THE STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE D/B/A
EVERSOURCE ENERGY

Docket No. DE 16-241

MOTION FOR LEAVE TO REPLY AND REPLY TO OPPOSITION OF THE OFFICE OF CONSUMER ADVOCATE TO MOTION FOR PROTECTIVE ORDER AND CONFIDENTIAL TREATMENT

Public Service Company of New Hampshire d/b/a Eversource Energy ("Eversource" or "Company"), hereby moves for leave to reply to the "Opposition of the Office of Consumer Advocate to Motion for Protective Order and Confidential Treatment" (the "Opposition") submitted by the Office of Consumer Advocate ("OCA") on February 29, 2016. The OCA's opposition goes well beyond merely challenging Eversource's arguments regarding confidentiality in this proceeding. Rather, the OCA seeks to undermine or significantly alter established Commission precedent. A request for such a dramatic shift in the law is justification for permitting Eversource's reply, which, for administrative efficiency, is included with this motion. In support of its motion and reply, Eversource states as follows:

1. Prior to discussing the merits or substance of its reply, Eversource points out a particularly significant issue with respect to confidentiality and the Opposition.[1] In Order No. 25,860 (January 19, 2016) in Docket No. IR 15-124, the Commission set out a specific process that it intended to use for the evaluation of proposals such as the one in the instant docket. Under that process, the Commission will consider this submission in multiple phases and:

[1] There is also a pending objection to Eversource's request for confidential treatment from Tennessee Gas Pipeline Company, L.L.C. in this proceeding. Eversource has not sought leave to reply to that objection – though it does not concede that the objection has merit – but will respond to the objection at some future point as may be appropriate or required by the Commission. For purposes of this filing, Eversource notes only that the significant issue identified by Eversource at the outset is equally applicable to that objection.

> In the first phase, the Commission would review briefs submitted by the petitioner EDC, Staff, and other parties regarding whether such capacity procurement is allowed under New Hampshire law. If the Commission were to rule against the legality of such acquisition, the petition would be dismissed. If the Commission were to rule in the affirmative regarding the question of legality, it would then open a second phase of the proceeding to examine the appropriate economic, engineering, environmental, cost recovery, and other factors presented by the actual proposal. This second phase would involve the usual procedural features of discovery, testimony, rebuttal testimony, and cross-examination, provided in any adjudicative proceeding before the Commission.

Order No. 25,860 at 3. Accordingly, the only issue before the Commission at present is the legality of the contract proposed by Eversource. The merits of the contract and any analysis of its supporting information – which includes the confidential information identified by Eversource – is not yet actually before the Commission for review, nor would it be set for review until after the legal issue is addressed and ruled upon. Should the Commission determine, following the submission and consideration of the required briefs, that the proposed contract is not permitted, the entire filing would be dismissed and the confidential information would not be relevant to the Commission or anyone else. Therefore, should it determine it appropriate, the Commission could hold the information as confidential without ruling upon either Eversource's motion or the Opposition unless and until there is a reason to do so following completion of the legal review.

2. With respect to the remainder of this submission, initially Eversource notes that the Commission has held that although its rules permit the filing of motions and objections thereto, the rules do not specifically contemplate the filing of replies to objections and that replies will not be considered absent specific authorization. *See Freedom Ring Communications LLC d/b/a BayRing Communications*, Order No. 25,327 (Feb. 3, 2012) at 8. In the Opposition, the OCA has argued for significant and unjustified changes to the Commission's precedent relative to confidentiality that would make it difficult, or in some cases impossible, to protect

confidential information that the Commission has justifiably protected for many years. Further, the Opposition relies upon characterizations of Eversource's motion that are inaccurate and which Eversource should be permitted to correct. Accordingly, Eversource requests leave of the Commission to reply to the Opposition to clarify its positions and arguments and to respond to the arguments in the Opposition.[2] Eversource's reply follows below.

3. On February 18, 2016, Eversource filed a petition and supporting testimony seeking Commission approval of a 20-year contract between Eversource and Algonquin Gas Transmission LLC whereby Eversource would purchase natural gas capacity on the Access Northeast pipeline. Contemporaneously with that submission, Eversource filed a motion for protective order and confidential treatment relating to certain financial and other information in the filing. On February 29, 2016, the OCA filed the Opposition contending that Eversource had failed to demonstrate it was entitled to a protective order under the three-step analysis employed by the Commission in such cases. In so contending, the OCA dismisses Commission precedent, makes irrelevant arguments, and implies that it may not abide by its statutory obligations. Eversource addresses these issues in turn.

4. In addressing the first of the three-part analysis relative to confidential materials, the privacy interest at stake, the OCA contends that Eversource's professed privacy interests are "conclusory assertions [that] do nothing more than reveal Eversource's subjective expectations and perhaps those of its counterparty as well." Opposition at 4. The OCA then contends that:

> although it is a truism to the point of triteness that information asymmetry will always benefit a negotiating party with superior access to information, the RSA

[2] For clarity, by this submission Eversource does not intend to foreclose the possibility that there might be potential, reasonable changes in the scope of the information for which confidential treatment is sought as the docket proceeds. Rather, this submission is intended to address the issues identified above, and, in particular, the request that the Commission depart from its long-established precedent with respect to confidential treatment.

> 91-A:5, IV exemption would be almost limitless if a company could invoke it successfully, as Eversource attempts here, merely by pointing out that less disclosure of previously agreed-to terms will give it an edge in future negotiations.

Id. In essence, the OCA is contending that Eversource has no privacy interest because failing to disclose the bidding information for a competitively bid contract would broaden the exemption in the statute. Notably, the OCA makes such argument while acknowledging that an asymmetry of information would be beneficial in contract negotiation – a benefit that would ultimately flow to customers. That issue aside, assuming the underlying logic of the OCA's contention is valid, the OCA is effectively contending that any information pertaining to competitively bid contracts entered into by utilities must be disclosed because the claim that withholding that information would benefit the utility and its customers in the future is inadequate. This would effectively nullify the ability of a utility to obtain confidential treatment in many cases, and would demonstrate a significant departure from established Commission precedent.

5. For years, utilities have argued, and the Commission has accepted, that keeping information about competitive bids, and the analysis of those bids, confidential was important. The rationale for that treatment was that if bidding parties could not be assured that their bids, and the utility's analysis of those bids, would be kept confidential they would likely refuse to bid, and such refusals would limit the pool of available contracting parties, perhaps to zero, and/or would result in non-competitive bidding because bids would be revealed. The end result would be that utility customers would be harmed by a less competitive process.[3] The Commission has long recognized these privacy interests and has kept confidential bid information private. As but

[3] In this case, and as identified in Eversource's initial motion for confidential treatment, because this case is one of a number of similar such filings across the region, the potential harm in this case goes beyond customers in New Hampshire and implicates customers in other states as well. Further, some of the contracting processes in other states in the region lag the New Hampshire process. Any disclosure in this case may result in bidders knowing or understanding each others' bids prior to bidding in another state and could jeopardize the competitiveness of the processes in those states.

a few examples, in *Unitil Corporation and Northern Utilities, Inc.*, Order No. 25,014 (September 22, 2009) at 5-6, the Commission noted that "Unitil's concern relates to the possibility that a party could undermine Unitil's bargaining process and obtain a competitive advantage in a future merger or acquisition transaction at Unitil's expense by becoming more knowledgeable about Unitil's methods for assessing such transactions" and concluded that "Unitil's concern is an adequate reason for granting the request for confidential treatment." Similarly, in *EnergyNorth Natural Gas, Inc. d/b/a National Grid NH*, Order No. 25,064 (January 15, 2010) at 9, the Commission noted that:

> The Company stated that it had a contractual obligation to keep confidential the billing information provided by consultants and experts in the request for proposal responses. In addition, the Company maintained that disclosure of this information would put its consultants at a competitive disadvantage by divulging to competitors the rates they charge for services and would adversely affect the Company because consultants would be discouraged from working with the Company if doing so would result in release of information that would give their respective customers an unfair advantage in future business transactions. The Company warned that public disclosure could cause fewer bidders to compete for consulting services in the future and ultimately customers would bear the burden of the lost savings that would otherwise result from a robust bidding process. The Company also asserted that the Company, the Commission and customers could be harmed to the extent that qualified consultants chose not to bid.

The Commission found "these contentions to be credible and conclude[d] that the Company and its service providers have an interest in the confidentiality of the information." *Id.* at 11. More recently, in *Pennichuck East Utility, Inc.*, Order No. 25,758 (January 21, 2015) at 3-4, the Commission noted that:

> PEU asserts that the itemized contractor bids received for the W&E project are 'confidential, commercial, or financial information' exempt from public disclosure under RSA 91-A:5, IV, as disclosure would constitute an invasion of privacy. PEU states that disclosing this information would cause competitive harm to the Company, and potentially have a detrimental effect on the Company's competitive bidding efforts in the future … in ways that would increase costs to

> be borne by customers. PEU states further that the information for which it seeks protection is not publicly available.

(internal citations and quotations omitted). After noting that the Staff "agree[d] with PEU that disclosure of this confidential information could cause competitive harm to the Company and the contractors who bid for the project, which harm could result in increased costs to PEU's customers" the Commission confirmed that it "routinely protects competitive bid information." *Id.* at 4-5. The Commission concluded that in that case:

> the public's interest in reviewing the W&E project bid information is not sufficient to outweigh the benefit derived from maintaining the confidentiality of that information. In addition, disclosure of this non-publically-disseminated information could result in financial harm to PEU, the contractors it does business with, or its customers, and there is no indication that disclosure of the information would inform the public about the workings of the Commission.

Id. at 5.[4] Eversource's basis for seeking confidential treatment of the competitive information identified in its filing is not new, unique, or untested. Instead, in making its motion Eversource relied upon years of Commission precedent in concluding that it has a recognized privacy interest in competitive bid information and its analysis of that information, both on its own and through its consultant, and that there would be harm to the Company, its contractors, and its customers if that interest was not respected. The Commission has repeatedly concluded that there is a legitimate interest in keeping such information private, and it should do the same here.

6. The OCA further argues that because of the allegedly unique nature of this contract, "Eversource will have few if any occasions to negotiate similar deals in the future" and, therefore, confidential treatment is not warranted. Putting aside that the likelihood of such future

[4] *See also Re Granite State Electric Co.*, 85 NHPUC 380 (2000) (wholesale price bid as part of a competitive process found to be commercially sensitive information for which confidential treatment is appropriate); *Re ISO New England Inc.*, 85 NHPUC 750 (2000) (the names of bidders subject to mitigation measures, bid data and certain ISO-generated analyses of the data were granted confidential treatment).

arrangements is irrelevant to the merits of Eversource's request,[5] this argument presupposes that any Commission ruling here would be limited only to the facts and circumstances of this case and would never be used or applied elsewhere. Obviously, that is not the case. The statute and the Commission's rules protect confidential information from disclosure regardless of how likely it may be that a specific circumstance will be repeated. For one relevant example, in Docket No. DE 10-195 relating to a long term power purchase agreement between Public Service Company of New Hampshire and Laidlaw Berlin BioPower LLC, the Commission granted confidential treatment to certain competitive bid and price information. *Public Service Company of New Hampshire*, Order No. 25,174 (November 24, 2010) at 12. The Commission did so without regard to how likely it may or may not have been that there would be another similar agreement for energy, capacity, and shared renewable energy certificates in the future. The possibility of similar future dealings does not matter, and the Commission should not accept the OCA's contention that it is relevant.

7. Further, the OCA contends that the Commission should disregard its recent decision relating to Liberty Utilities in Order No. 25,861 in Docket No. DG 15-494, because, according to the OCA, that ruling was premised upon the conclusion that the information for which protection was sought was similar to other information the Commission regularly protects, and such analysis does not apply here. The OCA is incorrect. In Order No. 25,861, the Commission specifically stated that while the gas contract information for which Liberty Utilities sought confidential treatment is now protected by rule, the confidentiality of such materials was repeatedly ruled upon in Commission orders before the rule was adopted. *Liberty Utilities*,

[5] Eversource points out that in its filing it identified that other electric utilities in New England are in the process of reviewing similar potential contracts. *See, e.g*, Direct Testimony of James G. Daly at 32-35 and Attachment EVER-JGD-3-B. Therefore, it is possible, if not likely, that New Hampshire utilities other than Eversource may make similar filings and seek similar relief from the Commission. Accordingly, any ruling here would certainly be relevant to those filings, should they be made.

Order No. 25,861 (January 22, 2016) at 5. In so stating, the Commission referenced its Order No. 25,161 (October 28, 2010) at 7-12. In that cited order, the Commission analyzed the company's claim that disclosing competitively bid contract information would result in harm to the utility and customers and granted the request for confidential treatment. Though the mechanism may differ now that the Commission's rules have been amended, the underlying analysis is no different now than it had been in the instance cited by the Commission.[6] The OCA is attempting to create a distinction where no material distinction exists.

8. With respect to the public interest criterion, after offering the opinion that Eversource's motion was "shockingly dismissive," of this issue, the OCA argues that Eversource "ignore[s] the fact that, in this proceeding, PSNH is seeking approval of an automatic cost recovery mechanism for retail distribution rates and, indeed, is seeking confidential treatment of the information specifying the retail rate impacts of the proposed agreement." Opposition at 5-6. Eversource has not ignored anything relevant to the public interest. Eversource acknowledges that it is proposing a cost recovery mechanism related to the proposed contract. What Eversource is not proposing, however, is a retail rate for recovery, and at page 4, lines 10 and 11 of the Goulding/Jones testimony, Eversource specifically states that it is not proposing a rate for effect at this time. The OCA also contends that if the proposed mechanism is approved, "there would be no future proceeding in which the public could educate itself about the effect on retail rates of the Precedent Agreement and its sequelae." Opposition at 6. That too is refuted by the Goulding/Jones testimony, which notes that "Eversource will propose a rate for effect once there is greater certainty surrounding the online date of the project and the ANE Contract has been

[6] Furthermore, it is telling that the Commission believed it more efficient to adopt a rule granting confidential treatment automatically for competitive bid information in cost of gas and default service filings. That the Commission so regularly granted motions to protect that information from disclosure that it deemed it more administratively efficient to do so by rule demonstrates that the Commission values the contentions that the Company has a legitimate privacy interest at stake and that disclosing such information would be harmful.

executed and approved by the relevant authorities, including the Federal Energy Regulatory Commission and this Commission." Goulding/Jones Testimony at 4, lines 11-14. What Eversource seeks in this case is approval of a method, not a rate.

9. The costs of the Access Northeast project are not yet known, and neither is the total number of contracting parties throughout New England who might share that cost. Without that information a true rate impact on Eversource's customers cannot be known. For those reasons, Eversource provided only illustrative calculations based upon certain assumptions. Because, however, the illustrative information Eversource provided might be used to calculate information in the confidential bid, it too should be confidential. Rather than seek recovery of a specific rate, for purposes of the Commission's analysis Eversource instead provided information showing that under a variety of scenarios, the proposed contract will yield net benefits to customers. The OCA, or others, may seek to test Eversource's assumptions relative to the value of the proposed contract, or may argue that the proposed recovery method is inadequate or improper. However, the desire to test Eversource's assumptions does not create or enhance a public interest in the confidential information. To the extent the OCA is contending that the public interest arises from a need to know the retail rate impact, when such impact is not known there can be no such interest.

10. The OCA further contends, after offering its opinion that Eversource is attempting to "denigrate and dismiss the public's interest in disclosure," that Eversource draws a distinction between its activities in negotiating the Precedent Agreement and the Commission's activities in reviewing it, and argues that "The Commission should reject such a simplistic distinction." Opposition at 7. As an initial matter, Eversource has not offered any opinion about the public's interest save for contending that it is not substantial in this case. As to the distinction drawn

between the activities of Eversource and those of the Commission, the same distinction was recently drawn by Liberty Utilities in its request in the above-referenced Docket No. DG 15-494 and, as noted, the Commission granted that same request.[7] The OCA's disagreement with the Commission's ruling does not somehow demonstrate that it is improper or worthy of rejection. Furthermore, the distinction between the utility's actions in receiving and evaluating bid information, and the actions of the Commission in evaluating the actions of the utility, is not a new or fanciful argument. Indeed, in the case quoted, *supra*, relative to Pennichuck East Utility, the Commission stated that there was no indication that disclosing the competitive bid information received and evaluated by PEU would inform the public about the workings of the Commission. *Pennichuck*, Order No. 25,758 at 5; *see also, Abenaki Water Company*, Order No. 25,840 (November 13, 2015) at 2 (concluding that a proprietary model used for preparing analyses relied upon by the utility "has no bearing on the workings of the Commission" and therefore should not be disclosed). The Commission has understood that the analyses of the utility are not the same as the analyses of the Commission and has recognized that they should, therefore, be treated differently.

11. Lastly, with respect to the public interest, the OCA draws a distinction between the information at issue here and the customer information at issue in the often cited case of *Lamy v. New Hampshire Public Utilities Commission*, 152 N.H. 106 (2005) and contends that:

> This case does not involve so routine and mundane a utility activity as investigating customer complaints of voltage variations on a single distribution circuit in a Manchester suburb. Rather, here the activities of the Commission and the Petitioner are notably entwined, given that Eversource negotiated the ANE Contract against the backdrop of, and to a significant extent in response to, the Commission-initiated Investigation into Potential Approaches to Ameliorate

[7] The OCA was an intervenor in Docket No DG 15-494 and raised no objection to Liberty Utilities' request for confidential treatment.

> Adverse Wholesale Electricity Market Conditions in New Hampshire in Docket No. IR 15-124.

Opposition at 7-8. As with its earlier arguments, the OCA attempts to creatively frame this argument to provide footing for its contentions. The "routine" or "mundane" nature of other utility undertakings has little, if any, bearing upon the issues here. Eversource has sought protection for information that is competitively sensitive financial or commercial information – the very type of information covered by the statute and the Commission's rules. In essence, the OCA is contending that if it deems a filing important, any commercially sensitive information should be disclosed, but if it decides the matter is less important, the information need not be protected. Such an argument is untenable and should be rejected.

12. As to the balancing of interests, the OCA contends that the scale tips toward disclosure because:

> The utility is not merely proposing to commit its electric customers to 20 years of paying for natural gas pipeline capacity; it is proposing to do so in a paradigm-shifting manner that would mark a major retrenchment from the driving assumption of the 1996 Restructuring Act that "[t]he most compelling reason to restructure the New Hampshire electric utility industry is to reduce costs for all consumers of electricity by harnessing the power of competitive markets," RSA 374-F:1, I, as opposed to the notions of guaranteed cost recovery that marked the development of the electric industry in the 20th Century.

Opposition at 9. Initially, the OCA appears to making an argument more about the legality of the proposed contract than about the appropriateness of confidential treatment. As noted above, the Commission has already determined that it will address the issue of whether such a contract is legal based upon briefs it will receive and consider in the first phase of a proceeding. *Electric Distribution Utilities*, Order No. 25,860 (January 19, 2016) at 3. If the OCA has a position on that issue, and it appears that it does, it is free to make such position known in its brief. That

issue, however, is not relevant to the Commission's consideration of the confidential nature of the information provided in Eversource's filing.

13. Further, there is nothing "paradigm shifting" about a utility entering into 20 year energy contract. While the concept of an electric utility purchasing natural gas capacity is novel in New Hampshire, the Commission can and will address that aspect of this proceeding in due course. Without doubt, an electric utility could enter into a contract for electrical energy for a 20 year period and, should it do so, it would put such a contract before the Commission for review and approval. In that instance, the Commission would be called upon to assess the merits of the proposal based upon its review of the utility's assessment of the relative merits of the contract as compared to other available alternatives. After disposing of the novel legal issue, a matter the Commission has already determined to address separately, the remaining analysis here would be little different than any other analysis the Commission would undertake. The Commission should resist the OCA's invitation to turn this case into something it is not.[8]

14. Finally, the OCA states in the Opposition:

> The OCA would also like to remind the Commission, respectfully, that it too is a government instrumentality and, therefore, the public's right to know what the OCA is "up to" is also relevant to any determination made by the Commission pursuant to RSA 91-A. Since the OCA cannot reject public inquiries about its work in this docket with reference to the principles of quasi-judicial neutrality that guide the Commission, and because the OCA's ability to represent residential ratepayers is materially advanced through an ability to collaborate freely and communicate openly with members of the public who share the OCA's interest in skeptically evaluating Eversource's proposal, subjecting virtually every material aspect of the Eversource filing to confidential treatment would significantly

[8] In its conclusion, the OCA also notes that New Hampshire has historically looked to other analyses, including those relating to the Federal Freedom of Information Act, on how to handle confidential information. Eversource submits that another entity regularly dealing with similar information, the Federal Energy Regulatory Commission ("FERC"), has dealt with similar requests in a manner substantially the same as argued by Eversource here. *See e.g., Order Accepting Informational Filing*, 138 FERC ¶61,196, 61,880-881 (2012) (finding that competitively sensitive information is entitled to protection if it is: not the type of information that is customarily released to the public; information that could provide a competitive advantage to another; and the type which, if released, would be more difficult for the FERC to obtain in the future).

> hamper our office's effort to advance the interests of residential utility customers in a thorough and accountable fashion.

Opposition at 9-10. In stating that it "cannot reject public inquiries" and that it must be able to "collaborate freely and communicate openly with members of the public" the OCA appears to be implying that it is without the ability or authority to keep information confidential if it is requested by, or allegedly relevant to, some member of the public. Pursuant to RSA 363:28, VI, however, "The filing party shall provide the consumer advocate with copies of all confidential information filed with the public utilities commission in adjudicative proceedings in which the consumer advocate is a participating party **and the consumer advocate shall maintain the confidentiality of such information.**" (emphasis added). The OCA, regardless of its status as a "government instrumentality," has a specific statutory obligation to protect confidential information. Moreover, pursuant to the requirements of this same statute, the OCA has all of the confidential information Eversource has provided. As such, it is unclear how the OCA's efforts to participate in this docket would be "significantly hamper[ed]" by complying with its express statutory duty to maintain information on a confidential basis as determined by this Commission.

15. Accordingly, for the above reasons, Eversource requests that the Commission reject the OCA's Opposition and issue a protective order preventing disclosure of the information in the Confidential Attachments and the related confidential testimony.

WHEREFORE, Eversource respectfully requests that the Commission:

A. Grant leave to reply and consider this reply;

B. Issue an appropriate protective order; and

C. Order such further relief as may be just and reasonable.

Respectfully submitted this 4th day of March, 2016.

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE d/b/a EVERSOURCE ENERGY

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CERTIFICATE OF SERVICE

I hereby certify that, on the date written below, I caused the attached to be served pursuant to N.H. Code Admin. Rule Puc 203.11.

March 4, 2016
Date

_____
Matthew J. Fossum