

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DG 14-380

**LIBERTY UTILITIES (ENERGYNORTH NATURAL GAS) CORP.
d/b/a LIBERTY UTILITIES**

Petition for Approval of Long-term Firm Transportation Agreement

Order on Motion to Compel Discovery

ORDER NO. 25,789

June 5, 2015

In this order, we grant in part and deny in part a motion to compel filed by Pipeline Awareness Network of the Northeast related to certain data requests propounded on Liberty Utilities (EnergyNorth Natural Gas) Corp. d/b/a Liberty Utilities.

I. BACKGROUND

On January 21, 2015, we issued an Order of Notice, opening this proceeding to consider a petition of Liberty Utilities (EnergyNorth Natural Gas) Corp. d/b/a Liberty Utilities (hereinafter, EnergyNorth) for approval of a 20-year firm transportation agreement (Precedent Agreement) with Tennessee Gas Pipeline Company, LLC (TGP), for capacity to deliver natural gas on the proposed Northeast Energy Delivery (NED) pipeline project. On February 19, 2015, we approved an initial procedural schedule, which permitted discovery on EnergyNorth's petition by Commission Staff, the Office of the Consumer Advocate (OCA), and an intervenor, Pipeline Awareness Network of the Northeast (PLAN). In Order No. 25,767 (March 6, 2015), we granted PLAN's petition to intervene, but limited its participation to issues related to the interests of its members who are EnergyNorth customers in the prudence, justness, and reasonableness of the Precedent Agreement. *Id.*

On May 1, 2015, PLAN filed a motion to compel EnergyNorth's responses to data requests PLAN 2-26 through PLAN 2-32 (Motion). PLAN 2-26 seeks information and documents related to pre-filing activities of a Local Distribution Company (LDC) Consortium, within which EnergyNorth negotiated the terms and conditions of the Precedent Agreement. PLAN 2-27 seeks information and documents related to EnergyNorth's analysis of the environmental impacts of the NED pipeline project as well as those of the other "competing" pipeline projects in New England. PLAN 2-28 through PLAN 2-32 seek information and documents related to the investment in the NED pipeline project by one or more affiliates of EnergyNorth. The Order of Notice in this proceeding referred to this investment and an associated Algonquin Power & Utilities Corp. (APUC) press release dated November 24, 2014. PLAN asserts that the disputed data requests are "designed to elicit, consistent with the broad discovery allowed by the Commission, relevant information relating to whether the Company reasonably investigated [the Precedent Agreement]." Motion at 3, citing Order of Notice at 3.

EnergyNorth filed a timely objection to the Motion (Objection). EnergyNorth contends that none of the disputed data requests is "relevant to the Commission's consideration of whether [the Precedent Agreement] is in the public interest, and thus PLAN's motion should be denied." Notwithstanding its objections, Liberty responded to parts of PLAN 2-26 and PLAN 2-28, as well as to PLAN 2-32. Motion, Appendix B. Liberty's Objection also provided responsive information related to PLAN 2-27. *See* Objection at 4-5 ("While the Company initially asserted an objection to PLAN's request, it has determined that it has no responsive documents to this request.").

II. COMMISSION ANALYSIS

To prevail on its Motion, PLAN must demonstrate that its data requests seek facts that are admissible or are reasonably calculated to lead to discovery of admissible evidence. *Public Service Co. of N.H.*, Order No. 25,646 (April 8, 2014) (citations omitted). “Discovery is not the time to argue policy or advocate for the final result but merely to seek and respond to factual matters that may lead to admissible evidence.” *City of Nashua*, Order No. 24,485 at 4 (July 8, 2005). Data requests are a “vehicle for developing factual information.” *Freedom Ring Communications, LLC d/b/a Bay Ring Communications*, Order No. 24,760 at 2 (June 7, 2007).

In ruling on a motion to compel, we “enjoy ‘broad discretion in the management of discovery.’” *Public Service Co. of N.H.*, Order No. 24,342 at 23 (June 29, 2004) (quoting *YYY Corp. v. Gazda*, 145 N.H. 53, 59 (2000)). We weigh “the effort needed to gather [the requested information], the availability of the information from other sources, and other relevant criteria.” *Public Service Co. of N.H.*, Order 25,595 at 2-3 (Nov. 15, 2013); *City of Nashua*, Order No. 24,485 at 4. If we perceive of no circumstance in which the requested data would be relevant, we will deny a request to compel its production.

Based on these standards, we grant in part and deny in part PLAN’s motion to compel EnergyNorth’s responses to the disputed data requests for the reasons described in the following paragraphs.

A. PLAN 2-26

PLAN 2-26 is as follows:

With respect to the LDC Consortium please provide the following information:

- a) all documentation and other materials relating to correspondence with and documentation received from the LDC Consortium with respect to the KM Pipeline and/or preparation of filing in this proceeding.
- b) the identity of the 10 individuals in the working group from the various member LDC Consortium as referenced in PLAN 1-3 b.

c) a complete description of the LDC Consortium negotiation process as referenced in PLAN 1-9. Please provide any documentation relating to the negotiations including minutes of meetings, handouts and notes.

PLAN contends the requested information is relevant to this proceeding, because EnergyNorth's filing includes discussion of the company's participation in and reliance on the LDC Consortium's pre-Precedent-Agreement-execution activity. PLAN also refutes the Company's objection based on privilege, the burden, and the breadth of production, contending that PLAN's status as an intervenor entitles it to the requested information.

EnergyNorth's initial objection to PLAN 2-26 stated:

a) through c): Liberty Utilities (EnergyNorth Natural Gas) Corp. objects on the basis that the request is overly broad and unduly burdensome and seeks voluminous documents to the extent that it seeks all documents received by EnergyNorth as a member of the LDC Consortium with respect to the pipeline that it is the subject of the Precedent Agreement and/or the preparation of this filing.

The Company further objects on the grounds that the request seeks production of information regarding negotiation of the Precedent Agreement that is not relevant to the Commission's determination of whether the proposed transaction is in the public interest. The purpose of this docket is to determine whether EnergyNorth's Precedent Agreement with Tennessee Gas Pipeline Company, LLC as executed is in the public interest. The particulars of the negotiation that led to the final Precedent Agreement are not relevant to the Commission's determination of whether the Precedent Agreement is in the public interest. *See Pub. Serv. Co. of N.H.*, Order No. 25,174 (DE 10-195); *Pub. Serv. Co. of N.H.*, Order No. 24,895 (DE 08-077); *City of Nashua*, Order No. 24,671 (DW 04-048).

Notwithstanding its initial objection, EnergyNorth provided a partial response to subpart (b) of PLAN 2-26. Motion, Appendix B:

b) Subject to and notwithstanding the above objection, EnergyNorth answers as follows: Representatives from the following utilities developed the pricing forecast on behalf of the LDC Consortium: Connecticut Natural Gas, Eversource, National Grid, NiSource, Unitil and Westfield Gas and Electric.

Through its Objection to PLAN's Motion, EnergyNorth argues that the request "is not likely to lead to the discovery of admissible evidence as the Commission's inquiry is not focused on the

back-and-forth of the negotiations between the contracting parties (here, EnergyNorth and Tennessee), but rather the final deal that was struck [between them].” Objection at 4.

The Commission has a well-established policy of not compelling the production of data related to negotiations that occurred before an agreement is filed with the Commission for review. In *Public Service Co. of N.H.*, Order No. 24,310 (April 16, 2004), the Commission refused to compel the production of documents related to negotiations between an electric utility and the contractor it selected to build a wood yard (in connection with plans to convert a coal-fired boiler to one capable of burning wood). The Commission ruled that, as to such confidential and competitively sensitive negotiations, and “[i]n contrast to the results of any such negotiations, we can conceive of no circumstances in which we would deem the information [to be] admissible.” *Id.* at 230; *see also City of Nashua*, Order No. 24,654 (August 7, 2006), *reh’g denied*, Order No. 24,671 (Sept. 22, 2006). In *Public Service Co. of N.H.*, Order No. 25,174 (November 24, 2010), the Commission denied a motion to compel the utility’s production of information related to the negotiations giving rise to a power purchase agreement that was the subject of the proceeding.

Likewise, in *Verizon New England, Inc. et al.*, Order No. 24,767 (June 22, 2007), the Commission denied a motion to compel a utility to produce information related to the negotiations that preceded the actual agreement of the joint petitioners. “It is an established principle that the Commission will not compel the discovery of information simply to shed light on the thinking of parties that enter into contracts subject to our review.” *Id.* It is apparent that PLAN 2-26(a) and (c) seek precisely the type of information we have previously ruled is outside the scope of discovery. Consequently, we deny PLAN’s motion to compel the production of that information.

B. PLAN 2-27

PLAN 2-27 is as follows:

In the technical session of March 17, 2015, Mr. DaFonte discussed the relative environmental impacts of the KM Pipeline with respect to the other competing pipeline proposals. Please provide any analyses or other documentation that EnergyNorth considered, prepared, and/or reviewed with respect to the environmental impacts of the KM pipeline and/or other pipelines proposed in New England, including the C2C and Spectra proposals.

PLAN asserts that the requested information and documents are “both relevant and subject to further inquiry.” Motion at 7. PLAN supports that assertion by referring to the Precedent Agreement, which considers “environmental implications.” Motion at 7 (citing Confidential Precedent Agreement at Bates 51, 98-99).

EnergyNorth’s initial objection to PLAN 2-27 stated:

The Company objects on the basis that the request seeks information that is not relevant to the proceeding or reasonably calculated to lead to the discovery of admissible evidence. The purpose of this docket is to determine whether EnergyNorth’s Precedent Agreement with Tennessee Gas Pipeline Company, LLC is in the public interest, not an examination of environmental impacts associated with the construction of the NED natural gas pipeline project.

The Company further objects on the basis that PLAN’s intervention is limited to “the interests of its EnergyNorth-customer members in the prudence, justness and reasonableness of the Precedent Agreement and its associated costs, to EnergyNorth and its customers.” The Commission expressly denied PLAN’s “...intervention on behalf of landowners along the proposed TGP route who are not EnergyNorth customers. Only EnergyNorth-customer members possess “rights, duties, privileges, immunities or other substantial interests [that] may be affected by the proceeding.” RSA 541-A:32, I (b). It will be EnergyNorth customers who will bear the costs of the Precedent Agreement if the Commission approves it. PLAN’s landowner members possess no such direct interest or cost responsibility; their interests, while important, are not pertinent to the Commission’s determinations in this proceeding. Consequently, it is likely that the participation of PLAN landowner members would “impair the orderly and prompt conduct of [these expedited] proceedings.” RSA 541-A:32, II. To ensure an orderly and focused proceeding, we limit PLAN’s participation to the interests of its EnergyNorth-customer members in the prudence, justness and reasonableness of the Precedent Agreement and its associated costs, to EnergyNorth and its customers.” Order No. 25,767 at 4.

In its Objection, EnergyNorth reiterates its initial objection and cites our order on PLAN's intervention:

[t]his proceeding does not concern and will not result in any approval of, or permissions for, siting or construction of TGP's NED project. Those matters are pending determination by other regulatory agencies, including the Federal Energy and Regulatory Commission (FERC). Order No. 25,767 at 3.

Objection at 5-6. EnergyNorth also refutes PLAN's assertion that the Precedent Agreement has "environmental implications." Objection at 6. EnergyNorth states that the "Reservation Rate Adjustment" referred to on Bates pages 51, 98, and 99 of the Precedent Agreement relates to capital cost overruns and underruns and defines, for the purpose of parties' contractual obligations, "actual project costs" and "estimated project costs" by reference to environmental and other expenses. EnergyNorth concludes that the Precedent Agreement "has nothing to do with environmental issues" (Objection at 7), and that the Commission should deny PLAN's request to produce the information requested by PLAN 2-27. Notwithstanding its objections, EnergyNorth also states, since its initial objection, "it has determined that it has no responsive documents to this request." Objection at 5.

Although EnergyNorth may have no documents responsive to PLAN 2-27, we disagree with its objection. We find that assessment of the environmental impacts of the NED pipeline is relevant to, or likely to lead to the discovery of relevant information about, the justness, reasonableness, and/or prudence of the cost of the new pipeline capacity. *See Confidential Attachment FCD-2, Precedent Agreement at Bates 43 and 51; Exhibit B to Precedent Agreement (Negotiated Rate Agreement) at Bates 94-95, paragraph 1.a; and Appendix A (to Exhibit B to*

Precedent Agreement) at Bates 98-100.¹ Therefore, EnergyNorth should provide a response to PLAN 2-27, even if the response is to confirm the statement in its objection that it has no responsive documents.

C. PLAN 2-28 through PLAN 2-32

EnergyNorth appears to have fully responded to PLAN 2-28 (a) and (b), and PLAN's Motion makes no specific argument that these responses are not sufficient.

PLAN 2-28 (c) through (g) are as follows:

In its Order of Notice, the NHPUC stated: "Although not mentioned in the filing, EnergyNorth's affiliate, Algonquin Power and Utilities Corp ("APUC") announced on November 24, 2014, that it plans to invest in the development of the NED pipeline project through Liberty Utilities (Pipeline and Transmission) Corp., a wholly owned subsidiary of APUC and Kinder Morgan Operating L.P." The Order of Notice referenced the Company Release (11/24/15) at link:

<http://investors.algonquinpower.com/file.aspx?IID=4142273&FID=26297428>. With respect to the NHPUC statement and the Company Release, please provide the following:

...

- c) Any and all agreements between Liberty Utilities (Pipeline & Transmission) Corp and/or APUC and/or Northeast Expansion LLC, and/or Kinder Morgan and/or any of their subsidiaries or affiliates with respect to pipeline capacity including the agreement (s) referenced in the Company Release, as well as any joint venture, development services agreement or other documentation related to the development, construction and ownership of the NED project.
- d) A listing of the local distribution companies referenced in the Company Release "with contracts" with the KM pipeline or that are in discussions regarding contracts for pipeline capacity with a description of their interests and a copy of each contract.
- e) the other customers or prospective customers referenced in the Company Release with contracts for pipeline capacity and a copy of each contract.
- f) An explanation of how this pipeline will "help ease constraints on natural gas supply in the northeast U.S. and help ensure much needed reliability to the power generation grid."
- g) The Operating Agreement for Northeast Expansion, LLC.

¹ Certain terms of the Precedent Agreement are protected from disclosure to the public under RSA 91-A:5, IV. See Secretarial Letter (February 19, 2015) (granting EnergyNorth's motion for confidential treatment) and Secretarial Letter (March 25, 2015) (accepting EnergyNorth's revised redactions).

PLAN 2-29 states:

With reference to the Company Release, please explain the circumstances under which APUC will increase its 2.5% interest in Northeast Expansion LLC to “up to 10%” as stated therein.

PLAN 2-30 states:

Please provide all documentation, correspondence and communications by and between Affiliated Entities (as defined above) regarding participation in the development of the Kinder Morgan NED natural gas pipeline project. Include all submittals (including without limitation any memorandum, risk assessments, power point or related submittals) to and approvals by any of the Affiliated Entities’ Board of Directors or Members.

PLAN 2-31 states:

If not previously provided, please provide any documentation regarding APUC’s strategic initiative to “connect our generation and distribution businesses across the utility value continuum” as quoted in the Company Release. Include any documentation prepared for or prepared by Ian Robertson with respect to the NED project and/or the strategic initiative.

PLAN 2-32 states:

If not previously provided, please [provide] any documentation by and between APUC and/or Liberty (Pipeline and Transmission) Corp. and/or Northeast Expansion, LLC, with Liberty Utilities (EnergyNorth Natural Gas) Corp. and Liberty Energy Utilities (New Hampshire) Corp regarding participation in the development of Kinder Morgan’s proposed NED pipeline.

Generally, PLAN contends that requests PLAN 2-28 through PLAN 2-32 seek information concerning the corporate relationships and “interbusiness documentation” among EnergyNorth and other corporate entities. Motion at 7-8. PLAN asserts these data requests seek relevant information, noting in support that the Commission’s Order of Notice referenced a press release related to the investment in the NED pipeline project by an EnergyNorth affiliate. *Id.* at 8. PLAN reasons it is “allowed to inquire about the interrelationships among the parties, the various parties’ contributions or considerations in entering the Precedent Agreement (or variation

thereof)[,]” because “evaluating whether EnergyNorth undertook an arm’s length negotiation or acted at the behest of its parent or some other affiliated entity is certainly relevant.” *Id.*

EnergyNorth’s initial objection to PLAN 2-28 (c) through (g) was as follows:

The Company objects on the basis that the requests ... seek information that is not relevant to the proceeding or reasonably calculated to lead to the discovery of admissible evidence to the extent it seeks contracts between Algonquin Power & Utilities Corp. and/or Liberty Utilities (Pipeline and Transmission) and third parties, or information about press releases or other business dealings of these entities which are not the subject of this docket or under the regulation of the Commission. The purpose of this docket is to determine whether EnergyNorth’s Precedent Agreement with Tennessee Gas Pipeline Company, LLC is in the public interest, not an examination of APUC’s or Liberty Utilities (Pipeline and Transmission) Corp.’s initiatives. The Company further objects on the basis that PLAN’s intervention is limited to “the interests of its EnergyNorth-customer members in the prudence, justness and reasonableness of the Precedent Agreement and its associated costs, to EnergyNorth and its customers.” PLAN’s inquiry in this request regarding APUC’s initiatives is also beyond the scope of its limited intervention.

Energy North’s initial objections to PLAN 2-29 through 2-32 invoked the same or similar objections as PLAN 2-28. EnergyNorth responded to PLAN 2-32, however, stating, “Subject to and notwithstanding this objection, there are no documents responsive to this request.”

In its Objection to the Motion, EnergyNorth characterizes those data requests as seeking “a wide range of documents regarding APUC’s investment in Northeast Expansion, LLC, and its strategic plans regarding generation and distribution activities.” Objection at 7. Because the data requests are “focused on the development of the NED pipeline and the corporate affairs of Northeast Expansion[,], LLC,” they seek information that is not relevant to the Commission’s review of the Precedent Agreement. Objection at 8. In support of its objection, EnergyNorth states, “Northeast Expansion, LLC[,], is not a party to this docket, and is not a counterparty to the Precedent Agreement” between the Company and Tennessee Gas Pipeline Company, LLC, “which has no common ownership or affiliated interest with EnergyNorth and is solely owned by Kinder Morgan.” *Id.* In addition, EnergyNorth observes that the requests for information about

the relationship between EnergyNorth and its affiliates are not relevant to, or necessary for, the Commission's evaluation of the Precedent Agreement, because the Precedent Agreement is not an affiliate transaction, and the amounts paid by EnergyNorth to Tennessee will be subject to FERC approval and otherwise capable of a market-based analysis. *Id.*

The Commission has the power to investigate contracts between public utilities and their affiliates and to make determinations of whether an affiliate contract is just and reasonable. RSA 366:5. If an affiliate agreement is deemed unjust or unreasonable, the Commission may protect the public good by disallowing a utility's recovery from customers of payments under the affiliate contract. *Id.*; see *Appeal of Verizon New Eng., Inc.*, 153 N.H. 50, 65 (2005) (Commission may "make any reasonable order required for the public good when it determines that an affiliate contract or agreement is unjust or unreasonable").

The standard we apply in discovery matters is that parties are entitled to obtain information from other parties if the information is relevant to the proceeding or reasonably calculated to lead to the discovery of admissible evidence. Puc 203.09(b). Such information in the possession of a regulated utility is discoverable regardless of whether it was prepared by and/or relates to its affiliate or affiliates, and regardless of whether any such affiliate falls within the Commission's regulatory jurisdiction. *Verizon New England, Inc.*, Order No. 24,767 at 7 (June 22, 2007).

We disagree with EnergyNorth that there are no affiliate interests in play. EnergyNorth's ultimate parent, APUC, is investing in a pipeline on which EnergyNorth is contracting for capacity, and EnergyNorth is seeking approval of an agreement that would make it a customer of that same pipeline. If EnergyNorth was directed by its parent to oversubscribe to make the pipeline economically viable, that would be relevant to the issues before us. We thus grant in

part PLAN's Motion with respect to PLAN 2-28(c), but only to the extent that it requests documents memorializing one or more obligations of EnergyNorth to one or more of the named entities concerning the Precedent Agreement's terms and conditions. We otherwise deny the request to compel PLAN 2-28(c) through (g).

We agree with EnergyNorth that PLAN 2-28(d) through (g) and PLAN 2-29 are overbroad. The press release that is the subject of these questions was issued by APUC, not EnergyNorth, and PLAN fails to sustain its burden of proving how the information requested by these data requests are relevant to, or likely to lead to the discovery of relevant evidence bearing on, our determinations of whether the Precedent Agreement is just, reasonable and prudent. We thus deny PLAN's Motion on those requests.

We also deny PLAN's request to compel the company's response to PLAN 2-30 and PLAN 2-31. Those data requests are too broad or irrelevant or both. The Commission is not adjudicating "the development of the Kinder Morgan NED natural gas pipeline project" (PLAN 2-30), or "APUC's strategic initiative" in making its determinations on the justness, reasonableness and prudence of the Precedent Agreement. Consequently, we deny PLAN's Motion to compel responses to PLAN 2-30 and 2-31.

To the extent that PLAN 2-32 seeks documents provided to EnergyNorth by the other entities named in the question that relate to obligations of EnergyNorth to one or more of the named entities concerning the Precedent Agreement, we grant PLAN's Motion. If the Company interpreted this question differently in responding that it has no responsive documents, we require EnergyNorth to produce any documents consistent with our ruling here.

Based upon the foregoing, it is hereby

ORDERED, PLAN's motion to compel the Company's response to PLAN 2-26 is denied; and it is

FURTHER ORDERED, PLAN's motion is granted with respect to PLAN 2-27; and it is

FURTHER ORDERED, PLAN's motion as to PLAN 2-28 (a) and (b) are denied as moot; and it is

FURTHER ORDERED, PLAN's motion as to PLAN 2-28 (c) is granted but only as to documents memorializing one or more obligations of EnergyNorth to one or more of the named entities concerning the Precedent Agreement; and it is

FURTHER ORDERED, PLAN's Motion as to PLAN 2-28 (d) through (g), and PLAN 2-29 through PLAN 2-31 is denied; and it is

FURTHER ORDERED, PLAN's motion is granted as to PLAN 2-32, to extent that documents relate to obligations of EnergyNorth to one or more of the named entities concerning the Precedent Agreement.

By order of the Public Utilities Commission of New Hampshire this fifth day of June, 2015.



Martin P. Honigberg
Chairman



Robert R. Scott
Commissioner

Attested by:



Debra A. Howland
Executive Director