

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DA 07-047, DG 07-034, DA 06-060, and DA 04-021

EnergyNorth Natural Gas, Inc. d/b/a KeySpan Energy Delivery New England

Motions for Confidential Treatment

Order Approving Motions

ORDER NO. 24,842

April 4, 2008

In this order we rule on various motions for protective order and confidential treatment filed by EnergyNorth Natural Gas, Inc. d/b/a KeySpan Energy Delivery New England (EnergyNorth or the Company). We do not rule here on the reasonableness or prudence of the affiliate agreements and the gas supply agreements to which the motions relate. As any issue that may arise under the agreements may be addressed in another docket or through the opening of a new docket, we will not open an investigation of the agreements at this time; instead, we direct that these dockets be closed.

DA 04-021

On February 26, 2004, EnergyNorth filed an agency agreement and a management services agreement dated as of February 4, 2004 between Northeast Gas Markets LLC (“NEGM”), EnergyNorth and a number of other local distribution companies (LDCs), among them both affiliates and non-affiliates of EnergyNorth. Since NEGM is an affiliate of EnergyNorth, the Company was required to file the agreements with the Commission pursuant to RSA 366:3. EnergyNorth explained that under the agreements, NEGM would act as agent and perform management services for the Company and the other LDCs with respect to the importation of natural gas from Western Canada under gas sales agreements between the

EnergyNorth and BP Canada Energy Company and EnergyNorth and Nexen Marketing.¹ Based on a competitive bid process, NEGM was selected as the winning bidder on price and non-price factors.

Accompanying the filing was EnergyNorth's motion for confidential treatment of certain information included in the filing. According to EnergyNorth, the price stated in the management services agreement is a negotiated rate that NEGM charges each of the LDC parties. However, EnergyNorth stated that because NEGM's fully loaded cost to provide this service is lower than the market rate, the price to be paid by EnergyNorth will be the fully loaded cost of NEGM to provide the service as required by N.H. Code Admin. Rules Puc 2105.09(a)(3). Exhibit A attached to EnergyNorth's filing is a memorandum from NEGM dated February 9, 2004 disclosing the detailed calculations involved in demonstrating the rationale for the reduced price to EnergyNorth. The Company requested confidential treatment of (1) the quantitative information in Exhibit A, (2) the description of the monthly fee paid to NEGM by the other contracting parties under the management services agreement, and (3) the pricing provisions of the gas sales agreements attached to the agency agreement.

In support of its motion, EnergyNorth stated that it and the other parties negotiated the price provisions in the gas sales agreements pursuant to a competitive, public bid process. EnergyNorth further stated that the gas sales agreements, the management services agreement and Exhibit A to the filing require EnergyNorth to treat the pricing terms as strictly confidential

¹ Attached to the agency agreement were gas sales agreements with BP Canada Energy Company and Nexen Marketing the form of which was applicable to each of the LDCs.

and to seek protective treatment in any Commission proceeding. Finally, EnergyNorth stated that the information pertaining to the agreement between it and NEGM contains confidential, commercial, and financial information detailing the price offered for a competitively marketed service and public disclosure of such information would jeopardize the ability of the parties to enter into future arrangements and thus be financially harmful to both EnergyNorth and its customers. For the reasons set forth below, we grant the motion.

The Right-to-Know Law provides each citizen with the right to inspect all public records in the possession of the Commission. *See* RSA 91-A:4, I. The statute contains an exemption, invoked here, for “confidential, commercial, or financial information.” RSA 91-A:5, IV. Our applicable rule, N.H. Code Admin. Rules Puc 203.08, is designed to facilitate the implementation of the statute as it as been interpreted by the courts.

Whether information is confidential is determined objectively, as opposed to the subjective expectations of the party generating it. *Union Leader Corp. v. New Hampshire Housing Fin. Auth.*, 142 N.H. 540, 553 (1997). Except when an exemption is plainly established by RSA 91-A, a balancing test is used to determine whether commercial or financial information is confidential such that non-disclosure is justified. *Id.* at 555. The test balances the benefits of public disclosure against the benefits of non-disclosure. *Id.* Disclosure must serve the purpose of informing the public about the activities of government. *Lamy v. New Hampshire Pub. Util. Comm’n*, 152 N.H. 106, 111 (2005).

The motion states that the parties to the BP Canada Energy Company and Nexen Marketing gas supply agreements agreed among themselves to protect the confidentiality of the pricing terms, but the motion does not discuss the underlying, substantive reasons for granting confidential treatment to those terms. In ruling on a motion for confidential treatment, we are

not bound by the terms agreed to by the contracting parties. We do, however, have 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. In some circumstances, we might decide that pricing information is so old that it cannot reasonably be expected to adversely affect ratepayer interests. That is not the situation in this instance.

We are not often asked to protect information in affiliate agreements and we are reluctant to grant confidential treatment to such information except for good reason. In this case, we recognize that numerous consortium members served by the agency and management services agreement are not affiliated with EnergyNorth and public disclosure of the competitively determined fee to manage the importation of natural gas may adversely affect the legitimate commercial interests of the parties to the agreement and, in turn, the customers of the regulated LDCs . Furthermore, we also conclude that information regarding the calculation comparing the competitive price procured by NEGM to NEGM's fully loaded cost of providing service to EnergyNorth should be protected inasmuch as disclosure could likewise adversely affect legitimate commercial interests. Accordingly, we conclude that the balance should be struck in favor of non-disclosure. Nevertheless, we stress that in this situation the Commission's express reservation of a right to reexamine this determination upon public request is significant, inasmuch as the public's substantial interest in discerning how vigilant the Commission is in policing transactions between utilities and their affiliates.

DA 07-047

On April 9, 2007, EnergyNorth filed a letter agreement renewing for a period ending March 31, 2012 the agency agreement and management services agreement initially filed in DA 04-021.² The renewal agreement stated that the previous gas sales arrangements involving BP Canada Energy Company and Nexen Marketing (“Boundary 3” gas supply arrangements) expired on March 31, 2007, and EnergyNorth and the other LDCs had or would enter into replacement (“Boundary 4”) gas supply arrangements involving BP Canada Energy Company. Attached to the renewal agreement was a base contract for the sale and purchase of natural gas between EnergyNorth and BP Canada Energy Company dated as of July 1, 2006. The renewal agreement did not include any price terms but the Company states that to the extent the negotiated rate for the LDC participants is greater than the fully loaded cost of NEGM to provide the service, the rate charged to EnergyNorth is the at-cost rate required by the Commission’s affiliate transactions rules. According to EnergyNorth, the renewal agreement was not subject to a competitive bidding process in light of NEGM’s successful bid for the management services agreement filed in DA 06-060, described below, and NEGM’s well documented expertise in representing the interests of a consortium of Northeast LDCs regarding Canadian supplies.

On April 19, 2007, EnergyNorth filed a motion for confidential treatment regarding the July 1, 2006 gas supply contract between EnergyNorth and BP Canada Energy Company. In support of its motion, EnergyNorth stated that the contract contains the price EnergyNorth has agreed to pay for gas to serve its customers and the terms of providing the gas, which constitutes confidential commercial information that is exempt from public disclosure under RSA 91-A.

² According to the Company, all but one of the LDC participants in the DA 04-021 agreements entered into a similar renewal agreement.

The Company noted that the information is similar to that for which the Commission has granted confidential treatment in numerous cost-of-gas and other proceedings involving the Company.

EnergyNorth also maintained that the information for which it seeks confidential treatment constitutes trade secrets and should be protected as confidential commercial information. EnergyNorth asserted that it does not disclose the information to anyone outside of its corporate affiliates and their representatives. Finally, EnergyNorth contended that release of the information that it seeks to protect would likely result in a competitive disadvantage to EnergyNorth resulting in less advantageous or more expensive gas supply or capacity contracts because suppliers possessing the confidential information would be aware of EnergyNorth's expectations regarding gas supply and capacity costs and other contract terms and would be unlikely to propose to supply such goods and services on terms significantly more advantageous to the Company. EnergyNorth predicted that if it were to receive less favorable agreements due to public disclosure, customers would ultimately bear the burden of the increased costs.

For the same reasons discussed above in connection with the pricing terms of the BP Canada Energy Company and Nexen Marketing gas supply agreements in DA 04-021, we will grant the motion as to the pricing and related terms of the July 1, 2006 gas supply contract between EnergyNorth and BP Canada Energy Company.

DA 06-060

On April 17, 2006, EnergyNorth filed a management services agreement dated April 7, 2006 between NEGM, Alberta Northeast Gas Limited (ANE), EnergyNorth and a number of other LDCs, both affiliates and non-affiliates. The agreement was filed with the Commission pursuant to RSA 366:3. ANE is a Canadian company formed for the purpose of exporting

natural gas from Canada on behalf of EnergyNorth and the other LDCs.³ Under the management services agreement, NEGM is to implement and administer the transactions governed by certain transportation agreements, gas sales agreements, back to back agreements, bridging agreements and other designated gas agreements (ANE II Project Agreements) and is to be paid a negotiated, market-based monthly fee by EnergyNorth and the other LDCs. Notwithstanding this provision, EnergyNorth states that in accordance with the Commission's affiliate transactions rules, to the extent NEGM's fully loaded cost of providing the service to EnergyNorth is less than the negotiated rate, the Company is charged the NEGM at-cost rate. The management services agreement has a primary term expiring on November 1, 2016. EnergyNorth states that NEGM was selected as the winning bidder on price and non-price factors after a competitive bidding process.

Accompanying the filing was a motion for confidential treatment of certain affiliate agreement pricing information, namely, the operations demand charge used in the calculation of the monthly fee to be paid to NEGM. On May 18, 2006, EnergyNorth filed an amended motion, asserting that the pricing information is confidential business information which, if it became public, could result in financial harm to EnergyNorth and its customers. EnergyNorth asserted that it does not disclose the pricing information to anyone outside of its corporate affiliates and the other parties to the affiliate agreement. If necessary, EnergyNorth offered to submit an affidavit supporting the confidential nature of the information and the damage that could be done to EnergyNorth and its customers if the information were made public.

³ The Brooklyn Union Gas Company, an affiliate of EnergyNorth's, owns 33.4 percent of ANE. See Appendix 3, page 3, of the joint petition for approval of stock acquisition and other regulatory authorizations filed by National Grid plc, National Grid USA and EnergyNorth in Docket No. DG 06-107.

The Company went on to assert in the amended motion that release of the pricing information is likely to result in competitive disadvantage for EnergyNorth and the other LDCs in the form of less advantageous or more expensive management services. According to the Company, other management service providers which possessed information regarding the pricing arrangements under the affiliate agreement would be aware of EnergyNorth's expectations regarding such services and would be unlikely to propose terms significantly more advantageous to EnergyNorth. The Company further maintained that the affiliate agreement includes some LDCs not affiliated with the Company and therefore the pricing provisions reflect an arm's length arrangement and would disclose to other providers of the services offered by NEGM the pricing terms that are acceptable to the Company and the other LDCs.

For the same reasons discussed above in connection with the monthly fee paid by the other LDCs to NEGM in DA 04-021, we will grant the motion. Legitimate commercial interests of NEGM are potentially adversely affected by disclosure of such information and such information does not appear to shed any light on the Commission's activities.

DG 07-034

On July 11, 2007, EnergyNorth filed a motion for protective order and confidential treatment regarding the Tenaska and Transgas contracts which were filed with the Commission pursuant to *EnergyNorth Natural Gas, Inc. dba KeySpan Energy Delivery New England*, Order

No. 24,323 (2004).⁴ The Tenaska contract is a letter agreement dated as of April 30, 2007 between EnergyNorth, Tenaska Gas Storage, LLC and Tenaska Marketing Ventures providing for storage refill supplies. The Transgas contract is an agreement between KeySpan Corporate Services, LLC on behalf of EnergyNorth and its affiliated New England LDCs and Transgas, Inc. providing for LNG transportation service to the LDCs for the period April 1, 2007, through October 31, 2007. The agreement stated that KeySpan Corporate Services, LLC had issued a request for proposals and that Transgas, Inc. was the winning bidder. Transgas, Inc. is an affiliate of EnergyNorth's.⁵

In support of its motion, EnergyNorth stated that the contracts contain pricing information that constitute confidential commercial information which is exempt from public disclosure under RSA 91-A. The Company stated that the information is similar to that for which the Commission has granted confidential treatment in numerous cost-of-gas and other proceedings involving the Company. In addition, EnergyNorth stated that the agreement between it and Transgas obligates EnergyNorth to keep all pricing information confidential. EnergyNorth also contended that the pricing information constitutes trade secrets and should be protected as confidential commercial information. EnergyNorth asserted that it does not disclose the information to anyone outside of its corporate affiliates and their representatives.

Finally, EnergyNorth maintained that release of the pricing information would likely result in a competitive disadvantage to EnergyNorth, resulting in less advantageous or more expensive gas supply or capacity contracts, because suppliers possessing the pricing information

⁴ The settlement agreement approved in Order No. 24,323 required EnergyNorth to file with the Commission copies of all new gas supply, transportation, storage, and asset management contracts.

⁵ See Appendix 3, page 6, of the joint petition for approval of stock acquisition and other regulatory authorizations filed by National Grid plc, National Grid USA and EnergyNorth in Docket No. DG 06-107.

would be aware of EnergyNorth's expectations regarding gas supply and capacity costs and other contract terms and would be unlikely to propose to supply such goods and services on terms significantly more advantageous to the Company. EnergyNorth predicted that if it were to receive less favorable agreements due to public disclosure, customers would ultimately bear the burden of the increased costs.

For the same reasons discussed above in connection with the pricing terms of the BP Canada Energy Company and Nexen Marketing gas supply agreements in DA 04-021, we will grant the motion as to the pricing and related terms of the Tenaska contract. Regarding the Transgas contract, no non-affiliated companies are parties to the contract. However, since KeySpan Corporate Services, LLC issued a public request for proposals, if Transgas' winning bid is publicly disclosed, it is conceivable that in future bidding situations non-affiliated bidders might obtain a competitive advantage over the Company for the reasons set forth by the Company in its motion. We conclude in the present posture of the case that the balance should be struck in favor of non-disclosure.

Based upon the foregoing, it is hereby

ORDERED, the motions for protective order and confidential treatment described above are granted. Consistent with past practice, the confidential treatment provisions of this order are subject to the on-going rights of the Commission, on its own motion or on the motion of Staff, any party or any other member of the public, to reconsider in light of RSA 91-A, should circumstances so warrant.

DA 07-047
DG 07-034
DA 06-060
DA 04-021

By order of the Public Utilities Commission of New Hampshire this fourth day of April,
2008.

Thomas B. Getz
Chairman

Graham J. Morrison
Commissioner

Clifton C. Below
Commissioner

Attested by:

Debra A. Howland
Executive Director & Secretary