

BEFORE THE NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

Re: Liberty Utilities (EnergyNorth Natural Gas) Corp.

Docket DG 14-380

**MOTION TO COMPEL RESPONSES
TO THE INTERVENOR PLAN'S SECOND SET OF DATA REQUESTS**

Pursuant to N.H. Code Admin. Rules Puc § 203.07(a) and 203.09(i), PLAN hereby moves the New Hampshire Public Utilities Commission (the "Commission") to compel Liberty Utilities (EnergyNorth Natural Gas) Corp. ("EnergyNorth" or the "Company") to fully respond to data requests Nos. 2-26, 2-27, 2-28, 2-29, 2-30, 2-31 and 2-32¹ of the Pipeline Awareness Network of the Northeast ("PLAN").

In support of its Motion, PLAN states as follows:

I. Introduction

A. EnergyNorth

In its Petition for Approval, EnergyNorth "seeks approval to enter into a 20 year contract with Tennessee" and "determination that the Company's decision to enter into the agreement is prudent and consistent with the public interest." *Id.*, p. 1. EnergyNorth asserts, inter alia, that: (a) "the Company *needs* this long-term firm transportation capacity"; (b) "it is the *best* cost resource to meet the capacity needs of the Company's customers"; (c) "the Company determined that the '*best cost*' capacity option for its customers was the purchase of additional capacity from Tennessee through its NED project." *Id.*, pp. 1-3 (emphasis added). PLAN's data requests are appropriately directed to EnergyNorth's testimony on these elements as filed.

¹ PLAN received Liberty Utilities' responses to PLAN second set of data requests on April 10, 2015. Therefore, this motion is timely filed, pursuant to Puc 203.09(i)(2). PLAN submitted a good faith communication to counsel as required by Puc 203.09(i)(4), attached as Appendix A, with the Company's response.

B. PLAN

The Commission granted PLAN permission to intervene and participate as a party in this proceeding, allowing PLAN to focus on 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 25,767, at 4.

C. Scope of Review

In its Order of Notice, the Commission established a broad scope of review and specifically “whether EnergyNorth reasonably investigated and analyzed its long term supply requirements and the alternatives for satisfying those requirements, and whether EnergyNorth’s entry into the Precedent Agreement with TGP for additional pipeline capacity is prudent, reasonable and otherwise consistent with the public interest.” . *Id.* at 3. Accordingly, the Company has the burden to demonstrate that its decision to negotiate and execute the Precedent Agreement at issue here was the subject of reasonable investigation by the Company, including alternatives, and is prudent, reasonable and in the public interest. As set forth below, PLAN’s data requests are designed to elicit, consistent with the broad discovery allowed by the Commission, relevant information relating to whether the Company reasonably investigated its contract with TGP

II. Standard Of Review

The Commission, when addressing a motion to compel discovery responses, “consider[s] whether the information being sought is relevant to the proceeding, or reasonably calculated to lead to the discovery of admissible evidence.” *Investigation Into Purchase of Receivables, Customer Referral and Electronic Interface Programs*, Order No. 25,439 (2012) at 2. The scope

of permitted discovery under Commission Rules is interpreted in a manner “[c]onsistent with Superior Court Rule 35(b)” [now Super. Ct. Civ. R. 21(b)]. *City of Nashua*, Order No. 24,681 (2006) at 2. Discovery is considered “an important procedure for probing in advance of trial the adversary’s claims and his possession or knowledge of information pertaining to the controversy between the parties.” *Johnston v. Lynch*, 133 N.H. 79, 84 (1990) (internal citation omitted). “Absent a claim of privilege or irrelevance, a party may not limit the scope of an adverse party’s discovery request.” *Breagy v. Stark*, 138 N.H. 479, 482 (1994) (citations omitted).

Due to the importance of “wide-ranging discovery,” the Commission will deny discovery requests only when it “can perceive of no circumstance in which the requested data would be relevant.” *Re Lower Bartlett Water Precinct*, 85 NH PUC 371, 372 (2000). Additionally, “[t]he Commission weighs ‘the effort needed to gather [the requested information], the availability of the information from other sources, and other relevant criteria.’” *Investigation of Scrubber Costs and Cost Recovery*, Order No. 25,646 (2014) at 4 (citing *Public Service Co. of N.H.*, Order No. 24,342 at 23).

III. Requests In Dispute²

A. PLAN Request No. 2-26 – Regarding Local Development Groups

1. The Request and EnergyNorth’s Response

Request No. PLAN 2-26 states:

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 1-3b.

² The Data requests in dispute and related responses are attached as Appendix 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.

To parts a) through c),³ EnergyNorth has objected on the following grounds:

- “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,” and “information about non-EnergyNorth participants in the LDC Consortium negotiation process is similarly not relevant”;
- “the request seeks information protected by the attorney-client privilege”;
- “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”; and
- “PLAN’s inquiry in this request . . . is . . . beyond the scope of its limited intervention.”

None of EnergyNorth’s objections withstand scrutiny.

2. The Request Seeks Relevant Information.

The requested information is relevant to this proceeding. Numerous references are made in Mr. DaFonte’s testimony to a consortium of New England Local Distribution Companies (LDC’s), of which EnergyNorth is a part. *See* DaFonte Testimony, BATES, p. 19, ll.6-15; BATES p. 23, ll. 1-3. Mr. DaFonte explains that “[t]he terms and conditions of the PA were

³ EnergyNorth has provided a partial response, but only as to part b), and then only to answer, subject to its objections: “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.” Such a broad description is not “the *identity* of the 10 individuals in the working group,” and amounts to gamesmanship. “A party is obligated to respond to requests for discovery honestly, fully and responsively.” *Bronson v. The Hitchcock Clinic*, 140 N.H. 798, 808 (1996) (citing 4 R. Wiebusch, New Hampshire Practice, Civil Practice and Procedure § 811 (1994)).

negotiated *within the context of* a broad consortium of New England Local Distribution Companies (LDCs),” which LDCs “together made up the anchor shippers on the NED project.” *Id.*, BATES, p. 19, ll. 6-7, 9 (emphasis added). According to Mr. DaFonte, “[t]his consortium approach allowed the LDCs to leverage their aggregate capacity commitment in the NED project to negotiate a deeply discounted anchor shipper rate as well as other key terms and conditions discussed later in [his] testimony.” *Id.*, BATES, p. 19, ll. 9-12 (emphasis added). By including and relying upon the information provided by LDCs, EnergyNorth cannot now deny that this information constitutes either “facts relied upon,” “other relevant facts,” or “policy arguments in support of the result sought,” and is therefore relevant. Puc 203.06(d).⁴

3. The Information Sought Is Not Subject To Any Privilege.

The requested information is not privileged. The Commission “shall give effect to the rules of privilege recognized by law.” Puc 203.23(e). There has been no showing by EnergyNorth that it and the other LDC’s were subject to joint representation or shared a common interest sufficient to trigger the attorney-client privilege. And even if there was some commonality in the lay sense, the content of the communication sought would have related to *business* advice, which communication would not be “for the purpose of facilitating the rendition of professional legal services” as required to trigger the protections of N.H. R. Evid. 502(b).

⁴ EnergyNorth’s three cited orders – *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), and *City of Nashua*, Order No. 24,671 (DW 04-048) – are neither binding nor persuasive. The Order in *City of Nashua* was predicated on the “expectation” that there would be “ample other ways of discovering” information about contract negotiations, and expressly noted that the Commission had “not rule[d] that cost information about the cost of the services covered (or not covered) by the contracts is irrelevant.” Order No. 24,671, at 3. In *Pub. Serv. Co. of N.H.* (DE 08-077), the Commission did not require PSNH “to provide in minute detail a record of its contacts and negotiations with Lempster [a renewable energy producer],” but made that ruling on breadth grounds, not on relevance grounds. Order No. 24,895, at 5. Lastly, the Order in *Pub. Serv. Co. of N.H.* merely adopted the conclusion of an earlier decision (89 N.H. PUC 226, 230 (2004)) that “[i]n contrast to the results of any such negotiations, we can conceive of no circumstances in which we would deem information about the negotiations themselves admissible.” Order No. 25,174, at 18. None of these cases involve approval of a contract that was negotiated by a group of LDCs, where the joint efforts of the group and analysis by the group were submitted as part of the case in chief and presented in support of the contract. Clearly, as part of discovery, further consideration of the LDC process is warranted.

Even if a privilege did apply, though, “[t]he attorney-client privilege is not absolute.” *Petition of Dean*, 142 N.H. 889, 890 (1998). EnergyNorth has placed those communications at issue and therefore waived any privilege. *See Desclos v. Southern New Hampshire Med. Ctr.* 153 N.H. 607, 614-15 (2006) (New Hampshire’s “rule on waiver of the attorney-client privilege . . . is that the holder of the privilege waives it when he has injected privileged material into the case, such that the information is actually required for resolution of the issue.”).

4. EnergyNorth’s Burden and Breadth Objections Should be Rejected.

EnergyNorth’s complaints about the burden of producing, and the breadth and volume of, responding information are unsupported. The lack of any explanation warrants a rejection of their protests.⁵

5. PLAN, As An Intervening Party, Is Entitled To This Information.

PLAN is entitled to propound Request No. 2-26, which is well within the scope of its permitted intervention. It is difficult to understand how PLAN could either understand “the context of” the consortium in which “the terms and conditions of the PA were negotiated,” or assess whether the negotiated anchor shipper rate was “deeply discounted,” without the requested information. EnergyNorth has put these points at issue willingly – and should be compelled to provide additional information. All the requested information would assist in any evaluation of the “prudence, justness and reasonableness of the Precedent Agreement and its associated costs, to EnergyNorth and its customers” as required by the Commission.

⁵ *See, e.g., N.H. Speedway, Inc. v. Motor Racing Network, Inc.*, Business and Commercial Dispute Docket No. 2008-EQ-099 (Merrimack Super. Ct. Jul. 17, 2014) (granting motion to compel; “MRN recites that production would be unduly burdensome but does not explain why. If the documents are maintained in the ordinary course of business, the request can be satisfied by simply allowing access to the documents, which would not ordinarily require undue expense. If the documents are in electronic format, the parties should be able to meet and confer, and subsequently determine whether the cost of production outweighs any potential benefit, or whether the cost of production should be shifted.”).

B. PLAN Request No. 2-27

Request No. PLAN 2-27 states:

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.

EnergyNorth has objected, without providing any response, on the stated grounds that:

- “the request seeks information that is not relevant to the proceeding or reasonably calculated to lead to the discovery of admissible evidence,” because “[t]he 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”; and
- PLAN’s inquiry in this request is beyond the scope of its limited intervention.

Mr. DaFonte’s assertions at the March 17th technical session are both relevant and subject to further inquiry. The Commission will “compel answers to data requests directed toward the party if the requests are related to the testimony of its sponsored witness.” *Investigation of Scrubber Costs and Cost Recovery*, Order No. 25,646 (2014) at 5. Moreover, environmental implications are considered in the Precedent Agreement. See Confidential, BATES, pp. 51, 98-99. Environmental implications have been raised in this case by EnergyNorth at the Technical Conference and in the Precedent Agreement itself and accordingly are relevant for discovery.

C. PLAN Request Nos. 2-28, 2-29, 2-30, 2-31 and 2-32 – Company Relationships

1. The Requests And EnergyNorth’s Responses

These requests generally seek information concerning the corporate relationships among EnergyNorth and other corporate entities (Request Nos. 2-28, 2-29, and 2-31), as well as inter-

business documentation, correspondence and communications regarding the Kinder Morgan NED natural gas pipeline project (Request Nos. 2-30 and 2-32).⁶ EnergyNorth has objected to these requests on the asserted grounds that these requests seek irrelevant information, and that PLAN is not allowed to make such inquiries under the terms of the Commission's permitted intervention.

2. These Requests Seek Relevant Information.

The extent of EnergyNorth's parent and affiliate relationships are relevant, a fact the Commission itself identified in its Order of Notice, stating: "Although not mentioned in the filing, EnergyNorth's affiliate, Algonquin Power & 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 & Transmission) Corp., a wholly owned subsidiary of APUC and Kinder Morgan Operating L.P." Thus, PLAN is allowed to inquire about the interrelationships among the parties, and the various parties' contributions or considerations in entering the Precedent Agreement (or a variation thereof).

In this respect, discovery directed at evaluating whether EnergyNorth undertook an arms length negotiation or acted at the behest of its parent or some other affiliated entity is certainly relevant. Any influence by parent company and/or affiliate certainly bears upon the prudence of the costs which EnergyNorth seeks to incur. *Cf. Appeal of Sinclair Machine Products, Inc.*, 126 N.H. 822, 835 (1985) ("allegations related to the parent/subsidiary relationship existing between Central Vermont and CVEC . . . that CVEC breached a fiduciary duty to its customers by not objecting to Central Vermont's wholesale rate in the ratemaking proceeding before the FERC. Such matters, *while reflecting upon the prudence of CVEC in incurring wholesale power costs,*

⁶ Given their length, the full text of Request Nos. 2-28 through 2-32 is being provided at Appendix A hereto.

are within the FERC's domain of fixing the wholesale rate between these parties.)(emphasis added). PLAN (and other parties) are entitled to probe the corporate relationship between the various entities that may have an interest in the transaction under review, to investigate bias and self dealing and to assess whether the interaction between affiliates and/or parent and subsidiary companies was an arms length transaction in the public interest. *See generally Pub. Serv. Co. of N.H. v. New Hampton*, 101 N.H. 142, 152 (1957) (rejecting utility company's assertion that net book cost was the proper measure of valuation based on prior sales of electric utility property in New Hampshire; "it was findable on the record that many of these sales were between affiliates or parent and subsidiary companies and were not actual arms-length transactions").

Furthermore, the questions seek additional information presented by an EnergyNorth affiliate, Algonquin Power and Utilities Corp. ("APUC"), in its Press Release ("Company Release") as set forth in PLAN 2-28 (d)-(f) which Company Release was specifically referenced in the Commission's Order of Notice in this case. These questions seek discovery of information presented by APUC promoting its investment in the NED project and the viability of the project, including other contracts, LDCs and benefits of the pipeline. It is fair, relevant and appropriate in discovery to evaluate statements made by the APUC (and cited by the Commission) directly relating to matters under review in the instant case.

WHEREFORE, in accordance with Puc 203.05(a)(2), PLAN respectfully requests that the Commission:

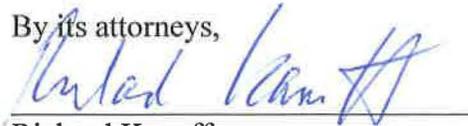
- (A) Overrule the objections lodged by the Petitioner to PLAN's Second Set of Data Requests, Nos. 2-26 through and including 2-32;
- (B) Order the Petitioner to fully respond to Petitioner's Requests Nos. 2-26 through and including 2-32; AND

(C) Grant PLAN such other and further relief as the Commission may deem just and equitable under the circumstances.

RESPECTFULLY SUBMITTED this 30th day of April, 2015.

PLAN,

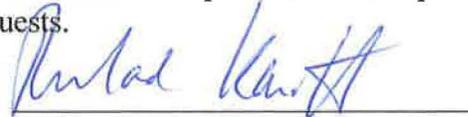
By its attorneys,



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Puc 203.09(i)(4) Certification

I hereby certify that PLAN has made a good-faith effort to resolve the dispute informally, without success. I served EnergyNorth's counsel with a letter on April 29, 2015, requesting that EnergyNorth drop its objections to the disputed requests.



Richard Kanoff

Certificate of Service

I hereby certify that on April 30, 2015, pursuant to Puc 203.02 & 203.11, I served an electronic copy of this Motion to Compel on each person identified on the Commission's service list for this docket and with the Office of the Consumer Advocate, by delivering it to the email address specified on the commission's service list for the docket.



Richard Kanoff