THE STATE OF NEW HAMPSHIRE

BEFORE THE

PUBLIC UTILITIES COMMISSION

ENERGY NORTH NATURAL GAS CORP. d/b/a LIBERTY UTILITIES

Docket No. DG 17-198

PETITION FOR APPROVAL OF FIRM SUPPLY AND TRANSPORTATION AGREEMENTS AND THE GRANITE BRIDGE PROJECT

OPPOSITION OF THE OFFICE OF CONSUMER ADVOCATE TO MOTION FOR PROTECTIVE ORDER

I. Introduction

On December 22, 2017, Energy North Natural Gas Corporation d/b/a Liberty Utilities ("Liberty") filed a petition for approval of (1) a delivered supply contract with Engie Gas & LNG, LLC (Engie), (2) a precedent agreement for firm transportation capacity with the Portland Natural Gas Transmission System (PNGTS), and (3) Liberty's decision to proceed with a huge capital initiative referred to as the Granite Bridge project. If built according to the plans reflected in the petition, Granite Bridge would involve the construction of a 27-mile pipeline along the Route 101 corridor from the Manchester area to the Seacoast along with a facility suitable for the storage of up to 2 billion cubic feet of liquefied natural gas (LNG).

Although the purpose of the petition is essentially to obtain a guarantee that Liberty will recover the cost of the Granite Bridge project from customers, along with the

costs associated a near-term supply contract and a long-term capacity contract that would round out Liberty's supply procurement plans, Liberty appended to its petition a Motion for Protective Order that would, if granted, shield the key terms of its proposal from public scrutiny. Because the Office of the Consumer Advocate (OCA), which represents the interests of residential utility customers pursuant to RSA 363:28, believes it is antithetical to the interests of all customers for a proceeding such as this to be conducted in a state of near-total secrecy, the OCA opposes the Liberty motion and as reasons therefor states as follows.

II. The Legal Standard under Puc 203.08 and RSA 91-A:5

Puc 203.08 provides that the Commission "shall upon motion issue a protective order providing for the confidential treatment of one or more documents upon a finding that the document or documents are entitled to such treatment pursuant to RSA 91-A:5, or other applicable law." RSA 91-A:5, part of the Right-to-Know Law codified in RSA 91-A, allows (but does not require) agencies and other instrumentalities of government to withhold from public disclosure certain information in their files based on enumerated exceptions to the broad disclosure principles enshrined in RSA 91-A.

Rule Puc 203.08 requires a request for confidential treatment to contain:

> (1) The documents, specific portions of documents, or a detailed description of the types of information for which confidentiality is sought;
>
> (2) Specific reference to the statutory or common law support for confidentiality; and
>
> (3) A detailed statement of the harm that would result from disclosure and any other facts relevant to the request for confidential treatment.

Liberty has not met the requirements of the rule. The Company's references to the information for which it seeks confidential treatment are vague and general. Its

characterizations of the alleged harm disclosure would wreak are conclusory, hypothetical, and self-serving.

The statutory basis asserted by Liberty for confidential treatment is the discretionary disclosure exception in the Right-to-Know Law for "confidential, commercial or financial information" contained in RSA 91-A:5, IV. In such cases, the decisionmaker must determine whether public disclosure would be an invasion of privacy – an inquiry that requires a three-step analysis. *Professional Firefighters of New Hampshire v. Local Government Center, Inc*., 159 N.H. 699, 707 (2010) (citations omitted); *Liberty Utilities*, Order No. 25,868 (Docket DG 15-289, February 19, 2016) at 5-6. The three steps are: (1) a determination of "whether there is a privacy interest at stake that would be invaded by the disclosure," (2) an assessment of "the public's interest in disclosure," and (3) an effort to "balance the public interest in disclosure against the government's interest in nondisclosure and the individual's privacy interest in nondisclosure." *Professional Firefighters*, 159 N.H. at 707 (citations omitted).

III. The Liberty Request

The pending motion seeks to shield from public scrutiny five enumerated categories of information: (1) the key terms (pricing and delivery) of both Liberty's existing supply contracts and those for which it is seeking approval in this docket, (2) the estimated cost of upgrading the Concord Lateral pipeline (a potential alternative to the Granite Bridge pipeline and storage project, but not owned by Liberty), (3) "[r]egulatory approval dates and other sensitive contract terms," (4) the cost of the Granite Bridge project, and (5) Liberty's reasons for selecting the short-term Engie contract over other

available alternatives. Liberty Motion at 2. Liberty's arguments are unpersuasive as to each of these categories.

IV. The Asserted Privacy Interests

Liberty's initial claim of a privacy interest, specific to the pricing and delivery terms in wholesale supply contracts, is premised largely on the fact that these contracts, in standard fashion, contain language specifying that the counterparties will treat the agreements as confidential. The Commission should use the pending motion as an opportunity to declare once and for all that utilities should not invoke this type of contractual language in support of confidentiality motions. To grant confidential treatment based in any way on such language would be to allow utilities and their counterparties to bootstrap their way to secrecy.

Moreover, in every instance, these confidentiality clauses contain additional language to the effect that the parties will comply with any regulatory requirements that involve public disclosure of contract terms. *See, e.g.*, ¶ 23 of PNGTS Precedent Agreement at Bates page 45 of Liberty Filing ("the Parties agree not to disclose such terms other than as . . . required by applicable laws, regulations or any securities exchange"). Therefore, it is absurd and illogical for Liberty to rely on this language in support of confidentiality requests. If Liberty could rely on these confidentiality provisions to support nondisclosure under RSA 91-A then the entirety of these documents could be treated as secret information.

Liberty's next argument in support of confidential treatment is that the Commission has granted similar requests in the past. This ignores the fact that the Commission is bound not by its own precedents, but rather by those of the New

Hampshire Supreme Court. Moreover, the previous order cited by Liberty – No. 25,861, entered in Docket No. DG 15-494 on January 22, 2016 – involved an uncontested motion for confidential treatment. The issue simply was not litigated in Docket DG 15-494; the Commission made conclusory findings about privacy interests, the disclosure interests, and their relative values without discussing or analyzing these issues. Here, the issue is contested and Liberty must therefore come forward with substantive arguments.

Liberty next contends it is entitled to secrecy for key contract terms because they are presumed to be confidential in proceedings to which Puc 201.06(a)(11) apply. Although Liberty concedes that Puc 201.06 is inapplicable to this case (because this proceeding is hardly a "routine" matter of the sort Puc 201.06 was intended to cover), the Company nevertheless claims that the existence of this rule is "an explicit acknowledgement that terms in gas supply contracts warrant confidential treatment in the first instance." In reality, Puc 201.06 – read in combination with Puc 201.07, governing requests for public disclosure of such information -- is to precisely the opposite effect. These two provisions of the Commission's rules merely establish an orderly process that promotes administrative efficiency by avoiding the need to make confidentiality rulings in situations where no one is seeking public disclosure.

Finally, the heart of Liberty's argument in favor of confidential treatment of key contract terms is what the Company refers to as "a reasonable expectation of privacy" in such information. *See* Liberty Motion at 4. The Commission should reject this argument as grievously lacking in merit.

The phrase "reasonable expectation of privacy" is a touchstone of the U.S. Supreme Court's Fourth Amendment jurisprudence, originating in Justice Harlan's

concurring opinion in a landmark case about intercepted telephone communications. *See Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring). The Fourth Amendment secures to individuals the right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." It has no applicability whatsoever to RSA 91-A determinations for the simple reason that there is no search or seizure occurring when a utility files information with the Commission in quest of favorable rulings. As Liberty's petition implicitly acknowledges, *see* Petition at ¶ 12, Liberty is not required to seek Commission approval of the contracts and investments at issue in this proceeding; Liberty is presumably doing so to protect its shareholders by gaining pre-clearance so as to avoid any possibility of future disallowances of rate recovery based on imprudence or used-and-useful arguments. To invoke the phrase "reasonable expectation of privacy" and all that it represents in American jurisprudence, is, to put it mildly, inappropriate in these circumstances.

Most of Liberty's effort to describe specific harms that disclosure would wreak are too vague and conclusory to pass muster. *See, e.g.*, ¶ 10(c) ("[r]egulatory approval dates and other sensitive contract terms" are "truly sensitive commercial information, the disclosure of which would cause competitive harm to the Company and its counterparties") ¶ 10(d) ("the levelized cost analyses used to compare the Granite Bridge project costs with tradition[al] pipeline capacity costs, [and] the annualized costs used to calculate the levelized costs" are "confidential") and ¶ 10(e) (the reasons Liberty chose Engie as its near-term supplier "reflects a balancing and comparison of competing confidential contract terms and the reasons EnergyNorth chose ENGIE"). A possible exception appears in the second half of paragraph 10(d).

The second half of paragraph 10(d) discusses the revenue requirement figures, which Liberty characterizes as "akin to what a pipeline or supplier would charge for a fixed annual cost for their service." According to Liberty, if the information becomes public but Granite Bridge is ultimately not built for any reason,

> disclosure would effectively have established a floor price for any supplies that the Company may seek as an alternative. That is, if such future suppliers knew the annual costs of the Granite Bridge project, which costs the Company stated were the least cost alternative, then these future suppliers could use that information to form the minimum of what they would charge, and would then propose a price in excess of that cost. Absent such knowledge, these future suppliers could very well offer EnergyNorth a lower price.

Liberty Motion at ¶ 10(e).

This is precisely the sort of "specific harm" discussion Puc 203.08 requires utilities (and other parties) to make in support of their confidentiality requests. However, the persuasiveness of these contentions is attenuated by the temporal and practical realities of the processes by which natural gas utilities undertake and obtain approval for major capital projects. For example, in the time period between the filing for approval of the Northeast Direct project and the instant petition, the dollar-per-dekatherm estimates for capacity expansion on the Concord Lateral have changed dramatically. Simply stated, if Granite Bridge is not built and Liberty must pursue other alternatives in the competitive marketplace, the cost data filed with the Commission in 2017 will be so stale as to be useless to competitors.

Overall, the privacy interests claimed by Liberty are extremely weak at best. The Commission can and should deny the Liberty motion on this basis alone – without reaching the next steps in the balancing test adopted by the New Hampshire Supreme Court.

V. The Public's Interest in Disclosure

The public's interest in disclosure is not a matter of what is interesting or even informative with respect to the activities and priorities of Liberty as the source of the material at issue in this motion. Rather, the objective is to "provide the utmost information to the public about what its government is up to." *New Hampshire Right to Life, v. Director, N.H. Charitable Trusts Unit*, 169 N.H. 95, 111 (2006) (citations and internal quotation marks omitted). "Disclosure of the requested information should inform the public about the conduct and activities of their government." *Id.* (citation omitted). Because "[t]he party resisting disclosure bears a heavy burden to shift the balance toward nondisclosure," upon judicial review a Court would consider whether the agency "has shown that the records sought will not inform the public." *Id*. (citations omitted).

Therefore, if the Commission finds a cognizable privacy interest here and moves to an assessment of the public's interest in disclosure, the Commission should reject Liberty's minimalist gloss on that interest. According to Liberty, disclosure "would not materially advance the public's understanding of the Commission's analysis in this proceeding." Liberty Motion at ¶ 11. The Company notes that because the Commission's ultimate review of the petition "will be transparent and publicly available," it would not "impair that transparency" if the Commission were to "[w]ithhold[] from public view the few pieces of information" for which the utility is seeking confidential treatment. *Id*.

This characterization appears to come from a parallel universe in which there are not raging public debates over the adequacy of existing natural gas pipelines, the extent to which climate change should preclude the development of infrastructure that facilitates

any additional reliance of consumers on fossil fuel, the inhibiting effect on the New Hampshire economy of the difficulties utilities face in gaining approval for major capital projects, and the extent to which regulators are acting in the public interest when considering such proposals. As Liberty's prefiled testimony makes clear, the instant petition amounts to 'Plan B' for Liberty in the wake of the cancellation of the hugely controversial Northeast Energy Direct pipeline. *See* Direct Testimony of Susan L. Fleck and Francisco C. DaFonte at Bates pages 8-9. It is difficult to imagine a proceeding among those currently pending at the Commission in which the public would have a more pressing interest in scrutinizing not just the ultimate decision to be made by the Commission but everything the agency and its Staff do along the way.[1]

Likewise, it would be absurd to conclude that the public has little interest in disclosure because Liberty is seeking to redact only a "few pieces of information." There are indeed thousands of words in the petition and its supporting materials; the words and numbers Liberty is seeking to shield from disclosure are only the ones that are most informative and interesting.

Liberty also claims that the public's interest in disclosure is insignificant because "[t]he Commission can, and often has in the past, couched its public filings and orders in a manner that protects confidential material while disclosing the full scope of its review and analysis." *Id*. Consider what this utility appears to be implying here: that the public

[1] Indeed, one barometer of how overwhelming the public's interest in disclosure is, given the circumstances: the fact that, because the OCA is obliged pursuant to RSA 363:28 and Puc 203.08(c) to treat the putatively confidential information as secret pending the Commission's RSA 91-A:5 determination, we cannot describe with particularity here the noteworthy extent to which this utility is seeking to add to its rate base. The Commission will find the relevant data at Bates page 101 of the confidential edition of the Liberty filing. According to the most recent filing by Liberty in its pending natural gas rate case, Liberty's current rate base is approximately $252 million. *See* Attachment DBS/DSD-1 Rebuttal, Schedule RR-1 (R), in the January 25, 2018 filing by Liberty Utilities in Docket No. DG 17-048.

has little or no interest in public disclosure of certain significant information because the Commission is perfectly capable of basing its findings of fact and conclusions of law on this information without alluding to it explicitly. The cynicism reflected in such an argument is staggering. The Commission should unambiguously reject such a pitch.

Finally, in assessing the public's interest in disclosure, the Commission should bear in mind that the OCA is obliged pursuant to RSA 363:28 to abide by the agency's determination on the pending confidentiality motion. Thus, the relevant inquiry is not just the extent to which the public has an interest in understanding what the Commission is up to – it has an interest in knowing how the OCA, as an agency that works alongside other parties in contested cases at the Public Utilities Commission, is discharging its responsibility to advance the interests of residential utility customers. The public cannot assess the extent to which the OCA has satisfied this responsibility based purely on the ultimate results of the proceeding.

VI. Balancing the Interests

Finally, even assuming that Liberty has stated a cognizable interest in non-disclosure, the public's interest in disclosure as described above is so significant that any reasonable balancing of the two as required by the New Hampshire Supreme Court must result in a decision rejecting the motion for confidential treatment. This is not a routine case. Data that might reasonably be shielded from public disclosure in a garden variety cost-of-gas proceeding, or even a docket involving the short-term Engie contract considered on a standalone basis, should still be subject to public disclosure here given the magnitude of Liberty's proposals. This utility is proposing a major increase in the size of its rate base, and significant contractual commitments for which its customers will

be paying over many years. In their joint testimony, President Susan Fleck of Liberty Energy Utilities (New Hampshire) and Vice President Francisco DaFonte describe the proposals as "critical to reliably meeting the projected demand requirements of our existing and future customers and avoiding a service moratorium." Fleck and DaFonte Testimony at Bates page 23 (characterizing the proposed strategy as "the most cost-effective"). If Liberty is correct – that the outcome of this case is of such consequence – then it follows the public's interest in disclosure substantially outweighs even the self-serving claims of privacy interests Liberty has asserted here.

To put it another way, if Liberty's proposals are as good for the public as the utility claims, the public's interest in knowing how regulators (and consumer advocates) handle these plans trumps the hypothetical danger that rejection of the proposals would leave Liberty at a disadvantage in negotiating alternatives in the future.

VI. Conclusion

For the foregoing reasons, the OCA respectfully requests that the Commission deny the Liberty Motion for Protective Order and Confidential Treatment.

Respectfully submitted,

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