

STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

DG 10-017

ENERGYNORTH NATURAL GAS, INC. D/B/A NATIONAL GRID NH

Rate Case Filing

Order on Motions for Confidential Treatment and Waivers of Filing Requirements

ORDER NO. 25,119

June 25, 2010

I. BACKGROUND

On February 26, 2010, EnergyNorth Natural Gas, Inc. d/b/a National Grid NH (National Grid or Company) filed proposed rate schedules seeking an increase in its annual distribution revenues. Coincident with its filing, the Company requested waivers of certain filing requirements and for confidential treatment of some information about the compensation paid to its officers and directors.

On March 10, 2010, the Commission issued Order No. 25,081, which, among other things, granted the Company's motion for a waiver of the 30-day notice requirement of New Hampshire Code of Administrative Rules Puc 1203.02(d). The order noted that the Commission was not then ruling upon the Company's other pending motions.

At the pre-hearing conference in this docket the Company was asked whether the issues raised by its motion were addressed by the Commission's recent order on officer and director compensation for Public Service Company of New Hampshire (PSNH). *See Public Service Company of New Hampshire*, Order No. 25,037 (October 30, 2009). On April 23, 2010, National Grid submitted a letter stating that following its review of the Commission's previous order, it wished to maintain its motion without amendment. On May 3, 2010, the Office of

Consumer Advocate (OCA) filed a response to the Commission's inquiry regarding confidential treatment. On May 6, 2010, the Company responded to the OCA's letter, stating that the letter was an untimely objection to the motion for confidential treatment.

II. POSITIONS OF THE PARTIES AND STAFF

A. National Grid

1. Motion for Confidential Treatment

With its permanent rate case filing, the Company submitted information in response to the requirement of Puc 1604.01(a)(14) that the utility provide a list of officers and directors of the company and their compensation for the last two years. The Company contends that disclosing this information would result in an unwarranted invasion of the personal privacy of the persons appearing on the list. Therefore, the Company sought a protective order to keep the information confidential.

As noted, at the pre-hearing conference the Company was asked whether the Commission's order, *Public Service Company of New Hampshire*, Order No. 25,037 (October 30, 2009), affected the Company's request. By its letter of April 23, 2010, the Company contended that, unlike PSNH, it has not publicly disclosed the full annual salaries or total compensation for its officers and directors. Instead, it noted that through its Annual Report it has disclosed only those portions of officer and director compensation that are allocated to operations in New Hampshire. It contends that there is no means by which the total compensation of the officers and directors could be discerned from the disclosure of their New Hampshire allocation. As such, the Company contends that except as to the New Hampshire allocation, the officers and directors maintain their interests in the privacy of their compensation

information, and that those interests are not outweighed by the public's interest in further disclosure.

2. Motion for Waiver

National Grid sought waivers of: (1) certain provisions of Puc 1604.01(a)(25) that would require the utility to file duplicates of the information required by Puc 1604.01(a) on its parent entity; and (2) Puc 1604.07(a)(5) and Puc 1604.07(j) "to the extent that they require a separate schedule setting forth payroll figures categorized by Operation, Maintenance, Construction, Plant Removal, and other accounts related to payroll."¹

As to the motion to waive portions of Puc 1604.01(a)(25), the Company contends that the information about its parent company is not relevant to its rate request and that production of the information would be wasteful for all parties. Regarding the motion to waive Puc 1604.07(a)(5) and Puc 1604.07(j), the Company stated that payroll figures relating to Operations and Maintenance are provided in its cost-of-service exhibits. It argues, however, that it does not maintain separate payroll figures with respect to Construction and Plant Removal, and that requiring the production of such information would be burdensome. The Company also contends that based upon its experience in prior proceedings, it believes the information provided in its filing is sufficient to satisfy the needs of the parties and Staff.

B. OCA

1. Motion for Confidential Treatment

In its May 3, 2010 letter to the Commission, the OCA acknowledged that it had not objected to the Company's motion for confidential treatment, and stated its letter was intended as "comments on the Commission's inquiry and the Company's response thereto." In its letter, the

¹ National Grid also sought waiver of Puc 1203.02(d) which requires that notice of the Company's filing be given to customers within thirty days of the Company's original filing; this request was granted by Order No. 25,081 (March 10, 2010).

OCA disagreed with the Company's position on the confidentiality of its executive compensation information and argued that because the compensation is funded through rates paid by the Company's customers, and because Commission Staff reviews the compensation costs in determining whether proposed rates are just and reasonable, the public has an interest in the information. It further argued that the public interest in disclosure outweighed the privacy interests of the identified officers and directors.

2. Motion for Waiver

The OCA has not taken a position with regard to the Company's motion to waive the filing requirements.

C. Staff

1. Motion for Confidential Treatment

At the May 6, 2010 hearing on temporary rates in this docket, Staff stated that it had no position on the merits of the Company's motion for confidential treatment. *See* Transcript of May 6, 2010 Hearing on Temporary Rates at 31-32.

2. Motion for Waiver

During the pre-hearing conference in this docket, Staff stated that it agreed with the Company that information about its parent would be voluminous and not necessarily relevant to the issues presented in this case. *See* Transcript of April 8, 2010 Pre-Hearing Conference at 8. Staff, however, stated that it would reserve the right to request the information should it later be deemed relevant. *See* Transcript of April 8, 2010 Pre-Hearing Conference at 8. Staff took the same position with respect to the payroll expense information, noting that the information would be voluminous and that it was not, at that time, relevant for Staff's review. *See* Transcript of April 8, 2010 Pre-Hearing Conference at 8.

III. COMMISSION ANALYSIS

1. Motion for Confidential Treatment

Turning first to the letter submitted by the OCA which was styled as a “comment” but was effectively an objection, and the Company’s assertion that the OCA filing is untimely. While the OCA did not object to the initial motion, we did ask the Company for further comment. Consequently, we do not regard the OCA letter filed in response to the Company’s new submission as untimely, under the circumstances. Thus, the letter will be admitted. Furthermore, while the Company has requested the opportunity to respond should the letter be admitted, because we grant the Company’s request subject to certain minor conditions set out below, we perceive no benefit in further argument on the motion at this time. Accordingly, we deny the Company’s request.

As to the merits of the motion, the Commission’s rule on requests for confidential treatment, Puc 203.08, requires petitioners to: (1) provide the material for which confidential treatment is sought or a detailed description of the types of information for which confidentiality is sought; (2) reference specific statutory or common law authority favoring confidentiality; and (3) provide a detailed statement of the harm that would result from disclosure to be weighed against the benefits of disclosure to the public. Puc 203.08(b). In this case, National Grid has provided the information, which consists of information about the direct compensation of its officers and directors, and contends that it is exempt from public disclosure under RSA 91-A:5, IV because such disclosure would violate the privacy rights of the persons whose information is reported.

When presented with a request for confidential treatment, the Commission is obliged to observe relevant case law and Commission rules in determining whether the exemption applies.

Unitil Corporation and Northern Utilities, Inc., Order No. 24,014 (Sept. 22, 2009) at 2. With regard to claims of invasion of privacy through the disclosure of information such as personnel files, the New Hampshire Supreme Court has stated:

We engage in a three-step analysis when considering whether disclosure of public records constitutes an invasion of privacy under RSA 91-A:5, IV. First, we evaluate whether there is a privacy interest at stake that would be invaded by the disclosure. If no privacy interest is at stake, the Right-to-Know Law mandates disclosure.

Next, we assess the public's interest in disclosure. Disclosure of the requested information should inform the public about the conduct and activities of their government. Finally, we balance the public interest in disclosure against the government interest in nondisclosure and the individual's privacy interest in nondisclosure.

Lamy v. N.H. Pub. Utilities Commn., 152 N.H. 106, 109 (2005) (citations omitted). "The party resisting disclosure bears a heavy burden to shift the balance towards nondisclosure." *Id.*

Moreover, "[w]hether information is exempt from disclosure because it is private is judged by an objective standard and not by a party's subjective expectations. . . ." *Id.*

The Company asserts in its motion that public disclosure of this information would cause various forms of competitive harm to it by potentially resulting in discord among its employees, or between the employees and the Company, or by allowing competitors to understand the nature of the compensation offered to National Grid employees. The motion is premised upon the argument that "The salary information provided by the Company pursuant to [the rule] requires protection because the data produced is confidential and not publicly available, and its disclosure would constitute an unwarranted invasion of personal privacy." Motion at 1. Moreover, the statutory quotations from National Grid in support of its motion reference only personnel and other files whose disclosure would constitute an invasion of privacy, and make no reference to competitively sensitive or other "commercial, or financial information." *See* RSA 91-A:5, IV. The focus on the privacy interest of the individuals covered by its list was reaffirmed in National

Grid's letter of April 23, 2010. Accordingly, we will consider only the arguments asserted in the Company's motion and letter. *See* Puc 203.08(b)(2) (motions for confidential treatment shall "reference specific statutory or common law authority favoring confidentiality").

In addressing the first step of the relevant analysis, *i.e.*, whether disclosure would constitute an invasion of privacy, the Company argues that "there is a clear privacy interest in the salary information provided to the Commission." Motion for Protective Order and Confidential Treatment Regarding Compensation Information (Motion) at 2. According to the Company, this is so because it is the Company's practice to keep "in strict confidence" private personnel information, including materials and data specific to individual employees. *Id.* In other words, the individuals have a privacy interest because their information has not been disclosed.

Prior non-disclosure, while arguably relevant, is not proof of a privacy interest. Instead, it shows that whatever privacy interest there may be has not been abrogated by disclosure. Thus, despite the Company's argument, we must determine whether a privacy interest exists. "The privacy interest at stake concerns the individual's control of information about his or her person." *Lamy*, 152 N.H. at 110. As noted in *Lamy*, an individual's privacy interest increases when names may be tied to financial information. *Id.* In *Lamy*, the Supreme Court cited with approval *Sheet Metal Workers Local No. 9 v. U.S. Air Force*, 63 F.3d 994, 997 (10th Cir. 1995) where that court, in interpreting a request under the Federal Freedom of Information Act, noted a substantial privacy interest in personal identifying information, such as names and addresses, particularly where the names and addresses would be coupled with personal financial information. *See also Lambert v. Belknap County Convention*, 157 N.H. 375, 379 (2008) (noting that it is interpretively helpful to review decisions of other jurisdictions relating to acts similar to

our Right-to-Know law). The Circuit Court further concluded that the redaction of addresses alone, leaving the names and financial information, and thereby directly linking detailed financial information to particular projects and people, does not materially lessen the substantial privacy interest involved. *Sheet Metal Workers*, 63 F.3d at 997. In following this precedent, we conclude that the officers and directors of the Company have a privacy interest in their personally identifiable financial information.

Turning to the public interest involved, the Right-to-Know Law was intended to promote citizens' access to information about the operation of their government. *Lamy*, 152 N.H. at 111. Stated another way, the purpose of the law is to provide the utmost information to the public about what its government is "up to." *Union Leader Corp. v. City of Nashua*, 141 N.H. 473, 476 (1996). If 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." *Id.* at 477 (quotation omitted).

By its original motion, the Company contended that its officers and directors are not public employees whose salaries are paid by taxpayer money, such as those in *Mans v. Lebanon School Bd.*, 112 N.H. 160 (1972), and therefore, [t]here is no public interest advanced by disclosure of the required salary information." Motion at 2. National Grid also noted that it is ultimately within the Commission's authority "to consider the Company's expenses and set a just and reasonable rate that balances the interests of the Company and the ratepayer." Motion at 2.

While the Company's compensation information may not be as relevant to the public as is that for individuals paid directly by the government, it does not follow that no public interest would be advanced by disclosure. As we have found previously, "the public has an interest in officer and director compensation since it has a direct bearing on the rates set by the Commission

and paid by customers, and . . . the question of whether customers, through rates, are funding inappropriately high executive compensation has historically been a matter of public concern.” *Public Service Company of New Hampshire*, Order No. 25,037 (Oct. 30, 2009) at 10. Disclosure will inform the public about the Commission because it would allow the public to know whether the rates permitted by the Commission, which cover expenses such as executive compensation, reflect reasonable and appropriate costs or costs which are excessive and unreasonable. Thus, we do not agree with National Grid that no public interest would be advanced by disclosure. Instead, there is a present and meaningful public interest in this information, just as there is with any other expense of the Company that is recovered through its rates.

Finally, we must balance the identified interests in determining whether disclosure is warranted. It is here we consider National Grid’s contention that any public interest has been diminished or eliminated by its disclosure of the allocation of these costs to New Hampshire. The fourth page of National Grid’s publicly available annual report for the year ended December 31, 2009 lists seventeen individuals and their respective positions as officers of the Company. For all but six, it provides the amount of compensation allocated to the Company’s New Hampshire operation. The Annual Report does not state the nature of this compensation, *i.e.*, salary, bonus, benefits, etc., but only the value the Company has calculated. For the remaining six, the report states that their compensation is paid by the Company’s ultimate parent entity in the United Kingdom. The annual report also lists the only director of the Company and his allocated compensation of zero. According to National Grid, this disclosure is sufficient to meet the needs of the public, and further disclosure is unnecessary. We disagree.

The information provided by National Grid informs the public about the ultimate burden for these expenses that is borne by New Hampshire ratepayers. However, that information,

standing alone, does not allow the public to understand whether the costs are reasonable and appropriate. The public cannot discern from this information whether the costs of this compensation bear any relation to the work performed on behalf of the New Hampshire operations. For example, if the New Hampshire operations represented 25 percent of the Company's revenues, but covered 50 percent of its costs, that could not be known. Similarly, if New Hampshire represented 25 percent of the Company's revenues, but only bore 10 percent of costs, that too could not be known and the reasonableness of costs and rates could not be determined. As a result, there is little information to be gained about the functions of the Commission from the data National Grid has already provided. We also do not believe that such limited disclosure would fulfill the general guideline that the Right-to-Know law is to be interpreted "with a view to providing the utmost information in order to best effectuate the statutory and constitutional objective of facilitating access to all public documents." *Goode v. N.H. Legislative Budget Assistant*, 148 N.H. 551, 554 (2002).

We are also cognizant, however, of the fact that the individuals' privacy interests do not evaporate simply because more information would be desirable or useful. This is particularly true when the information at issue is the subject of a heightened privacy interest. *See Sheet Metal Workers*, 63 F.3d at 997. As such, though the balance would cut in favor of more disclosure than has been made to this point, we cannot say at this time that full disclosure of the salary information is warranted. In previous orders we have attempted to strike a balance between disclosure and protection through the use of aggregated data. *See, e.g., Public Service Company of New Hampshire*, Order No. 25,037 (Oct. 30, 2009) at 10-11; *Public Service Company of New Hampshire*, Order No. 24,333 (June 11, 2004) at 5. We continue to believe that this method provides information necessary for the public to understand the workings of the

Commission in setting rates, while at the same time respecting the privacy interests of the individuals at issue.

Accordingly, we determine that National Grid shall publicly file a schedule containing, at a minimum: (1) the total compensation for the last two years of the seventeen individuals listed as officers of the Company on its December 31, 2009 annual report, in aggregate; (2) the total compensation for the last two years of the eleven officers on the December 31, 2009 annual report for whom a portion of their compensation is allocated to New Hampshire operations, in aggregate; (3) the average allocation percentage to the Company for the eleven officers whose compensation is allocated to the Company for the past two years; and (4) the percentage resulting from dividing the total New Hampshire allocation of the eleven officers' compensation by the total compensation paid to all officers and directors of National Grid USA, the Company's immediate parent entity for the past two years. To the extent that the list of officers has changed from one year to another, the compensation figures shall include those officers as of December 31 in each year, 2008 and 2009. Individually identifiable compensation information, other than that in the annual report, will be kept confidential, and will not be disclosed to the public.

We believe that the schedule outlined above will provide the public with information about the total costs borne by New Hampshire ratepayers and it will allow the public to understand how those costs compare to the wider operations of National Grid's corporate affiliates. In this way, the public will have access to information sufficient to understand the costs evaluated by the Commission in setting the Company's rates, and whether those costs are reasonable in comparison to costs allocated elsewhere. At the same time, the individuals listed will be able to maintain the privacy of any individually identifiable compensation information. Consistent with Puc 203.08(k), and our past practice, we note that our ruling on the motion for

confidential treatment is subject to our on-going authority, on our own motion, or that of the Staff or public, to reconsider our determination.

2. Motions for Waiver

National Grid seeks waivers from the Commission's filing requirements relative to information about its parent company and to payroll information that it states it does not maintain. The Company also argues that this information is irrelevant, voluminous and potentially burdensome to produce. Staff has stated that it agrees with the Company's assessment that the information is not necessarily useful at present. Moreover, Staff has agreed with the Company that, at least as to the information about its parent, such information is likely not relevant to the issues in this case.

Under Puc 201.05, the Commission "shall" waive its rules, except where precluded by statute, if it finds that the waiver serves the public interest, and the waiver will not disrupt the orderly and efficient resolution of the matter. In determining the public interest, the Commission is to consider whether compliance with the rule would be onerous or inapplicable given the circumstances or whether the purpose of the rule would be satisfied by an alternative method proposed. Puc 201.05(b). We conclude, based upon testimony by the Company and Staff, that the information sought by the filing requirements is not necessary at this time, and that compliance with the rule is unnecessary in these circumstances and, therefore, that waiver serves the public interest. Further, given that the information is not needed at present, we conclude that the waiver will not disrupt the orderly and efficient resolution of this case. Accordingly, we grant the Company's motion for waiver of the requirements of Puc 1604.01(a)(25), and Puc 1604.07(a)(5) and Puc 1604.07(j) "to the extent that they require a separate schedule setting forth

payroll figures categorized by Operation, Maintenance, Construction, Plant Removal, and other accounts related to payroll.”

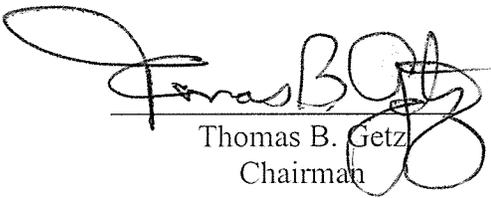
Based upon the foregoing, it is hereby

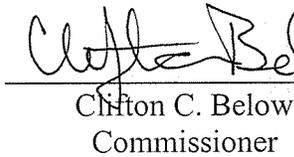
ORDERED, that National Grid shall file a schedule of compensation information as set out in this Order; and it is

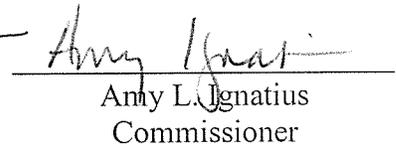
FURTHER ORDERED, that except as to the information in the Annual Report and the schedule to be filed, National Grid’s motion for confidential treatment is GRANTED; and it is

FURTHER ORDERED, that National Grid’s motion to waive certain filing requirements is GRANTED as set out in this Order.

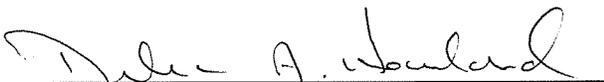
By order of the Public Utilities Commission of New Hampshire this twenty-fifth day of June, 2010.


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Chairman


Clinton C. Below
Commissioner


Amy L. Ignatius
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FILING INSTRUCTIONS: PURSUANT TO N.H. ADMIN RULE PUC 203.02(a),

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