

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

DG 21-144

Northern Utilities, Inc.

**Petition for Approval of Seventh Amendment to
Special Contract with Foss Performance Materials, LLC**

Order on Motions for Protective Order and Confidential Treatment

O R D E R N O. 26,710

October 24, 2022

In this order the Commission grants, pursuant to N.H. RSA 91-A:5, IV and N.H. Admin. Rule Puc 203.08, two motions for protective orders and confidential treatment of certain proprietary information filed by Northern Utilities, Inc. (Northern, or the Company) related to its special contract with Foss Performance Materials, LLC (Foss, or the Customer).

I. PROCEDURAL HISTORY

On December 29, 2021, Northern filed a petition for approval of a seventh amendment to its current special contract with Foss Performance Materials, Inc. (Petition). With its Petition, the Company filed a motion for protective order and confidential treatment (Motion 1) regarding certain pricing and cost information, customer-specific marginal cost information, customer-specific operational and financial information, and financial analyses in support of its Petition. On September 9, 2022, Northern filed a second motion for protective order and confidential treatment (Motion 2) regarding customer-specific pricing and usage data and the results of Northern's marginal cost analysis included in Supplemental Schedule NU-11 (Marginal Cost Analysis), and certain operational and financial information provided in Supplemental Schedule NU-12 (Letter from Foss dated September 7,

2022) filed on the same date.

The motions and all other docket filings, other than any information for which confidential treatment is requested of or granted by the Commission, are posted to the Commission's website at: www.puc.nh.gov/Regulatory/Docketbk/2021/21-144.html.

II. MOTIONS FOR PROTECTIVE ORDER AND CONFIDENTIAL TREATMENT

A. Motion 1

In Motion 1, Northern requested confidential treatment of a number of supporting documents filed with its Petition that contain confidential information, including the Prefiled Direct Testimony of Michael Smith; Special Page 2 of 5 of the Firm Transportation Agreement (Schedule NU-1); the Third Amendment of Agreement (Schedule NU-5); a Letter from Foss (Schedule NU-9); and a Marginal Cost Analysis (Schedule NU-11). Specifically, Northern requested protective treatment for information related to the agreed-upon Monthly Customer Charge, the Minimum Monthly Charge, negotiated unit charges, an agreed-to minimum transportation and payment obligation, and the results of Northern's marginal cost analysis, as well as certain operational and financial information provided by Foss in connection with the Company's Petition. Northern stated that it seeks to protect this information from public disclosure in order to protect the competitive positions of the Company as well as the Customer.

In support of Motion 1, Northern argued that release of the identified confidential information would likely result in harm to the Customer by divulging sensitive confidential commercial and financial information that the Customer would not otherwise disclose. That information would be of interest to the Customer's competitors and could be utilized to gain a competitive advantage over the Customer.

Northern also seeks to protect this information from public disclosure to protect its own competitive position, positing that release of the information would likely result in harm to the Company in the form of being disadvantaged in price negotiations with customers or potential customers who have alternative options, whether from bypass, alternative fuel supplies, or direct competitors. Northern argued that public knowledge of the confidential information would impair Northern's future bargaining positions and thus its ability to obtain the maximum possible contribution to fixed costs. to the benefit of its firm ratepayers.

B. Motion 2

In Motion 2, Northern requested protective treatment of certain pricing information, cost information, customer-specific marginal cost information, customer-specific operational and financial information, and financial analyses supporting its proposed Seventh Amendment to the Special Contract with Foss. Here, too, Northern argued that release of the confidential information would likely disadvantage the Company in price negotiations with customers or potential customers who have alternative options, and that disclosure would impair its future bargaining positions and ability to obtain maximum possible contributions to fixed costs.

III. COMMISSION ANALYSIS

RSA Chapter 91-A ensures public access to information relative to the conduct and activities of governmental agencies or "public bodies" such as the Commission. Disclosure of records may be required unless the information is exempt from disclosure under RSA 91-A:5. RSA 91-A:5, IV exempts several categories of information, including records pertaining to confidential, commercial, or financial information. The party seeking protection of the information in question has the burden of showing that a privacy interest exists, and that its interest in

confidentiality outweighs the public's interest in disclosure. *Union Leader Corp. v. Town of Salem*, 173 N.H. 345, 355 (2020) (citing *Prof'l Firefighters of N.H. v. Local Gov't Ctr.*, 159 N.H. 699, 707 (2010), and *N.H. Housing Fin. Auth.*, 142 NH 540 at 552, 555-59 (1997)).

The New Hampshire Supreme Court and the Commission each apply a three-step balancing test to determine whether a document, or the information contained within it, falls within the scope of RSA 91-A:5, IV. *Lambert v. Belknap County Convention*, 157 NH 375, 382-83 (2008). The Commission's rule on requests for confidential treatment reflects the three-step balancing test required by New Hampshire case law. See N.H. Code Admin. Rules Puc 203.08; see also, e.g., *Unitil Energy Systems, Inc.*, Order No. 26,214 (April 26, 2011) at 35. Under the balancing test, the Commission first inquires whether the information involves a privacy interest and then asks if there is a public interest in disclosure. *Id.* The Commission then balances those competing interests and decides whether disclosure is appropriate. *Id.* When the information involves a privacy interest, 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.*

In both Motion 1 and Motion 2, Northern asserted that release of the identified confidential information would likely disadvantage the Company in price negotiations with customers or potential customers who have alternative fuel supply options. Northern further posited that public knowledge of that information would impair its future bargaining positions and thus the Company's ability to obtain the maximum possible contribution to fixed costs, and that the Company must be able to maximize such contributions to its fixed costs to benefit its firm ratepayers.

The Commission has routinely protected as confidential similar detailed

information regarding costs, pricing, and analyses underlying utility contracts with customers pursuant to RSA 91-A:5, IV, which states, in relevant part, that records of “confidential, commercial, or financial information” are exempt from disclosure. *See, e.g., Northern Utilities, Inc.*, Order No. 26,308 at 6 (November 13, 2019) (citing *Unitil Corp. and Northern Utilities, Inc.*, Order No. 25,014 at 3 (September 22, 2009)). *See also*, *Northern Utilities, Inc.*, Order No. 26,107 (February 28, 2018) at 6-7; *Northern Utilities, Inc.*, Order No. 25,993 (February 24, 2017) at 6; *Northern Utilities, Inc.*, Order No. 25,306 (December 22, 2011); and *Northern Utilities, Inc.*, Order No. 25,047 (November 25, 2009) at 7-9.

We agree with Northern that the information at issue constitutes confidential and sensitive commercial or financial information under RSA 91-A:5, IV, and that Northern and its customer, Foss, each have a privacy interest in protecting the details of the costs, pricing, and negotiated terms of the contract at issue here. Further, there is no indication that disclosure would inform the public about the workings of the Commission. Although the public may have an interest in that information to aid in understanding the Commission’s analysis of the issues presented in this proceeding, we find that the public’s interest in disclosure is outweighed by the privacy interests of both Northern and Foss in information that, if disclosed, could result in legitimate financial and competitive harm to Northern and Foss, and, ultimately, to the detriment of ratepayers.

Accordingly, pursuant to Puc 203.08(a), we grant Northern’s motions for protective order and confidential treatment. Consistent with past practice and Puc 203.08(k), the protective treatment provisions of this order are subject to the ongoing authority of the Commission, on its own motion or on the motion of any party or member of the public, to reconsider this protective order under RSA 91-A, should

circumstances so warrant.

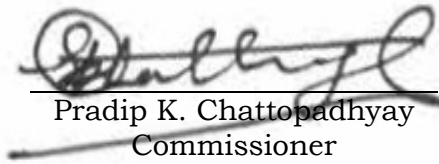
Based upon the foregoing, it is hereby

ORDERED, that the motions for confidential treatment and a protective order filed by Northern Utilities, Inc. in this proceeding are **GRANTED**, as set forth herein above.

By order of the Public Utilities Commission of New Hampshire this twenty-fourth day of October, 2022.



Daniel C. Goldner
Chairman



Pradip K. Chattopadhyay
Commissioner

Service List - Docket Related

Docket#: 21-144

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