of the significant issues presented in the Eversource Petition. The appropriate

balance is to allow NEER access to any designated confidential information through an appropriate NDA.

DISCUSSION

I. The premise of New Hampshire’s Right to Know Law and of Intervention as a Party is Meaningful Participation.

A. RSA 91-A requires access to information to the greatest extent possible to allow meaningful participation by the public.

The purpose of New Hampshire’s Right to Know Law is to ensure that the citizenry knows – to the greatest extent possible – the information upon which public bodies such as the Commission makes its decisions. *See e.g.*, RSA 91-A:1 (“Openness in the conduct of public business is essential to a democratic society. The purpose of this chapter is to ensure both the greatest possible public access to the actions, discussions and records of all public bodies, and their accountability to the people.”); *see also Herron v. Northwood*, 282 A.2d 661, 111 N.H. 324, 327 (N.H. 1971) (Right to Know is premised on public’s ability to participate in decision-making process). Because the law favors disclosure, “[t]he burden of proving that the information is confidential and private rests with the party seeking non-disclosure.” *Unitil Corp. and Northern Utils.*, Order No. 25,014 (September 22, 2009), citing *Goode v. N.H. Legislative Budget Assistant*, 148 N.H. 551, 555 (2002); *see also Lambert v. Belknap County Convention*, 949 A.2d 709, 157 N.H. 375, 379 (N.H. 2008) (“When a public entity seeks to avoid disclosure of material under the Right-to-Know Law, that entity bears a heavy burden to shift the balance toward nondisclosure.”). The law also requires that the Commission “resolve questions regarding 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 N.H. v. Local Gov. Center, Inc.*, 992 A.2d 582, 159 N.H. 699, 703 (N.H. 2010), quoting *ATV Watch v. N.H. Dep’t of Resources & Econ. Dev.*, 155 N.H. 434, 437,

923 A.2d 1061 (2007). The Commission must thus “construe provisions favoring disclosure broadly, while construing exemptions narrowly.” *Id.* at 707 (citations omitted).

B. As an intervening party, NEER has the right to participate fully and meaningfully to protect its substantial interests.

Entities and persons are entitled to intervene as parties and participate in proceedings before the Commission where the “petition states facts demonstrating that the petitioner's rights, duties, privileges, immunities or other substantial interests may be affected by the proceeding . . . [and] [t]he presiding officer determines that the interests of justice and the orderly and prompt conduct of the proceedings would not be impaired by allowing the intervention.” RSA 541-A:32, I. In other words, if a party’s interests may be affected by the proceeding, that party is entitled to intervene and participate meaningfully in order to protect those interests. The multiple reasons that NEER satisfies this standard are set forth in NEER’s Petition to Intervene, incorporated herein by reference.

“Where governmental action would affect a legally protected interest, the due process clause of the New Hampshire Constitution guarantees to the holder of the interest the right to be heard at a meaningful time and in a meaningful manner.” *Appeal of Northern New England Telephone Operations, LLC*, 75 A.3d 1102, 165 N.H. 267, 274 (N.H. 2013), quoting *Appeal of Pennichuck Water Works*, 160 N.H. at 36 (quotation omitted); *Appeal of Town of Nottingham*, 153 N.H. 539, 551, 904 A.2d 582 (2006) (“where issues of fact are presented for resolution by an administrative agency due process requires a meaningful opportunity to be heard” (quotation and brackets omitted)); *Appeal of Portsmouth Trust Co.*, 120 N.H. 753, 758, 423 A.2d 603, 606 (1980) (“The fundamental requisite of due process is the right to be heard at a meaningful time and in a meaningful manner.”). This includes an intervenor’s right to “conduct cross-examination of a witness in order to develop a full and true disclosure of the facts.” Puc

203.24(a) (Emphasis added).

II. Granting the Motions would deny NEER’s right to participate meaningfully in this proceeding in which NEER’s substantial rights may be affected.

Large portions of the Eversource petition have been redacted in the public filing. For example, more than one third of the pages of the Precedent Agreement are redacted. *See*, EVER-JGD-2. The redacted topics include numerous terms of the proposed contracts, including terms other than price, and much of the asserted economic justification for the proposed contracts. *See, e.g.*, EVER-JDG-2 (the maximum daily quantity available at each phase of the ANE project; information related to the “primary term extension;” termination provisions; the extension reservation rate; footnotes of unknown subject matter; most favored nations provisions; the pro forma schedule); EVER-CJG-1 (all economic data from the rate illustration); EVER-LBJ-2 (illustrative bill impacts); EVER-JMS-4 (landed cost analysis of proposals); EVER-JMS-5 (qualitative analysis of proposals); EVER-JMS-6 (qualitative analysis of LNG proposals); EVER-JMS-7 (qualitative analysis of hybrid proposals). The prefiled testimonies contain similar, substantial redactions, which relate to the fundamental terms of the proposal that Eversource suggests is in the best interests of EDC ratepayers. In short, the redacted information is not just some of the information necessary to assess the Eversource Petition; it is the information that NEER and its experts need to assess the proposal and participate meaningfully “in order to develop a full and true disclosure of the facts.” Puc 203.24(a). This is perhaps most easily demonstrated in the testimony of Mr. Daly, who testified as follows:

Q. What are the key aspects of the Precedent Agreement?

A. [By Mr. Daly] The key aspects of the Algonquin Precedent Agreement are as follows:

Cost and Cost Caps: [REDACTED]. . . .

Right of First Refusal (“ROFR”) and Discount for Contract Extensions:

[REDACTED]. . . .

Sunset Date: [REDACTED]. . . .

Most Favored Nation Provision: [REDACTED].

(Daly Prefiled, p.19, ln. 13-p.21, ln.19.)

If the Motions are granted and a protective issues that prohibits NEER access to the redacted information, NEER will have been denied a meaningful opportunity to participate in a proceeding in which its substantial rights may be affected.¹

III. The appropriate balance of Eversource/Algonquin’s confidentiality concerns with NEER’s due process rights is to allow NEER access to the redacted information subject to a reasonable non-disclosure agreement.

Rather than prohibiting access to parties with substantial interests, the Commission’s usual way of dealing with information that is clearly germane to the proceeding but nonetheless confidential is to require its disclosure pursuant to an appropriate NDA:

We agree that EnergyNorth has a privacy interest in the pricing, delivery, and financial information redacted in its original filing. Because this is the type of information we will consider in this docket, there is public interest in its disclosure. However, we conclude that any public interest in disclosure is outweighed by EnergyNorth's interest in privacy. Accordingly, we grant EnergyNorth's motions for protective order and confidential treatment. Consistent with past practice, EnergyNorth should provide the confidential information to any party in this docket that signs an appropriate confidentiality and non-disclosure agreement.

Liberty Utilities Corp., Order No. 25,861 (January 22, 2016) (emphasis added); *see also, Public Service Company of New Hampshire*, Order 25,332 (February 6, 2012) (ordering disclosure of bidder and bid price information pursuant to an NDA); *see also Prof. Firefighters of N.H.*, 159

¹ As evidenced by its Petition to Intervene, NEER owns and operates generating assets in New England, including in New Hampshire, that form the basis for its right to intervene in this proceeding. Perversely, granting Algonquin’s suggestion that parties like NEER should be prohibited from accessing the fundamental terms of the Eversource contracts would mean that NEER would be prevented from using the very expertise that forms the basis for its intervention as a means of protecting its substantial interests in this case. For that same reason, suggesting an “attorneys eyes only” limitation for the redacted information would not appropriately balance Eversource’s confidentiality concerns with NEER’s due process right to a meaningful opportunity to protect its substantial interests that may be affected in this case.

N.H. at 709 (requiring disclosure because the records sought were pertinent to the issue to be decided).

To the extent the Commission determines that some or all of the redacted information is confidential, NEER is willing to enter into an appropriate NDA that will allow NEER access consistent with its due process rights, while ensuring that the Eversource/Algonquin confidential information remains so. This – and not the outright prohibition on disclosure that Eversource and Algonquin suggest – is the appropriate balance of the competing interests in this case.

WHEREFORE, NEER respectfully requests that the Commission issue an order on the Eversource and Algonquin Motions that provides for NEER to have access to the redacted information.

Respectfully Submitted,

NEXTERA ENERGY RESOURCES, LLC,

By its attorneys,



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Dated: April 6, 2016

CERTIFICATE OF SERVICE

I hereby certify that on the date of this filing, I have served the foregoing document on all persons listed in the Commission's service list in this docket via electronic mail.

A handwritten signature in blue ink, appearing to be 'C. Roach', written over a horizontal line.

Christopher T. Roach