

THE STATE OF NEW HAMPSHIRE

BEFORE THE

PUBLIC UTILITIES COMMISSION

ENERGYNORTH 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

**MOTION OF REPSOL ENERGY NORTH AMERICA CORPORATION IN SUPPORT OF
LIBERTY UTILITIES' MOTION FOR PROTECTIVE ORDER AND REPLY TO OPPOSITION
OF
THE OFFICE OF THE CONSUMER ADVOCATE**

I. INTRODUCTION

By this Motion, Repsol Energy North America Corporation (“RENA”) hereby supports the Motion for Protective Order filed by Liberty Utilities (EnergyNorth Natural Gas) Corporation d/b/a/ Liberty Utilities (“Liberty”) to protect RENA’s confidential information in this docket pursuant to N.H. Code Administrative Rule Puc 203.08, independently moves for confidential protection of such information pursuant to Puc 203.08, and opposes the request by the Office of Consumer Counsel (“OCA”) to publicly release such information. Further, for the reasons stated below, RENA moves for protection of its confidential information in such a manner as to prohibit RENA’s competitors or potential competitors from having access to its confidential information during the course of the proceeding.

II. PROCEDURAL BACKGROUND

On December 22, 2017, Liberty filed a petition for New Hampshire Public Utilities Commission (“Commission”) approval of Liberty’s decision to proceed with the Granite Bridge Project, a project involving the construction of an intrastate natural gas pipeline between the Joint Facilities owned by Maritimes & Northeast Pipeline, L.L.C. (“MNE”) and Portland Natural Gas Transmission System (“PNGTS”) and the Tennessee Gas Pipeline Company, L.L.C. (“TGP”) Concord Lateral, and the construction of a liquefied natural gas (“LNG”) facility in Epping, New Hampshire (“Petition”). Liberty’s Petition also requested Commission approval of a supply contract with Engie Gas & LNG, LLC (“ENGIE”) and a precedent agreement for firm transportation capacity with PNGTS. Concurrent with its Petition, Liberty filed a Motion for Protective Order to protect certain categories of confidential information contained in the Petition including: (a) pricing and delivery terms of proposed and existing supply and capacity contracts; (b) estimated costs for TGP to upgrade the Concord Lateral; (c) regulatory approval dates and other sensitive contract terms; (d) cost calculations for the Granite Bridge Project; and (e) reasons for choosing ENGIE over another supplier. Liberty Motion at ¶ 2.

On February 9, 2018, the Office of the Consumer Advocate (“OCA”) filed an Opposition to Liberty’s Motion for Protective Order and advocated for the release of all the information contained in Liberty’s Petition to the general public.

At the March 9, 2018 Initial Prehearing Conference, the Commission heard additional oral argument regarding Liberty’s Motion for Protective Order. At that conference, Counsel for RENA requested leave to file additional comment on the Motion and the OCA’s Opposition in light of the fact that some of the information at issue is RENA

proprietary information. The Commission granted RENA and other entities an opportunity to file additional comment by March 13, 2018, and for responses to be filed by March 16, 2018.

III. LEGAL STANDARD

New Hampshire's Right-to-Know law is embodied in RSA Chapter 91-A, Access to Governmental Records and Meetings. Among other things, this law provides public access to governmental records in the possession, custody or control of public bodies or agencies, except as otherwise prohibited by statute or RSA 91-A:5. RSA 91-A:4, I. RSA 91-A:5 contains exemptions to the public access requirements for certain governmental records enumerated in the statute, including an exemption for records pertaining to confidential, commercial or financial information. RSA 91-A:5, IV. The statute also provides an exemption for "other files whose disclosure would constitute an invasion of privacy." *Id.*

Under the precedent set forth in *Professional Firefighters of New Hampshire v. Local Government Center, Inc.*, the Commission must first determine whether the information is confidential, commercial or financial information, and whether disclosure would constitute an invasion of privacy. *Professional Firefighters of New Hampshire v. Local Government Center, Inc.*, 159 N.H. 699, 707 (2010). The New Hampshire Supreme Court has set forth a three-step analysis for the Commission to determine whether disclosure of public records constitutes an invasion of privacy under RSA 91-A:5. First, the Commission should evaluate whether there is a privacy interest at stake that would be invaded by the disclosure. *Lambert v. Belknap County Convention et al.*, 157 N.H. 375, 382 (2008). Second, the Commission should assess the public's interest in disclosure. *Id.* And third, the

Commission should then balance the public interest in disclosure against the government's interest in nondisclosure and the individual's privacy interest in nondisclosure. *Id.*

IV. LIBERTY'S REQUEST FOR PROTECTIVE ORDER WITH RESPECT TO RENA SUPPLY PRICING OR OTHER CONFIDENTIAL RENA INFORMATION IN THIS PROCEEDING SATISFIES THE BURDEN FOR NON-DISCLOSURE

RENA urges the Commission to protect any of RENA's pricing information and other RENA proprietary information as confidential in this proceeding because: (a) it is confidential commercial information in which RENA has a privacy interest that would be invaded by disclosure; and (b) the harm to RENA, Liberty and Liberty's customers from such disclosure outweigh the public interest in the release of the information.

A. THE RENA INFORMATION AT ISSUE IN THIS PROCEEDING IS CONFIDENTIAL COMMERCIAL INFORMATION IN WHICH RENA HAS A PRIVACY INTEREST THAT WOULD BE INVADED BY DISCLOSURE

Liberty included multiple references to RENA's confidential information in the supporting testimony filed with its Petition. Specifically, in the Pre-filed Testimony of William Killeen and James Stephens ("Killeen/Stephens Pre-filed Testimony"), Liberty states that it engaged in discussions with RENA for winter peaking supply and redacts the portion of the Liberty's analysis related to RENA's proposed contract terms.

Killeen/Stephens Pre-filed Testimony at 83-84. Additionally, the SENDOUT® analyses attached to the Killeen/Stephens Pre-filed Testimony includes Alternative Case Analyses that contain redacted pricing and cost information for RENA's supply. Killeen/Stephens Pre-filed Testimony, Exhibit WRK/JMS-6 at 14, 17, 20, 23, 26, 29, 32, 35, 38, 41, 44, 47, 50, 53, 56, 59, 62, and 65; Killeen/Stephens Pre-filed Testimony, Exhibit WRK/JMS-7 at 14, 17, 20, 23, 26, 29, 32, 35, 38, 41, 44, 47, 50, 53, 56, 59, 62, and 65. Accordingly, it is reasonable to conclude that this proceeding will address these contractual and pricing terms of RENA's

offer of supply to Liberty, and any other similar contractual and pricing terms that RENA provided to Liberty for supply (“RENA Confidential Information”).

This information is confidential, proprietary commercial information that RENA has gone to great lengths to protect from release into the public domain, including negotiating and executing confidentiality agreements with the utilities and other potential customers to whom RENA provides such information, and retaining legal counsel in proceedings such as the one at hand to argue against the public release of such information.¹

If the Commission were to allow public disclosure of RENA Confidential Information in this proceeding, such disclosure would invade RENA’s privacy interest. The RENA Confidential Information at issue in this proceeding is current (not stale) information that would disadvantage RENA in the marketplace if it were released to RENA’s competitors or potential competitors, some of whom are participating or actively monitoring this proceeding.² To the extent that this information is released into the marketplace, RENA’s competitors would be able to match RENA’s terms or even underprice them going forward. Accordingly, RENA has a strong privacy interest in the RENA Confidential Information that would be invaded by public disclosure of such information.

B. THE HARM FROM DISCLOSURE OF RENA’S CONFIDENTIAL INFORMATION OUTWEIGHS ANY ALLEGED PUBLIC BENEFIT FROM ITS RELEASE

Although RENA does not dispute that the public has an interest in the Commission’s review of Liberty’s proposal, RENA respectfully submits that public access to RENA’s

¹ RENA is unable to access the confidential version of Liberty’s Pre-filed Testimony as it has not yet been granted intervenor status in this proceeding. However, based upon the context in the unredacted portions of the testimony on the same page, it is reasonable to conclude that the redacted portions of the testimony relate to RENA’s proposed commercial contract terms and pricing proposals.

² Attorney Shope entered an appearance for ENGIE Gas & LNG, LLC (“ENGIE”) in this proceeding, and a representative of Portland Natural Gas Transmission System (“PNGTS”) attended the March 9, 2018 Case Conference.

Confidential Information is not required to be informed of the Commission or the OCA's activities.

It is an accepted principal that the New Hampshire's Right-to-Know law is intended to allow its citizenry to be informed about the activities of their government. As the Supreme Court observed in *Lamy v. N.H. Public Utilities Commission*, "[t]he purpose of the law is 'to provide the utmost information to the public about what its government is up to,'" and "[i]f disclosing the information does not serve this purpose, 'disclosure will not be warranted even though the public may nonetheless prefer, albeit for other reasons, that the information be released.'" *Lamy v. N.H. Pub. Utils. Comm'n*, 152 NH 106, 111 (2005) (internal citations and quotation marks omitted).

In this case, the disclosure of RENA's Confidential Information does not materially advance the purpose of informing the public of the Commission's and the OCA's activities. RENA's Confidential Information is part of Liberty's alternative supply analysis that is a complex, computer generated model involving a variety of confidential commercial inputs. The Commission and the OCA's review of Liberty's analysis can be adequately communicated to the public without requiring the public release of such underlying confidential inputs. In fact, explaining the Commission's and the OCA's analysis without breaching the confidentiality of certain commercially sensitive information is an exercise that both the Commission and the OCA undertake on a regular basis. Although there is public interest in the overall proceeding given the high-profile nature of the proposal, there is no evidence that this case presents a unique situation in which protecting RENA's Confidential Information as confidential would prevent the Commission and the OCA from adequately conducting its review and adequately communicating it to the public.

Therefore, the disclosure of RENA's Confidential Information does not materially advance the public's understanding of what the Commission and the OCA are "up to" and merely serves to place RENA at a disadvantage with respect to its competitors in the marketplace.

To the extent that the Commission finds that the public, nonetheless, has an interest in the disclosure of RENA's Confidential Information, RENA respectfully submits that the harm resulting from the disclosure of this information, and the precedent it sets for future transactions, outweighs the public interest. As discussed above, the public disclosure of RENA's Confidential Information will place RENA at a competitive disadvantage in the marketplace because its competitors will become aware of the sensitive, proprietary commercial details of RENA's supply offerings and the prices offered for such supply. This will allow RENA's competitors to develop alternative proposals that are specifically designed to undercut RENA in the highly competitive market, thereby producing real competitive harm from disclosure.

Additionally, the disclosure of RENA's Confidential Information will also adversely impact Liberty's customers. This long-term impact has been recognized by the Commission in prior orders. For example, in Order No. 24,842, the Commission stated that it "has a longstanding practice of according confidential treatment of pricing information in supply-related contracts at the request of a utility on the ground that public disclosure could ultimately force the utility to pay higher prices or agree to less advantageous terms, thus harming ratepayer interests." Order No. 24,842 at 4 (Apr. 4, 2008). This is because suppliers possessing the disclosed information would be aware of Liberty's expectations regarding gas supply arrangements and would be unlikely to propose such goods and services on terms significantly more advantageous to Liberty in the event that Liberty has

to return to the marketplace for additional supply proposals either in the context of this proceeding or in a future circumstance. Additionally, to the extent that companies such as RENA are at risk of the disclosure of their confidential information if they negotiate with New Hampshire utilities such as Liberty, this may act as a disincentive for RENA and other companies who are concerned about their confidential information to participate in future negotiations with those utilities. As a result, Liberty and other New Hampshire utilities may end up with less supply options and higher overall costs resulting from less competition. Accordingly, on balance, the harm resulting from the public disclosure of RENA's Confidential Information significantly outweighs any perceived benefit from its disclosure.

V. ACCESS TO RENA'S CONFIDENTIAL INFORMATION UNDER THE PROTECTIVE ORDER SHOULD BE LIMITED TO PARTIES WHO ARE NOT ACTUAL OR POTENTIAL COMPETITORS

As discussed above, the disclosure of RENA's Confidential Information to competitors or potential competitors will adversely affect RENA in the marketplace and at least one of RENA's competitors, ENGIE, may be granted intervenor status in this proceeding. Accordingly, RENA requests that the Commission order that RENA's Confidential Information shall not be accessible to any of RENA's competitors or potential competitors who are accorded party status and access to confidential information in the proceeding. Additionally, RENA would not object to an order preventing it from accessing ENGIE's proprietary and confidential pricing information or other confidential commercial terms related to ENGIE's supply proposals. This is consistent with an existing informal agreement that RENA has already made with ENGIE, in which both companies have agreed

not to request access to each other's confidential financial and commercial information in this proceeding.

VI. CONCLUSION

WHEREFORE, RENA respectfully requests the Commission to:

- A. Grant Liberty's Motion for Protective Order and RENA's supporting motion pursuant to N.H. Code Administrative Rule Puc 203.08, and protect as confidential RENA's supply pricing information, special contract terms and any other RENA confidential and proprietary commercial or financial information related to RENA's supply proposal that may be addressed in this proceeding;
- B. Modify the Protective Order to ensure that intervenors who have access to confidential information in this proceeding, but who are competitors or potential competitors of RENA (*e.g.*, ENGIE), do not have access to RENA's Confidential Information.
- C. Grant any other relief that the Commission deems necessary, just and reasonable to implement the relief sought above.

Respectfully submitted,

Repsol Energy North America Corporation

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Dated: March 12, 2018

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document will be sent via electronic mail to all persons on the Service List in Docket No. DG 17-198 on March 13, 2018.

By: /s/ Sarah B. Tracy
Sarah B. Tracy

Dated: March 12, 2018