

DG 05-147

NORTHERN UTILITIES, INC.

2005/2006 Winter Cost of Gas

**Order On Motions For Protection From
Public Disclosure And Confidential Treatment**

ORDER NO. 24,590

February 10, 2006

APPEARANCES: Seth L. Shortlidge, Esq., of Pierce Atwood LLP, and Patricia M. French, Esq., on behalf of Northern Utilities, Inc.; Rorie E.P. Hollenberg, Esq., of the Office of Consumer Advocate, on behalf of residential utility consumers; and Edward N. Damon, Esq., for the Staff of the New Hampshire Public Utilities Commission.

I. PROCEDURAL HISTORY

On September 13, 2005, Northern Utilities, Inc. (Northern) filed with the New Hampshire Public Utilities Commission (Commission) its Cost of Gas (COG) for the period November 1, 2005 through April 30, 2006, applicable to Northern's natural gas operations in the Seacoast area of New Hampshire. On September 14, 2005, Northern filed with the Commission revised tariff sheets and certain supporting information regarding the annual update of Appendices A and C of the Delivery Terms and Conditions pursuant to the requirements of *Gas Restructuring-Unbundling and Competition in the Natural Gas Industry*, 86 NH PUC 131, Order No. 23,652 (2001). On September 15, 2005, Northern filed with the Commission a Motion for Protection from Public Disclosure and Confidential Treatment regarding Attachment II of the updated Appendices (September 15 Motion). The cover letter accompanying the September 15 Motion noted that Northern was filing one copy of the unredacted, confidential version of Attachment II with the Commission's Executive Director.

On September 30, 2005, Northern filed a Motion for Protection from Public Disclosure and Confidential Treatment regarding the resource, supplier identity and cost information contained in Northern's calculation of the COG, N.H.P.U.C No. 10, Nineteenth Revised Tariff Page 38 and materials provided in support thereof (September 30 Motion).¹ The cover letter accompanying the September 30 Motion noted that Northern was filing one copy of the unredacted, confidential pages with the Staff Attorney assigned to this docket.

On October 20, 2005, Northern filed with the Commission a revised 2005/2006 Winter COG, including certain updated supporting attachments, together with an Amended Motion for Protection from Public Disclosure and Confidential Treatment regarding cost information contained in the materials provided in support of Northern's initial COG filing and its revised COG calculation (October 20 Motion). The cover letter accompanying the October 20 Motion noted that Northern was filing one copy of the unredacted, confidential pages with the Staff Attorney assigned to this docket.

The COG hearing was held on October 26, 2005. On October 31, 2005, the Commission issued Order No. 24,540 which set the COG rate and stated that the Commission would address the three pending motions for confidential treatment in a separate order. At hearing, the Commission indicated that in light of the timing of Staff's partial objections to the motions, Northern would be given the opportunity to respond to the objections in writing or discuss the matter with Staff.

On December 23, 2005, Northern filed a letter with the Commission again requesting that the information at issue in the September 30 Motion, which was amended by the October 20 Motion, be protected and treated confidentially. Northern asserted that this

¹ These materials relate to information used to prepare the initial Winter 2005/2006 COG filed on September 13, 2005.

information has not been publicly disclosed and that this type of information has not intentionally been made public in the past.

II. PENDING MOTIONS FOR PROTECTION FROM PUBLIC DISCLOSURE AND CONFIDENTIAL TREATMENT

A. September 15 Motion

The September 15 Motion requests that the Commission issue an order requiring that the resource, supplier identity, and cost information contained in Northern's update to its Model Delivery tariff be treated as confidential information and in the nature of a trade secret, and not be made part of the public record in this docket. The information for which confidential treatment is sought is described in general terms only. However, Northern's update to the Model Delivery Tariff and the cover letter accompanying the September 15 Motion establish that its request for confidential treatment is limited to certain information in Attachment II to the update, which relates to the calculation of the Peaking Service Demand Charge.

Northern states that as part of Appendix A to the Terms and Conditions portion of the revisions to its Model Delivery Tariff, it provides specific information about suppliers, resource information, commodity and demand charges, and related contract terms which Northern believes constitutes a trade secret. Northern emphasizes that it does not disclose this information outside a close circle of Northern employees with a need to know, and release of this information is likely to result in competitive disadvantage for Northern, its affiliates, and its suppliers, and be very beneficial to competitors who may gain a competitive edge as a result of disclosure. Northern additionally claims that disclosure of this information would disadvantage Northern in its negotiations with suppliers or other resource providers and that public knowledge of the information would impair Northern's future bargaining position and its ability to obtain the best cost resources for its natural gas portfolio. Northern asserts that disclosure of the

information would expose to the public and to actual and potential competitors Northern's internal, closely-held business information.

B. September 30 Motion

The September 30 Motion requests that the Commission issue an order requiring that the resource, supplier identity, and cost information contained in Northern's calculation of the COG adjustment NHPUC No. 10, Nineteenth Revised Tariff Page 38, as well as the materials provided in support thereof, be treated as confidential commercial information and in the nature of a trade secret, and not be made part of the public record in this proceeding. The September 30 Motion describes the information for which confidential treatment is sought in general terms only. However, the cover letter accompanying the initial COG filing stated that six schedules, including Revised Tariff Page 38, were being redacted to preserve supplier pricing, contract quantity and cost information. In addition, comparison of the unredacted pages accompanying the September 30 Motion with the redacted pages included in the initial COG filing indicates that Northern seeks confidential treatment for certain information contained on Nineteenth Revised Tariff Page 38 as well as pages 7-11 and 22 of the initial COG filing.²

Northern states that as part of the semi-annual filing with the Commission of its COG adjustment, it provides specific information with regard to the cost of delivered and produced gas, as well as its projected forecast of its natural gas commodity and storage pricing, including resource name, volumes, rate, and total amount, which Northern believes constitutes a trade secret. Northern admits that it has disclosed this information as part of the public record in past filings, although it avers that such disclosure was made inadvertently. Northern seeks to protect this information from public disclosure on a continuing, going-forward basis in order to

² The version of page 12 of the initial COG filing which is included among the unredacted pages appears to be identical to the version of page 12 included in the public filing. Accordingly, it is understood that Northern is not requesting confidential treatment for this page.

protect trade, contractual, and financial secrets that Northern claims are otherwise closely-held by Northern.

Northern emphasizes that, except for inadvertent previous disclosures, it does not make this information available outside a close circle of Northern employees with a need to know, and release of this information is likely to result in competitive disadvantage for Northern and possibly its suppliers as contracts are renegotiated and renewed, and be very beneficial to competitors who may gain a competitive edge as a result of disclosure. Northern additionally claims that disclosure of this information disadvantages Northern in its negotiations with suppliers or other resource providers and that public knowledge of the information would impair Northern's future bargaining position and its ability to obtain the best cost resources for its natural gas portfolio. Northern avers that disclosure of the information would expose to the public and to actual and potential competitors Northern's internal, closely-held business information.

C. October 20 Motion

The October 20 Motion requests that the Commission issue an order requiring that the resource, supplier identity, and cost information contained in the materials Northern provided in support of its initial COG filing dated September 13, 2005, and its revised calculation of its COG dated October 19, 2005, be treated as confidential information and in the nature of a trade secret, and not be made part of the public record in this docket. The information for which confidential treatment is sought is described in general terms only. However, comparison of the unredacted pages accompanying the October 20 Motion with the redacted pages included in the revised COG calculation indicates that Northern seeks confidential treatment for certain information regarding terms, rates and dollar amounts associated with certain resources listed

on a revised page entitled, "Calculation of Cost of Gas Adjustment."³ Northern also seeks confidential treatment for certain amounts shown on unredacted, updated pages 7-11 and 22 of the revised COG calculation.

Northern states that as part of the semi-annual filing with the Commission of its COG adjustment, it provides specific information with regard to the cost of delivered and produced gas, as well as its projected forecast of its natural gas commodity and storage pricing, including resource name, volumes, rate, and total amount, which Northern believes constitutes a trade secret. Northern admits that it has disclosed this information as part of the public record in past COG filings, although it avers that such disclosure was made inadvertently. Northern seeks, in this motion, to protect this information from public disclosure on a continuing, going-forward basis in order to protect trade, contractual, and financial secrets that Northern claims are otherwise closely-held by Northern.

Northern emphasizes that, except for inadvertent previous disclosures, it does not make this information available outside a close circle of Northern employees with a need to know, and release of this information is likely to result in competitive disadvantage for Northern and possibly its suppliers as contracts are renegotiated and renewed, and be very beneficial to competitors who may gain a competitive edge as a result of disclosure. Northern additionally claims that disclosure of this information would disadvantage Northern in its negotiations with suppliers or other resource providers and that public knowledge of the information would impair Northern's future bargaining position and its ability to obtain the best cost resources for its natural gas portfolio. Northern avers that disclosure of the information would expose to the

³ This information supports a new, revised Nineteenth Revised Tariff Page 38 which describes the components of gas costs in summary terms, without reference to costs associated with individual resources as did the previous version included in the initial COG filing.

public and to actual and potential competitors Northern's internal, closely-held business information.

D. Staff's Position

According to Staff, Northern has routinely requested confidential treatment regarding supporting information for its updates to the Model Delivery Tariff. At the October 26, 2006 hearing, Staff did not object to the September 15 Motion provided the information for which confidential treatment is sought was not included in Northern's tariff. Staff urged the Commission to be especially cautious about ordering confidential treatment for a tariff page. *See* RSA 378:1.

With respect to Northern's September 30 and October 20 Motions, Staff stated that Northern appeared to be requesting confidential treatment for information that was actually included in the public tariff filing, other publicly available filings, or that had been previously publicly disclosed elsewhere. To the extent Northern was seeking confidential treatment of information that was filed as part of the public record, Staff recommended that the Commission deny the motions for confidential treatment. However, Staff did not object to the motions to the extent they seek to protect information that had not been otherwise publicly disclosed.⁴

III. COMMISSION ANALYSIS

N.H. Code Admin. Rules Puc 204.06 sets forth procedures that implement the New Hampshire Right to Know Law, RSA 91-A. This rule requires that motions for confidentiality contain, among other things, the "documents, specific portions of documents, or types of information for which confidentiality are sought" and evidence that the information is "not general public knowledge or published elsewhere." Puc 204.06 (b)(1) and (4), (c)(3). The

⁴ Upon submission of the October 20 Motion, Northern no longer seeks protection over any terms contained in tariff pages.

rule also requires that an original and 8 copies of information which is determined by the Commission to be confidential shall be provided for use by the Commission and Commission Staff. Puc 204.06 (d)(3). The rule further provides that if any information determined by the Commission to be confidential is thereafter released or made public by the party who sought its protection, any protection shall cease with respect to the released information. Puc 204.06 (f). Under RSA 378:1, public utilities are required to file with the Commission, print and keep open to public inspection “schedules showing the rates, fares, charges and prices for any service rendered or to be rendered” in accordance with Commission rules.

In order to avoid confusion of the type created by Northern in this proceeding, utilities or other parties seeking to obtain confidential, protective treatment for information filed with the Commission are required to simultaneously file a motion for confidentiality that contains a clear and concise summary listing of all documents for which protection is sought. The original and 8 copies of such documents should accompany the motion, instead of being sent separately to the Staff Attorney assigned to the docket.⁵ Of course, the proponents of confidential treatment should take care to ensure that the information for which protection is sought is not included in the publicly available part of the filing and that only the information for which protection is necessary is redacted. The Commission does not assume that a proponent of confidential treatment is seeking to protect more information than it has redacted in its filings. Finally, we note that pursuant to RSA 378:1, tariff pages are not eligible for confidential, protective treatment.

The New Hampshire 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

⁵ The Commission has internal processes and routines designed to protect the confidentiality of information for which a motion has been filed but not yet ruled on and for which a determination of confidentiality has been made.

contains an exception for “confidential, commercial or financial information.” RSA 91-A:5, IV. In particular, Puc 204.06 (c)(1)b contemplates that fuel supply contract prices and terms fall within the general category of “[o]ther confidential, research, development, financial, or commercial information which may be protected.” The case law interpreting whether information is considered confidential requires an objective test; it is not based on the subjective expectations of the party generating the information. *See Union Leader Corp. v. New Hampshire Housing Finance Authority*, 142 N.H. 540 (1997). In order to show that the information is sufficiently “confidential to justify nondisclosure the party resisting disclosure must prove that the disclosure is likely to (1) impair the state’s ability to obtain necessary information in the future; or (2) cause substantial harm to the competitive position of the person from whom the information was obtained.” *Id.* Generally speaking, the Commission does not protect the identities of parties which have supply or other resource contracts with a utility. Cf. *Energynorth Natural Gas, Inc. d/b/a Keyspan Energy Delivery New England*, 89 NH PUC 671, 674, Order No. 24,408 (December 3, 2004) (Commission did not find a basis for protecting the identity of unsuccessful bidders responding to a request for proposal issued by the utility).

Applying the above-described standards, we will grant the September 15 Motion except with respect to the identities of the suppliers and resources redacted by Northern. We note that no objection to this Motion has been made and that the Commission has granted similar motions in previous COG filings. Consistent with our past practice, the identity of suppliers will be publicly available information. Accordingly, Northern is directed to refile the redacted pages at issue in the September 15 Motion, revised to include the identities of any suppliers and resources.

We treat the relief requested in the September 30 Motion as being restated in, and not rendered moot by, the October 20 Motion. We will grant the September 30 Motion to the extent it seeks protection for the redacted information in the initial, September 13, 2005 COG filing (except with respect to the identities of the suppliers and resources redacted by Northern) and the October 20 Motion to the extent it seeks protection for the redacted information in the revised COG calculation. We will not grant confidential treatment for information other than that which Northern has specifically redacted, notwithstanding the broad, rather open-ended references in the Motions. Were we to do otherwise, we would be speculating about the information Northern seeks to protect. Again, Northern is directed to refile the redacted pages at issue in the September 30 Motion, revised to include the identities of any suppliers and resources.

It is important to note that, although the initial filing included tariff pages containing redacted terms, Northern has now amended its tariff to place confidential information in supporting documents rather than in the tariff itself, which is the appropriate way to deal with the underlying terms that merit protective treatment. The initial proposed tariff was never in effect and was superceded by the October 20, 2006 amended tariff and supporting documents. We will protect the initial filing, therefore, with the understanding that in the future, Northern submit tariff pages that do not contain redacted terms.

Consistent with our practice, the protective treatment provisions of this Order are subject to the on-going authority of the Commission, on its own motion or on the motion of Staff, any party or any other member of the public, to reconsider the protective order in light of RSA 91-A, should circumstances so warrant.

Based upon the foregoing, it is hereby

ORDERED, that the September 15 Motion, the September 30 Motion and the October 20 Motion are GRANTED to the extent provided in this Order.

By order of the Public Utilities Commission of New Hampshire this tenth day of February, 2006.

Thomas B. Getz
Chairman

Graham J. Morrison
Commissioner

Clifton C. Below
Commissioner

Attested by:

ChristiAne G. Mason
Assistant Executive Director & Secretary