

STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 2014-00071

August 5, 2015

MAINE PUBLIC UTILITIES
COMMISSION Re: Investigation of
Parameters for Exercising Authority Pursuant
to the Maine Energy Cost Reduction Act, 35-
A M.R.S. §1901

NEES' Statement of
Opposition to TGP's Appeal
[sic] of Procedural Order --
Schedule for Exploration of
London Economics Inc.'s
Report

Now comes Northeast Energy Solutions (“NEES”) pursuant to Rule 5(B)(3) of the Public Utilities Commission Rules of Practice and Procedure and hereby submits this Statement in Opposition to Tennessee Gas Pipeline, LLC’s (TGP) Appeal of Procedural Order – Schedule for Exploration of London Economics Inc.’s Report.¹

In the Procedural Order, the Hearing Examiners established a measured, deliberate, cost-effective and, in NEES’s view, reasonable approach for enabling the parties and the Commission to assess and, if appropriate, challenge or rehabilitate the LEI Report. Specifically, the Hearing Examiners authorized written discovery and a Technical Conference with regard to the LEI Report “to allow a fuller understanding of the Report and its fundamental assumptions.” The Hearing Examiners explicitly reserved judgment, however, “on further procedural steps” which would be evaluated in light of the information adduced during the initial discovery phase.

TGP objects to the Procedural Order, demanding that it be afforded unrestrained, burdensome and expensive discovery from LEI and, further, that a full Hearing on the LEI Report be scheduled and that TGP be permitted to file further testimony in the proceeding.

¹ TGP has styled its filing as an “appeal” “pursuant to Chapter 10, Section 11(D), of the Commission’s Rules of Practice and Procedure.” Section 11(D) does not provide a right of appeal, but rather establishes a procedure for “[p]etitions to change, modify, rescind, clarify, reconsider or vacate any decision or order of the Commission or presiding officer...” TGP’s “appeal” is therefore procedurally defective and may be denied on that basis alone.

As set forth in more detail below, TGP's petition to modify the Procedural Order should be denied because the Commission properly exercised its authority to impose reasonable limits on the scope, timing and methods of discovery. TGP's request for a full hearing and an opportunity to submit further testimony should be denied because it is premature; the Commission explicitly reserved for a future date consideration of those issues.

I. Discussion

A. The Commission Reasonably Exercised Its Authority to Control the Scope And Timing of Discovery.

TGP's principal argument – that the LEI Report must be discarded unless TGP is authorized to conduct essentially unlimited discovery at the taxpayers' expense – must be rejected because the Commission is vested with the authority to control the scope and timing of discovery. TGP is correct that the Commission at the conclusion of Phase I of the proceeding authorized the taking of discovery with respect to the LEI Report. However, the Commission at that time did not purport to define the contours of the discovery to be allowed. The Commission certainly did not authorize the type of discovery TGP now seeks.

The rules of this Commission and of Maine Civil Procedure both authorize the commission to implement reasonable controls on discovery, such as those contained in the Procedural Order. See M. R. Civ. P. 26(c) & (d); Rules of Practice and Procedure, § 9(A) (“The presiding officer may ... set[] procedures and timetables for discovery ... limit[] the amount of additional discovery and address[] other discovery issues...”). The Maine Rules of Civil Procedure give discretion to the Commission to sequence discovery and further to restrict the scope or methods of discovery to prevent undue burden or expense. Id. In so doing, the Commission may weigh the probative value of the proposed discovery against the burden and expense associated therewith. See, e.g., Key Trust Co. of Maine v. Nasson College, 697 A.2d 408 (Me. 1997).

The Hearing Examiners were clearly within their discretion in determining that a phased approach to assessing the LEI Report was appropriate, with the parties first conducting discovery tailored to determining whether the LEI Report is so fundamentally flawed that the proposed ECRC's could, in fact, be cost-effective. The decision to adopt such an approach was patently reasonable. Here, the ultimate issue in this proceeding is not the technical precision or exactitude of the LEI Report, but rather whether the proposed ECRCs are reasonably likely to produce a net benefit. As Examiner Tannenbaum properly observed at the conference on July 21, 2015:

I think given the LEI report, there'd have to be testimony or support that it -- there are serious errors in order to turn the conclusion around that these proposals could be cost effective. So fighting around the edges is not going to be helpful and won't be allowed.

Transcript, p.38.² It was, therefore, appropriate for the Commission to give the parties an opportunity to conduct limited discovery to assess whether such "serious errors" exist, instead of allowing unduly expensive and burdensome, but only peripherally relevant, discovery about the minutiae of LEI's modeling and methodology.

The scope of discovery allowed by the Commission was appropriately tailored in light of the potential burdens and expenses of the discovery sought. Specifically, the Commission required that the discovery requests be "reasonably likely to provide information that will assist in determining whether the LEI Report contains significant flaws or its cost-benefit analysis results should be considered unreliable and that, as a result of these facts, under revised assumptions and analysis, ECRC proposals could be found to be cost effective." Such a limitation is justified by the Commission's concerns with the undue expense of requiring LEI to respond to duplicitous and only marginally relevant discovery. As the Hearing Examiner stated at the conference:

² At the hearing, counsel for TGP agreed with this approach: "On behalf of TGP, I want to say I think your suggestion about limiting the focus to those matter that would make one or more proposals cost effective is a good standard." Transcript, p. 21.

I would urge the parties and inform the parties that staff will be looking over the data requests very carefully to make sure that they're relevant and useful, unlike our usual practice. And -- and to be honest, that's because we have a limited budget with -- with LEI and we're not going to allow them to spend time doing work that's not going to be helpful for this process.

Transcript, p.26.

Despite its current protestations, TGP has not articulated how the scope of discovery approved by the Commission will inhibit TGP's ability to assess or challenge the conclusions of the LEI Report. TGP already appears armed with an arsenal of arguments to attack the LEI Report—spending nearly half of its appeal brief articulating the report's purported flaws. See Appeal, pp. 4-7, § B (“The LEI Report Contains Major Flaws”). Tellingly, TGP does not identify any specific topics into which the Commission has prohibited it from inquiring which would assist TGP (or the Commission) from assessing the LEI Report.

B. Nothing Requires the Commission to Allow Sensitivities Analyses

TGP's primary objection to the Procedural Order appears to be the prohibition on discovery requests that would require LEI to conduct sensitivities analyses or other additional modeling. Indeed, TGP's request that LEI be required to conduct sensitivities is the only specific “discovery” which TGP claim the Commission has improperly excluded. However, as TGP properly concedes, there are no rules which require or, for that matter, even authorize sensitivities by a consultant at the request of an intervening party during discovery. While the Commission may at times allow sensitivities analyses, TGP has not and cannot cite any authority which would require it to do so.

TGP's request to require LEI to run sensitivities should also be denied because TGP failed to raise such a request at the procedural conference. At the conference, the Hearing Examiner unambiguously stated that “Also, LEI will not be running sensitivities if people have that in mind, you know, run your model assuming this or run your model assuming that. That will not be allowed. Any other questions or issues?” (Transcript, p. 26). While TGP raised other issues, such

as its request to have testimony, TGP did not press its current request for sensitivities. It is well-settled under Maine law that a party may not raise for the first time on appeal an issue which was not explicitly raised below. E.g. Nicholson v. Nicholson, 510 A.2d 1075, 1076 (Me. 1986) (“This Court has repeatedly held that ‘[n]o principle is better settled than that a party who raises an issue for the first time on appeal will be deemed to have waived the issue, even if it is one of constitutional law.’ Cyr v. Cyr, 432 A.2d 793, 797 (Me.1981)”).

C. The Appeal is Premature Because The Hearing Examiners Reserved a Decision on Further Process

TGP’s argument that it should be allowed to present additional testimony is not yet ripe because the Hearing Examiners explicitly reserved until after discovery the decision on whether to allow testimony. It is fundamental that a decision which has not yet been made cannot be appealed. Johnson v. City of Augusta, 902 A.2d 855, 858 (Me. 2006). (appeal not appropriate where the appellee city had not yet made a final decision on the application at issue, as the appeal would require the court “to assume that the [city] will deny the applications”). Here, the Hearing Examiners have left for future hearing – after discovery on the LEI Report is completed – whether to allow additional testimony and, if so, the scope of such testimony. The Hearing Examiners were correct to reserve hearing and decision on these issues because they will likely depend on the outcome of the discovery conducted.

D. TGP Is Not Entitled to Discovery or to Provide Further Testimony in This Proceeding Because The Commission May Terminate This Investigation at Any Time.

TGP’s arguments concerning its rights to discovery and to present testimony misconstrue the nature of this proceeding and TGP’s rights herein. This proceeding fundamentally is not a

proceeding to decide between ECRC proposals; nothing in the Maine Energy Conservation Act (The “Act”) requires the Commission to enter an ECRC. To the contrary, the Act simply authorizes the Commission to do so if such an ECRC meets the statutory conditions. 35-A M.R.S. §1904 (“The commission in consultation with the Public Advocate and Governor's Energy Office *may* execute an energy cost reduction contract in accordance with this section”). As such, the Commission need not afford full adjudicatory rights to TGP at this time because the Commission may decide at any time to terminate this investigation. NEES submits that the time has come to terminate further discovery and this investigation, as the evidence has become sufficiently clear that an ECRC such as those currently proposed will not currently yield a net benefit to Maine.

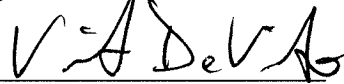
II. Conclusion

The Commission properly exercised its authority in allowing limited discovery as to the LEI Report and reserving a decision on whether to allow additional testimony and the Commission should deny TGP’s appeal.

Respectfully submitted this 5th day of August, 2015.

Northeast Energy Solutions

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