

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DG 19-116

NORTHERN UTILITIES, INC.

Petition for Approval of Precedent Agreements for Westbrook Xpress Phase III Project

Order Approving Precedent Agreements

ORDER NO. 26,309

November 19, 2019

APPEARANCES: Patrick H. Taylor, Esq., on behalf of Northern Utilities, Inc.; the Office of the Consumer Advocate by D. Maurice Kreis, Esq., on behalf of residential ratepayers; and Lynn Fabrizio, Esq., on behalf of Commission Staff.

This order approves Northern's entry into three precedent agreements with Portland Natural Gas Transmission System, TransCanada Pipelines Limited, and Enbridge Gas, Inc., under specific terms described herein.

PROCEDURAL HISTORY

On June 28, 2019, Northern Utilities, Inc. (Northern or the Company) filed a petition for approval of three separate precedent agreements (Precedent Agreements, or Agreements) with (1) Portland Natural Gas Transmission System (PNGTS), (2) TransCanada Pipelines Limited (TransCanada), and (3) Enbridge Gas, Inc., formerly known as Union Gas Limited (Enbridge). Together, the Agreements will establish a firm natural gas pipeline transportation path, from Dawn, Ontario, to Granite State Gas Transmission, Inc., (Granite), as part of PNGTS's proposed Westbrook Xpress Phase III (WXP III) project. The Company requested findings that the Agreements are prudent, reasonable, and consistent with the public interest.

In support of its petition, Northern submitted pre-filed testimony of Robert S. Furino.¹ Northern also filed a motion for confidential treatment of certain information related to commercial terms, pricing, special delivery terms, and financial-related terms and conditions within the Precedent Agreements.

On July 24, 2019, the Office of the Consumer Advocate (OCA) notified the Commission of its participation on behalf of residential ratepayers pursuant to RSA 363:28. On August 6, 2019, the Commission held a Prehearing Conference, at which it granted Northern's motion for confidential treatment. Staff filed direct testimony of Al-Azad Iqbal, Utility Analyst with the Commission's Gas and Water Division, on September 10. On October 8, Northern filed a Settlement Agreement (Settlement Agreement or Settlement) reached with the OCA and Staff. On October 31, Northern filed a motion for confidential treatment of certain data responses as well as the confidential attachment to the Settlement Agreement filed on October 8.

The petition and subsequent docket filings, other than information for which confidential treatment is requested of or granted by the Commission, are posted on the Commission's website at <http://puc.nh.gov/Regulatory/Docketbk/2019/19-116.html>.

I. POSITIONS OF THE PARTIES AND STAFF

A. Northern

Northern requested approval to enter into separate Precedent Agreements with PNGTS, TransCanada, and Enbridge to create a firm natural gas pipeline transportation path, from Dawn, Ontario, to Granite, as part of the PNGTS Westbrook Xpress Phase III project. The Precedent Agreements would cover an initial term of 15 years for gas supply transactions with options to extend beyond the initial 15 years. As described in Northern's petition and the direct testimony

¹ Mr. Furino is Director, Energy Contracts of Unitil Corp., and Vice President of Unitil Corp's three subsidiaries: Fitchburg Gas and Electric Light Co., Northern Utilities, Inc., and Unitil Energy Systems, Inc.

of Mr. Furino, the WXP III Precedent Agreements will: (a) provide cost-effective and reliable natural gas supply for Northern's customers; (b) reduce reliance on delivered supplies; (c) provide savings and price stability; and (d) provide greater access to more attractive and liquid gas supply markets. Northern maintained that the Company's commitment under the Agreements is modest, with a relatively short duration and is an important addition to its gas supply portfolio. Northern argued that the Settlement in support of the Precedent Agreements is just and reasonable and in the public interest, and requested approval of the Settlement as well as the Agreements.

B. OCA

The OCA maintained that the Settlement Agreement reached among Northern, Staff, and the OCA is reasonable and should be approved. In its closing statement, the OCA noted that the Settlement Agreement requires the Company to maintain an ongoing obligation to manage the Precedent Agreements in a prudent fashion in order to minimize ratepayer exposure to costs they should not be made to bear. The OCA recommended that the Commission grant approval of the three Precedent Agreements, subject to the conditions in the Settlement Agreement.

C. Staff

Staff recommended that the Precedent Agreements be approved with the understanding that recovery of costs related to the transactions conducted under each Agreement, other than pre-service and cancellation costs associated with the Precedent Agreements accrued to date, would be addressed in future rate proceedings.

Staff maintained that the Precedent Agreements differ from routine capacity contracts in that the applicable cancellation fees and the magnitude of those fees under the Agreements could amount to potentially tens of millions of dollars for which Northern could be responsible. In

traditional precedent agreements, terms and costs are known and the transporters are liable for pre-service costs in case of project cancellation. Cancellation fees introduce a significant risk and need to be comprehensively analyzed and evaluated. Staff noted that the prudence of the Company's decisions to continue or terminate the Agreements would need to be evaluated in light of existing circumstances at each decision point.

According to Staff, although the projected maximum cancellation charge in the initial petition appears to be cost prohibitive, the probability of the project's cancellation at later points in the contract process is low. Staff also maintained that the volume of capacity contracted for under the Agreements appears reasonable in relation to the Company's current and projected supply requirements.

Staff recommended that the Commission issue an order finding that Northern's decision to enter into the Precedent Agreements is prudent, reasonable, and consistent with the public interest.

Staff also recommended that the Commission clarify in its order that recovery of further costs associated with the terms of the Agreements will be determined in future rate proceedings and are largely dependent on future Company decisions in response to changing circumstances.

II. Settlement Agreement

Northern, Staff, and the OCA entered into the Settlement Agreement presented at the hearing held on October 8, 2019. Through the Settlement, the parties recommended that the Commission approve Northern's petition, subject to the express and general settlement terms contained therein and set forth below. Northern requested that the Commission accept and approve the late-filed Settlement pursuant to N.H. Code Admin. Rules Puc 203.20(f).

A. Express Terms of Settlement

The Settlement Agreement includes seven express terms of agreement among the settling parties, as follows:

1. In light of the Company's assessment of its supply needs, options available in the market, and regional supply constraints, the relatively modest commitment of 10,000 Dth/day is reasonable.
2. The 15-year term of the firm transportation agreements is reasonable in light of the Company's planning load analysis.
3. Pre-service and cancellation costs associated with the Precedent Agreements accrued as of the date of this Order and for which the Company is liable, are reasonable and appropriately recoverable through the Company's rates.
4. Recovery of costs associated with the Precedent Agreements, other than pre-service and cancellation costs covered in 3 above, will be addressed through the Company's annual cost of gas filings.
5. Northern will monitor and evaluate the prudence of continuing with or terminating any or all of the Precedent Agreements at certain decision points outlined in the Company's response to Staff Data Requests 4-2 and 4-3, or in light of any new information or change in circumstances. The prudence of the Company's decisions to continue with or terminate any of the Precedent Agreements will be evaluated in light of existing circumstances known to the Company at each decision point. To the extent that the Company is found to have acted reasonably and prudently in incurring costs associated with the Precedent Agreements, such costs will be recoverable through the Company's rates.
6. Decision points include, but are not limited to, unfavorable regulatory decisions, a material increase in actual or projected project costs, and material changes in cost allocation due to decisions or actions of the transporter and/or other shippers. The Company shall inform the Commission of regulatory approvals related to the projects and/or material changes in actual and projected costs Northern would be responsible for under the Agreements.
7. Northern will not waive the conditions precedent under the PNGTS and Enbridge Precedent Agreements that allow it to terminate said Agreements prior to November 30, 2019, without liability to the Company unless the Company receives approval of the Agreements in a form acceptable to the Company of its respective petitions from both the New Hampshire and Maine Public Utilities Commissions.²

² On November 7, 2019, the Maine Public Utilities Commission issued an order in Docket No. 2019-0010, finding that entering Precedent Agreements is prudent and approving Northern's execution of them.

B. General Terms of Settlement

The Settlement includes agreement that all testimony and supporting documentation be admitted as full exhibits, and that admission of testimony without challenge does not constitute agreement by the settling parties that the content of the testimony is accurate or indicative of what weight, if any, should be given to the views of any witness. The settling parties agreed to forgo cross-examination of witnesses regarding pre-filed testimony, with the condition that the testimony or supporting documentation shall not be deemed to constitute an admission by any party that any allegation or contention in this proceeding is true or false, except that the sworn testimony of any witness shall constitute such admission by that witness. The parties agreed that the Commission's acceptance of the Settlement does not constitute continuing approval of, or precedent regarding, any particular issue in this proceeding, but does constitute a determination that the provisions set forth in the Settlement are just and reasonable.

The Settlement is conditioned upon the Commission's acceptance of all of its provisions without change or condition, with all terms interdependent.

III. Motion for Confidential Treatment and Waiver of Puc 203.20(e)

In addition to the motion for confidential treatment filed with its petition, Northern filed a second motion for confidential treatment on October 30, 2019. In its second motion, Northern asked the Commission to extend the protective treatment granted at the Prehearing Conference held on August 6 to certain confidential and/or proprietary commercial information submitted in the course of discovery in this matter, and to the confidential attachment to the Settlement Agreement among the parties filed on October 8.

Northern contended that its first motion requested protective treatment of certain commercial terms of the Precedent Agreements at issue in this case, as well as descriptions and

discussion of such terms in the testimony of the Company's witness. That motion further requested that such treatment be extended "to any discovery, testimony, argument or briefing relative to the confidential information." Accordingly, Northern has requested protective treatment of the confidential attachment to the Settlement Agreement, as well as its responses to certain data requests.³ Northern maintained that information included in the designated discovery responses and in the settlement agreement is competitively sensitive commercial information that is entitled to be protected from public disclosure under RSA 91-A:5, IV. *See also* N.H. Code Admin. Rules Puc 203.08.

Northern asserted that disclosure of the capacity supply pricing and delivery-related terms, as well as Northern's descriptions, analysis, and evaluation of such terms as reflected in the referenced data requests, would not materially advance the public's understanding of the Commission's analysis in this proceeding. Northern argued that the information is probative of the Company's confidential commercial analyses and strategies, not the Commission's work. Northern reiterated in its second motion that release of this information would be highly disadvantageous to its bargaining position, if future suppliers were aware of the pricing and other key terms upon which the Company was willing to conduct business, or of its analytical and evaluative processes. Northern added that disclosure would impair the respective bargaining positions of its counterparties who have entered into the Precedent Agreements with an expectation of privacy and confidentiality relative to certain commercial terms. Northern also maintained that its ability to negotiate favorable terms with such counterparties, or similarly situated entities, in the future might be harmed, which would ultimately harm its customers.

³ The data responses for which Northern requested confidential treatment included: Staff 1-1, Staff 1-2, Staff 1-3, Staff 2-2, Staff 2-5, Staff 2-6, Staff 2-9, Staff 4-1, Staff 4-2, and Staff 4-3

Northern requested that the Commission issue an order that exempts from public disclosure and otherwise protects the confidentiality of the information designated confidential in the referenced documents. Toward that end, Northern asked the Commission to waive the requirement of Puc 203.08 that a motion for confidential treatment be submitted at or before commencement of hearing, and accept the post-hearing motion.

Northern asked the Commission to extend the confidential treatment granted at the Prehearing Conference to the identified data responses and the confidential portions of the attachment to the Settlement Agreement filed at the October 8 hearing. Northern added that the majority of the confidential information contained in the Company's discovery responses pertains to the commercial terms of the Precedent Agreements, for which the Commission has already granted protective treatment. Northern also noted that the type of confidential information included in the referenced data requests is already subject to protective orders in the concurrently pending Maine Public Utilities Commission docket, 2019-00101. *See* ME PUC 2019-00101, Protective Orders 1 and 2 (May 13, 2019).

No party objected to the motion.

IV. COMMISSION ANALYSIS

A. Precedent Agreements

In this proceeding, we must consider whether the terms of the Precedent Agreements are reasonable and whether Northern's decision to enter into the Agreements is prudent. *See Liberty Utilities (EnergyNorth Natural Gas) Corp. d/b/a Liberty Utilities*, Order No. 25,822 at 24 (October 2, 2015) (considering reasonableness of the terms of a precedent agreement and the utility's prudence in entering into the agreement); *see also* RSA 374:1 and 374:2 (public utilities shall provide reasonably safe and adequate service at "just and reasonable" rates), and

RSA 378:7 (rates collected by a public utility for services rendered or to be rendered must be just and reasonable).

While the Settlement Agreement before us does not change the terms of the Precedent Agreements, it proposes certain actions the Company must undertake to ensure the prudence and reasonableness of its decision to enter into the Agreements. We, therefore, must review the Precedent Agreements and the Settlement Agreement in tandem. Our review of the Settlement concerns whether it is just and reasonable and serves the public interest. *See* Puc 203.20(b) (“The commission shall approve a disposition of any contested case by stipulation [or] settlement ... if it determines that the result is just and reasonable and serves the public interest”). We construe the public interest within the context of our overall authority, including, in this case, the interests of Northern’s existing and future customers. Order No. 25,822 at 14.

According to the filings, the Agreements collectively will enable Northern to contract for the transport of up to 10,000 Dth/day of natural gas from the Dawn Hub in Ontario to Westbrook, Maine, for a 15-year initial term, with an option to extend. Approximately 4,200 Dth/day of the contracted capacity will be used by Northern’s New Hampshire Division customers.

According to the petition, the Precedent Agreements will provide cost-effective and reliable natural gas supply for Northern’s customers, reduce reliance on delivered supplies, provide savings as well as price stability, and provide greater access to more attractive and liquid supply markets. Staff testified that the Agreements are routine contracts for a modest increase in capacity, typically addressed through cost of gas proceedings, and that the volume of capacity contracted for under the Agreements is reasonable in relation to the Company’s current and projected supply requirements. We accept the parties’ stipulation in the Settlement Agreement

and find that the Company's commitment of 10,000 Dth/day and associated firm transportation agreements is reasonable in light of the Company's supply needs, options available on the market, and regional supply constraints. Similarly, we find that the 15-year term of the firm transportation agreements is reasonable in light of the Company's planning load analysis. Based on these findings, we conclude that Northern's proposed acquisition of the capacity contracted for in the Precedent Agreements is prudent and reasonable.

Typically, we determine prudence and reasonableness within the context of a full rate proceeding, after a utility has incurred costs to serve its customers. Accordingly, our approval of the Company's entry into the Agreements at this time does not include approval of the prudence and recoverability of any costs incurred under those Agreements, with the exception of the pre-service and cancellation costs associated with the Agreements that have accrued as of the date of this order as proposed in the settlement agreement. We find those costs to be reasonable and appropriately recovered by the Company through its rates.

The prudence and recoverability of all other costs associated with the Agreements will be determined in the future in the Company's annual Cost of Gas filings, based upon the reasonableness of the Company's decision making regarding continuing or terminating the Agreements. Indeed, the potential magnitude of the applicable cancellation fees that could reach tens of millions of dollars for which Northern could be responsible requires our careful scrutiny. Staff testified that Northern has adequately addressed the financial risks of the cancellation fee provisions through the discovery process, as reflected in the terms of the Settlement Agreement. According to Staff, the projected maximum cancellation charge as presented in the initial petition appears to be prohibitive. Staff pointed out, however, that the majority of that projected charge reflects construction costs that would be incurred only when all regulatory approvals have been

attained, and the probability of the project's cancelation after receiving regulatory approval would be low. We agree that the prudence of the Company's decisions to continue or terminate the Agreements will need to be evaluated in light of existing circumstances at each decision point.

The Settlement ensures that Northern will monitor and evaluate the prudence of continuing with or terminating any or all of the Precedent Agreements at designated decision points, and in light of any new information or change in circumstances. Accordingly, the prudence of the Company's decisions to continue with or terminate any of the Precedent Agreements will be evaluated in light of existing circumstances known to Northern at key decision points for the duration of each respective contract period, consistent with the Settlement. This bifurcation of prudence findings is consistent with the terms of the Settlement Agreement before us.

Northern has established through its filings that the contracted capacity represents the most viable, reasonably available alternative for Northern to meet its current and forecasted customer requirements in a least-cost and reliable manner. As the Settlement highlights, the Precedent Agreements are a reasonable supply option that will enable Northern to meet a portion of its identified incremental resource need while enhancing reliability and price stability for its customers. Our finding that the contracted capacity is prudent assumes, however, that Northern will manage its business and operate in a manner consistent with good utility practice and its plans outlined in its petition and in testimony. The Settlement ensures that Northern will adhere to reasonable and prudent oversight of each Agreement and keep the Commission informed of regulatory approvals related to the Westbrook Express Phase III project as well as any material

changes in actual and projected costs Northern will be responsible for under the terms of the Agreements.

With the caveats stated above, we find that Northern's decision to enter into the Precedent Agreements is prudent, reasonable, and consistent with the public interest. We also find that the Settlement is just and reasonable, and consistent with the public interest of Northern's existing and future customers.⁴

B. Second Motion for Confidential Treatment

With respect to Northern's motion for confidential treatment, RSA 91-A:5, IV states, in relevant part, that records of "confidential, commercial, or financial information" are exempt from disclosure. *See Unitol Corp. and Northern Utilities, Inc.*, Order No. 25,014 (September 22, 2009). In determining whether commercial or financial information should be deemed confidential, we first consider whether there is a privacy interest that would be invaded by the disclosure. *Id.* Second, when a privacy interest is at stake, the public's interest in disclosure is assessed. *Id.* 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.* Finally, when there is a public interest in disclosure, that interest is balanced against any privacy interests in non-disclosure. *Id.* This is similar to the Commission's rule on requests for confidential treatment. *See* Puc 203.08.

As noted above, the Commission has previously found the categories of information for which Northern seeks protection to be exempt from disclosure. *See Northern Utilities, Inc.*,

⁴ We note the parties' conclusion of settlement discussions and agreement late in this relatively expedited proceeding. To promote the orderly and efficient conduct of this process, we grant the requested waiver of Puc 203.20(e) and find, pursuant to Puc 203.20(f), that acceptance of the settlement agreement as presented at the hearing on October 8, 2019, will promote the orderly and efficient conduct of this proceeding and will not impair the rights of any party.

Order No. 25,047 (November 25, 2009); and *Northern Utilities, Inc.*, Order No. 25,306 (December 22, 2011). Disclosure would reveal internal business decisions and financial information, could harm Northern, and could result in a competitive disadvantage to Northern, ultimately to the detriment of ratepayers. Further, there is no indication that disclosure would inform the public about the workings of the Commission. In balancing the interests of Northern in protecting information with the public's interest in disclosure, we find that the privacy interests in non-disclosure outweigh the public interest in disclosure and, therefore, we grant Northern's motion.

Consistent with Puc 203.08(k), our grant of this motion is subject to our on-going authority, on our own motion, on the motion of Staff or of any member of the public, to reconsider our determination.

Based upon the foregoing, it is hereby

ORDERED, that Northern Utilities, Inc.'s entry into the proposed Precedent Agreements with Portland Natural Gas Transmission System, Enbridge Gas Inc., and TransCanada Pipelines Limited, respectively, for a firm natural gas pipeline transportation path, from Dawn, Ontario, to Granite State Gas Transmission, Inc., as part of the Westbrook Xpress Phase III project, is APPROVED; and it is

FURTHER ORDERED, that the Settlement Agreement between Northern, Commission Staff, and the Office of the Consumer Advocate is APPROVED; and it is

FURTHER ORDERED, that the motion for confidential treatment of certain information included in the Settlement Agreement and data requests attached to the Settlement Agreement is APPROVED; and it is

FURTHER ORDERED, that pre-service and cancellation costs associated with the Precedent Agreements accrued as of the date of this Order and for which the Company is liable, are reasonable and appropriately recoverable through the Northern's rates; and it is

FURTHER ORDERED, that recovery of prudent costs associated with the Precedent Agreements, other than pre-service and cancellation costs covered above, will be addressed through Northern's annual cost of gas filings; and it is

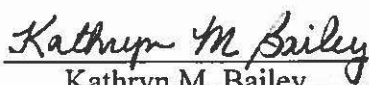
FURTHER ORDERED, that Northern Utilities, Inc. will monitor and evaluate the prudence of continuing with or terminating any or all of the Precedent Agreements at certain decision points outlined in Northern's response to Staff Data Requests 4-2 and 4-3 in this proceeding, or in light of any new information or change in circumstances. The prudence of the Company's decisions to continue with or terminate any of the Precedent Agreements will be evaluated in light of existing circumstances known to Northern at each decision point. To the extent that the Company is found to have acted reasonably and prudently in incurring costs associated with the Precedent Agreements, such costs will be recoverable through Northern's rates; and it is

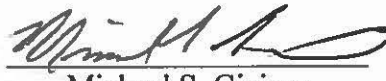
FURTHER ORDERED, that decision points include, but are not limited to, unfavorable regulatory decisions, a material increase in actual or projected project costs, and material changes in cost allocation due to decisions or actions of the transporter and/or other shippers. Northern shall inform the Commission of regulatory approvals related to the projects and/or material changes in actual and projected costs the Company would be responsible for under the Agreements; and it is

FURTHER ORDERED, that Northern will not waive the conditions precedent under the Portland Natural Gas Transmission System and Enbridge Precedent Agreements that allow it to


terminate those Agreements prior to November 30, 2019, without liability to Northern unless the Company receives approval of the Agreements in a form acceptable to the Company of its respective petitions from both the New Hampshire and Maine Public Utilities Commissions.

By order of the Public Utilities Commission of New Hampshire this nineteenth day of November, 2019.


Kathryn M. Bailey
Commissioner


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Commissioner

Attested by:


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