STATE OF MAINE
PUBLIC UTILITIES COMMISSION

January 3, 2000
ORDER (PART II)

CENTRAL MAINE POWER COMPANY
AND CMP NATURAL GAS, L.L.C.,
Application for Approval of Affiliated Interest Transaction

DOCKET NO. 99-739

CMP NATURAL GAS, L.L.C.,
Petition for Approval to Furnish Gas Service in the Municipalities of Westbrook And Gorham

DOCKET NO. 99-477

WELCH, Chairman; NUGENT and DIAMOND, Commissioners

NOTE: This Order incorporates the remainder of our deliberations on December 3, 1999 in both Docket Nos. 99-477 and 99-739 (i.e. PART II) as well as our deliberations in Docket No. 99-739 on December 20, 1999.

I. SUMMARY

We direct the Hearing Examiner to adopt a schedule for resolution of Docket No. 99-739 that includes a prompt, comprehensive hearing to develop the record evidence on affiliate dealings and to minimize contentious discovery and confidentiality disputes.

In addition, we grant initial confidential treatment for information relating to dealings between affiliates and allow distribution only to the Commission and its staff (Staff) and the Office of the Public Advocate (OPA) and its staff. We direct the Staff and OPA to review such information carefully and expeditiously to ensure that information which is necessary for the litigants to fairly adjudicate the issues in this case is released to all parties and/or their attorneys. In making this determination, we apply a balancing test to ascertain whether the probative value outweighs the risk of harm of disclosure of the information, coupled with a determination that disclosure of the information is necessary to ensure that litigation of these matters is fair and effective.

II. PROCEDURAL HISTORY

A. Background

This Part II Order[1] provides for an expeditious process for

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[1]See our Part I Order issued December 3, 1999 for a comprehensive procedural history up to December 3, 1999 and our decision to grant CMP NG's

resolution of the question of whether the affiliated interest agreements between Central Maine Power Company (CMP) and CMP Natural Gas, L.L.C. (CMP NG) for transfer of property rights in, and use of, CMP's electric corridors should be approved. It also sets out our decision, reached at our deliberations on December 20, 1999, as to which information warrants initial confidential treatment as well as the balancing test we will use to determine whether any of that information must be released to competitor parties and/or their attorneys for the fair and effective litigation of the issues in this case.

B. Temporary Protective Order No. 2

On December 7, 1999, CMP requested that the Commission issue Temporary Protective Order No. 2 in Docket No. 99-739 to provide confidential treatment for information provided by CMP regarding the location and terms for the sale of easements or the granting of other related rights. CMP requested accelerated review and approval of proposed Temporary Protective Order No. 2 to accommodate the interest expressed by other parties in expediting this proceeding.

In particular, CMP requested that the following information be distributed only to the Commission and its staff and the OPA and its staff: 1) financial information and analyses concerning costs, revenues and earnings prepared by or for CMP; 2) information concerning the pricing provisions of agreements under which CMP has bought or sold real property interests, other than fee interests; and 3) information concerning the compensation which CMP received for real property interests that were taken pursuant to eminent domain authority. In its request, CMP asserted that such information constitutes confidential business information the disclosure of which would disadvantage the requesting entity vis-à-vis competitors, chill demand for use of CMP's easements, and reduce the value received for easement use negotiated in the future.

On December 8, 1999, the Hearing Examiner issued Temporary Protective Order No. 2 – Confidential Business Information, in modified form. The order excluded information regarding affiliates from protection on the premise that "public utility affiliate dealings should generally be open to public review and because the issues in this proceeding bear directly on matters involving CMP's dealings with its affiliates." See Temporary Protective Order No. 2 at 2. However, the Hearing Examiner issued the order on a temporary basis pending further determination of whether it was necessary to deny parties and their attorneys access to the confidential information contained in the protective order.

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request for reconsideration for a limited exemption pursuant to 35-A M.R.S.A. §707(3)(F).

Parties were invited to file written comments on this matter on December 13, 1999. CMP, CMP NG, Northern Utilities, Inc. (Northern), OPA and Maritimes & Northeast Pipeline (MNE) filed comments.

In their comments, CMP and CMP NG requested that Temporary Protective Order No. 2 be amended to also protect designated confidential information pertaining to affiliates. MNE and CMP NG argued that the Commission should not disclose this information to competitor parties' attorneys as allowed by 35-A M.R.S.A. § 1311-A(1)(D) and (F), asserting that the risk of harm from disclosure outweighs the probative value of the information to this proceeding.

We deliberated this matter on December 20, 1999.

III. DECISION AND ANALYSIS

A. Procedure

In our Order (Part I), we allowed CMP NG to begin limited construction activities on CMP's electric corridors because of the exigencies of this situation. In particular, because of the potential benefits to the public of the Calpine facility, we did not wish to have our regulatory concerns regarding the affiliate dealings unnecessarily delay its in-service date. The evidence before us indicated that certain tasks are better performed during the late fall or winter season.

We recognize that if the right-of-way agreements proposed between CMP and CMP NG are not approved, it will be necessary for Calpine to make alternative arrangements with gas providers to bring gas to its facility in time for a June 1, 2000 start-up. These negotiations and the resulting construction will take time to complete. Consequently, we hope to resolve this matter as soon as possible so that all parties will have adequate time in which to act to meet Calpine's needs.

We, therefore, direct the Hearing Examiner to promptly schedule a hearing on the affiliate dealing issue and to make that hearing comprehensive. Everyone who has been involved in discussions on the use of the right-of-way from CMP NG, CMP, and Granite/Northern shall appear before us to provide testimony under oath sufficient to allow us to make a judgement on the fairness of the dealings among all players. We envision an open hearing in which each participant describes in detail how the discussions occurred and responds directly to our inquiries. We direct the Hearing Examiner to develop a set of questions that witnesses should be prepared to address at the hearing.

We also believe that by holding a one-day comprehensive hearing, the need for extensive discovery and the opportunity for litigious battles over confidentiality may be reduced. We see no purpose in allowing the parties to

continue the protracted disputes over the details of the litigation at the expense of the issues in the case. Finally, we see this hearing as a useful first step which will not preclude further process, if it is necessary.

B. Confidential Information

In Docket No. 99-477, disputes among the parties over what information should be released to competitor parties dominated the case and distracted from the presentation of relevant facts. We hope to avoid that circumstance in this further proceeding. The issue before us involves what degree of protection should be afforded to information prepared by or for CMP regarding terms for procurement of right-of-ways.

Northern argues that all information regarding affiliate dealings or the terms of CMP's and CMPNG's agreements and the course of their negotiations should be released to allow public scrutiny and demonstrate the fairness of dealings between CMP and CMP NG. OPA supports broad disclosure of information unless disclosure would adversely impact ratepayers.

CMP argues that release to competitor parties of information relating to the location, terms of sale, or the granting of other related rights such as access to electric utility corridors would be detrimental to CMP, its affiliates, and, ultimately, to ratepayers. CMP reasons that entities seeking to use utility corridors will incur competitive harm if the location of their proposed use is revealed because they would lose the advantage of being first to market. Revealing price may also result in higher land acquisition costs to CMP if landowners demand compensation based on the amount for which CMP sells assembled corridor rights, rather than the market value of the landowner parcel. Further, disclosing information regarding use of corridors gives competitors an unfair advantage by knowing CMP's and its affiliates' business activities. Finally, CMP argues that the detriment resulting from additional disclosure (i.e., beyond the Commission and OPA) substantially outweighs the potential benefits in this proceeding.

CMP NG echoes these arguments and further argues that attorneys for competitor parties should not be provided access to this confidential information, or if they are, it should be subject to severe restrictions on subsequent activities in related matters by the attorney. Similarly, MNE argues against releasing negotiated price and other terms between CMP and other entities for use of corridors, noting that all other parties in this proceeding, other than Staff and OPA, are competitors of CMP NG and "all have or are likely to be in the position of negotiating with CMP for access to its electric transmission lines or other real property." MNE comments at 2. Finally, MNE argues that the price and other terms of such arrangements are "not the type of information … which benefits from or requires extensive discovery or exploration in order to develop … admissible evidence." Id.

While we believe it may be important to establish standard procedures governing the relationship between a utility and potential purchasers of its corridors at some point in the future, we agree that disclosure of the information identified in Temporary Protective Order No. 2 would negatively impact CMP and CMP NG in the competitive arena. There is a risk of harm to both CMP and CMP NG in subsequent negotiation for similar arrangements. This risk exists even if the information were provided only to the competitor parties' attorneys if they were allowed to represent those parties in subsequent negotiations or in direct competition with CMP or CMP NG. This is particularly so in the unique circumstance present here, where, if we do not approve the agreements between CMP and CMP NG for use of the electric corridor to build a gas pipeline to serve Calpine, the matter will again be opened up to competition among these same players.

Moreover, absent special circumstances, we generally strive for competitive neutrality, a goal that militates in favor of the rules of disclosure being the same for affiliates. The better, safer course for this proceeding is to allow protection of the designated information, subject to review and further consideration initiated by Staff and OPA, that allows us to find that it is clearly necessary to release some part of it.

For the above reasons, we hold that the financial information designated in Temporary Protective Order No. 2 should be disclosed initially only to the "public parties," i.e. the Commission and its staff and the OPA and its staff. In this context, we observe that the issues in this case center on whether or not there was discrimination in CMP's treatment of its affiliate and of other potential buyers of this particular asset. In that regard, it will be important for parties to know what was communicated or provided by CMP to its affiliate, compared to what was communicated by or available from CMP to non-affiliates in competition with the affiliate. On the other hand, just as a seller need not reveal underlying cost information or financial analyses to a potential buyer, this information has no clear relevance to the issue of fair dealings, and its disclosure could expose CMP and CMP NG to competitive harm. Similarly, the price at which CMP NG purchased the easement rights may have little relevance in this case because no other competitors reached this issue with CMP. We will grant confidential treatment of such sensitive information until there is a persuasive showing of relevance and a judgment on our part that disclosure of the information is necessary to fairly litigate the case. In light of the significant potential for harm should the information be disclosed, we find that, until we have reviewed the material and more probative value appears, we have satisfied the statutory test contained in 1311-A(1)(D)(1) for withholding information from competitor parties' attorneys.

As the preceding discussion implies, we recognize that there may be information filed pursuant to the terms of Temporary Protective Order No. 2 that we decide warrants disclosure to parties or parties' attorneys. This would be

the case if confidential information is so probative to the issues in this proceeding that the value of its disclosure outweighs the risk of harm and we find we could not fairly litigate the matters at issue without its release to other parties. See, e.g., *Order Denying Northern Utilities, Inc.'s Request to Release Confidential Information to Counsel Pursuant to 35-A M.R.S.A. 1311-A(1)(D)* dated October 12, 1999, in Docket No. 99-477.

We recognize also that only the so-called public parties will be in a position to identify such information. We, therefore, direct Staff and OPA to be vigilant in their review of information submitted pursuant to protective orders in this proceeding and to bring forward for release confidential information where it appears that the risk of harm is outweighed by the probative value and its importance to fair litigation. Until and unless that determination is subsequently made, however, the information designated in Temporary Protective Order No. 2 will not be disclosed to parties or their attorneys, as allowed in 35-A M.R.S.A. §1311-A (1)(D).[2]

For these reasons, we

O R D E R

1. That Temporary Protective Order No. 2 be amended according to this order.

Dated at Augusta, Maine, this 3rd day of January, 2000.

BY ORDER OF THE COMMISSION

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Dennis L. Keschl
Administrative Director

COMMISSIONERS VOTING FOR: Welch
Nugent
Diamond

[2] We reject release under the conditions proposed by CMP NG at this time, but may consider similar proposals in the future if warranted.

NOTICE OF RIGHTS TO REVIEW OR APPEAL

5 M.R.S.A. § 9061 requires the Public Utilities Commission to give each party to an adjudicatory proceeding written notice of the party's rights to review or appeal of its decision made at the conclusion of the adjudicatory proceeding. The methods of review or appeal of PUC decisions at the conclusion of an adjudicatory proceeding are as follows:

1. Reconsideration of the Commission's Order may be requested under Section 1004 of the Commission's Rules of Practice and Procedure (65-407 C.M.R.110) within 20 days of the date of the Order by filing a petition with the Commission stating the grounds upon which reconsideration is sought.

2. Appeal of a final decision of the Commission may be taken to the Law Court by filing, within 30 days of the date of the Order, a Notice of Appeal with the Administrative Director of the Commission, pursuant to 35-A M.R.S.A. § 1320(1)-(4) and the Maine Rules of Civil Procedure, Rule 73, et seq.

3. Additional court review of constitutional issues or issues involving the justness or reasonableness of rates may be had by the filing of an appeal with the Law Court, pursuant to 35-A M.R.S.A. § 1320(5).

Note: The attachment of this Notice to a document does not indicate the Commission's view that the particular document may be subject to review or appeal. Similarly, the failure of the Commission to attach a copy of this Notice to a document does not indicate the Commission's view that the document is not subject to review or appeal.