

Before the New Hampshire Public Utilities Commission

DE 08-103

Investigation of PSNH Installation of Scrubber Technology
at Merrimack Station

**JOINT OBJECTION TO PSNH MOTION FOR PROTECTIVE
ORDER AND CONFIDENTIAL TREATMENT**

NOW COME the Office of the Consumer Advocate (“OCA”), the Conservation Law Foundation (“CLF”), the Sierra Club, TransCanada Power Marketing Ltd. and TransCanada Hydro Northeast Inc. (“TransCanada”), and New England Power Generators Association (NEPGA) (collectively, the “Parties”) and object to Public Service Company of New Hampshire’s (“PSNH’s”) Motion for Protective Order and Confidential Treatment (“Motion”) regarding materials related to work performed for the Commission by Jacobs Consultancy (“Jacobs”), and in support thereof state as follows:

1. The Commission opened Docket DE 08-103 to investigate and monitor PSNH’s installation of a Wet Flue Gas Desulfurization (“FGD”) System (i.e., “Scrubber” technology) at Merrimack Generating Station in Bow. In January of 2010 the Commission retained Jacobs as its “due diligence” expert to assist with the Commission’s prudence review of the Scrubber investment. *See* Motion at p. 1, para. 1. In the context of Jacobs’ due diligence investigation on behalf of the Commission, PSNH required Jacobs to enter into a confidentiality agreement (“Jacobs Confidentiality Agreement”).
2. On November 18, 2011 PSNH requested permission from the Commission for the establishment of temporary rates, within the context of another docket, DE 11-250, which the Commission had opened on its own initiative to consider PSNH’s recovery of the costs

associated with the Scrubber. *See* DE 11-250 Order of Notice, December 1, 2011.

Specifically, PSNH seeks to recover \$359.1 million in Scrubber costs that the Company states had been incurred as of November 18, 2011.¹

3. On January 20, 2012 the Commission Staff filed a letter and an “Update on Jacobs Consultancy Review and Reports” in DE 08-103. The letter was accompanied by copies of four reports prepared by Jacobs: quarterly reports from June, November and December of 2011; and one report entitled “New Hampshire Clean Air Project Due Diligence on Completed Portion” (“Jacobs Report”). Based on information and belief, two versions of the Jacobs Report were provided to the Commission: one confidential and one redacted.
4. Also on January 20, 2012, PSNH filed its Motion. PSNH attached a copy of the Jacobs Confidentiality Agreement to the Motion. The Jacobs Confidentiality Agreement states, in part, that “the documents that form the basis of Jacob’s conclusions shall not be provided to the NHPUC staff without the prior notification and permission of PSNH.” Jacobs Confidentiality Agreement at paragraph 4 (emphasis added).
5. On January 26, 2012, the OCA received a copy of the confidential version of the Jacobs Report. To date, no other party has received a copy of the confidential Jacobs Report.
6. In its Motion, PSNH seeks to protect “three categories” of information contained within the confidential version of the Jacobs Report:
 - a. Vendor bid information;
 - b. Costs related to vendor contracts; and
 - c. Information related to Jacob’s due diligence investigation on behalf of the Commission.
7. For each category of information, PSNH has failed to establish that confidential treatment is

¹ Recent total costs estimates have been as high as \$430 million.

warranted. This objection addresses each category in turn, below.

Bid Information

8. PSNH seeks protection of the names of the unsuccessful bidders for each of the sixteen contracts associated with the Scrubber's construction as well as PSNH's bid scores ("Bid Information"). Motion at p. 3, para. 5. PSNH argues that the Bid Information should be protected from disclosure for the following reasons: (1) "to honor its legal obligations to the bidders" given the "highly competitive nature of the marketplace for these vendors' services;" (2) "to maintain the integrity of its procurement processes for any future solicitations" in order not to negatively impact the Company's ability to "obtain robust participation in competitive solicitations in the future" to the detriment of PSNH's customers; (3) because disclosure of unsuccessful bidders and the bid scores "would not provide any information to the public on the workings of the government" and, therefore, there is no public interest in disclosure; and (4) even if there is a "slight public interest in disclosure," it is outweighed by the Company's and the unsuccessful bidders' privacy interest. PSNH is incorrect on all counts.
9. The Right-to-Know Law provides each citizen with the right to inspect public information in the possession of the Commission except in very limited circumstances. RSA 91-A:4, I, and RSA 91-A:5. In making its determination on whether or not information in its possession should be disclosed, the Commission utilizes an "invasion of privacy" analysis. This analysis specifically includes the following considerations: (1) evaluating whether there is a privacy interest at stake that would be invaded by the disclosure; (2) assessing the public's interest in disclosure; and (3) balancing the public interest in disclosure against the government's interest in nondisclosure and the individual's privacy interest in nondisclosure. Public Service Company of New Hampshire, Order 25,313 (DE 11-215, December 30, 2011), slip op. at pp.

11-12, *citing Lambert v. Belknap County Convention*, 157 N.H. 375, 382 (2008).

10. Under the first prong of this analysis, whether information is exempt from disclosure under the Right-to-Know Law because it is private is judged by an objective standard and not a party's subjective expectations. *Id.* at 382-383. If no privacy interest is at stake, then the Right-to-Know Law mandates disclosure. *Id.* at 383.

11. PSNH cites to two sources as the basis for its claim that the bidders and PSNH have privacy interests in the Bid Information. First, PSNH claims that the RFP provided to all bidders contained a “confidentiality provision which states that ‘[b]idders were assured that any Sensitive, Confidential or Proprietary information, ideas or protected design criteria submitted and identified as such, in Bidder’s Proposal will not be shared with [the bidders’] competitors” Motion at p. 3, para. 6. (internal quotation omitted). Second, PSNH contends that certain language in the confidentiality agreements with “vendors in association with their responses to the RFP” forms a basis for these privacy interests: “[c]onfidential Information shall not be used for any purpose other than [by the bidder] to formulate a response to the RFP or [by PSNH] to evaluate such a response.” *Id.*

12. PSNH also cites to recent energy service proceedings to support its privacy claim for the Bid Information. In effect, PSNH contends that the Scrubber bidders and PSNH’s ratings of the bidders’ responses to the RFP are analogous to energy service bidders and the electric utilities’ analysis of these bids. Motion at p. 4, para. 7. PSNH claims that releasing the bidders’ identities and PSNH’s assessment of the Scrubber bids “could have a chilling effect on the willingness of vendors to participate in the Company’s contracting process in the future.”

13. When viewed objectively, as the Commission is required to do, PSNH has failed to

demonstrate that the unsuccessful bidders and PNSH have privacy interests in the Bid Information. PNSH's privacy argument is self-serving and circular: because the RFPs (that PNSH itself drafted) contain assurances about the information being kept confidential PNSH needs to honor these assurances. As a regulated public utility issuing RFPs for vendors on a unique, major, and expensive project paid for by ratepayers, a project that PNSH knew was going to be subject to a prudence review, the Company should not have assured vendors that their identities or PNSH's scores of the vendors' responses to the Scrubber RFP would be kept confidential. PNSH simply cannot use the confidentiality provisions it unilaterally created in its RFPs to circumvent the requirements of New Hampshire's Right-to-Know law and the critically important public policy objectives it serves.

14. PNSH has also failed to attach copies of the executed confidentiality agreements, and instead merely asserts that these agreements exist. As a result, the Parties are not able to examine the scope of any claim of confidentiality, or the privacy interests that PNSH asserts. Similarly, PNSH has failed to establish that the material for which it seeks the Commission's protection has actually been held in confidence by either PNSH, Jacobs, or the contracting parties. Therefore, no privacy interest has been demonstrated.
15. Assuming for the sake of argument that either the vendors or PNSH has a privacy interest in the Bid Information, PNSH has failed to demonstrate that this privacy interest outweighs the public's interest in disclosure of at least PNSH's scoring of the bids.
16. In its prudence review of the Scrubber costs pursuant to RSA 125-O:18, the Commission will consider, among other considerations, whether PNSH's selection of vendors was prudent. The public has an interest in disclosure of the facts that will form the basis for the

Commission's determination on this issue. It is just this kind of openness and accountability that RSA 91-A seeks to protect.

17. "The purpose of the Right-to-Know Law is to ensure both the greatest possible public access to the actions, discussions and records of all public bodies, and their accountability to the people. The Right-to-Know law helps further our state constitutional requirement that the public's right of access to governmental proceedings and records shall not be unreasonably restricted. Although the statute does not provide for unrestricted access to public records and proceedings, to best effectuate the statutory and constitutional objective of facilitating access to all public documents and proceedings, we resolve questions regarding the Right-to-Know Law with a view to providing the utmost information." Lambert v. Belknap County Convention, 157 N.H. 375, 378-379 (2008) (citations and internal quotations omitted); *see also* N.H. CONST. pt. I, art. 8.
18. Because an analysis of bidding information is highly relevant to whether PSNH was prudent in how it chose one or more vendors, the public's interest in the Commission's assessment of the bid scores outweighs any alleged privacy interest that PSNH or the unsuccessful bidders have in the bid scores. Moreover, for the sake of argument, if the identity of the unsuccessful bidders is kept confidential, the unsuccessful bidders no longer have a privacy interest at stake.
19. The passage of time since these bids were submitted and the unique circumstances of the Scrubber project also require that PSNH's efforts to keep the information confidential must fail. Although it is unclear exactly when the bids were submitted, given the length of time that the project has been underway it is highly likely that this information is stale; it is information that pertains to pricing that was done long enough ago that any concerns about

negative impacts to the competitive positions of unsuccessful bidders or PSNH should be significantly diminished if not altogether eliminated. In that case, the alleged privacy interests seem all the more outweighed by the public's interest in the Commission's assessment of the Bid Information.

20. Because PSNH has argued in many forums that it was "mandated" by the Legislature to install the Scrubber, and because this Commission is a state agency required to conduct a critical prudence review of this project, PSNH's argument that disclosure of the Bid Information to the public is outweighed by any privacy interest is specious. The public interest in making this information available for review is great and it clearly outweighs any interest PSNH might have in keeping this information confidential.

Contract Price Information

21. PSNH also seeks to protect from disclosure the "final contract amount (including a not-to-exceed amount)" for each of the sixteen vendor contracts for the Scrubber, which is contained within the Jacobs Report ("Contract Price Information"). Motion, at p. 6, para. 11. PSNH contends that the Contract Price Information "constitutes competitive, commercial, financial information which neither the Company nor the vendors have disclosed publicly, was submitted in confidence as part of the RFP process described above, and is subject to contractual obligations of confidentiality." Id.
22. PSNH has failed to demonstrate that either the successful vendors or PSNH have a privacy interest in the total amounts paid by PSNH for the total amount of services delivered by each of the vendors. PSNH simply cannot avoid the Commission's obligations under RSA 91-A – or the important policy objectives of the Right-to-Know law – through contract. In other words, just because PSNH states that it entered into "confidentiality" agreements to

keep this information confidential does not mean that it can avoid the public disclosure requirements of RSA 91-A.

23. In addition, as with the bid information discussed above, PSNH has again failed to attach copies of the executed confidentiality agreements related to the contract price information. Instead, PSNH merely asserts that these agreements were executed, leaving the Parties unable to examine the scope of any confidentiality and accordant privacy interest PSNH asserts. Similarly, PSNH has failed to establish that the material for which it seeks this Commission's protection has actually been held in confidence by either PSNH, Jacobs, or the contracting parties. Again, PSNH has failed to demonstrate that a privacy interest exists.
24. As the Commission has recently noted in a proceeding concerning a PSNH power purchase agreement, "the disclosure of [contract price] information is central to the public's understanding of how the Commission evaluates" utility proposals and activities. Order No. 25,158 in DE 10-195 (October 15, 2010) at p. 12. PSNH offers no legitimate explanation for why the Commission should treat this same type of information as confidential within the context of a prudency proceeding.
25. Similarly, "absent disclosure of the pricing terms and details, the public's ability to understand how the Commission reaches a finding" regarding utility filings "would be diminished [and d]isclosure of the pricing terms would permit a fully transparent review of the costs" of the Scrubber. Order No. 25,158 (October 15, 2010) at p. 13.

Jacobs Data Requests

26. PSNH next argues that the Commission should not disclose to the public or any of the Parties, “[I]nformation relating to the discovery submitted by Jacobs to the Company as part of its due diligence review which itself was the subject of a confidentiality agreement between PSNH and Jacobs” (“Jacobs Data Requests”). *See* Motion at p. 2, para. 2 and p.

11. PSNH also claims that it controls Jacobs’ ability to disclose information to the Commission Staff that Jacobs obtained from PSNH, even though Jacobs performed its work behalf of the Commission.² PSNH’s argument is a novel and perhaps unprecedented request, as it seeks to have a government agency hide information from ratepayers about a matter that will have a major impact on them.

27. PSNH appears to rely on three bases for preventing the disclosure of the Jacobs Data Requests: (1) that pending litigation and threats of litigation require the Commission to protect the Jacobs Data Request from public disclosure; (2) that PSNH has a confidentiality agreement with Jacobs that prevents the release of the information; and (3) that PSNH has a privacy right that allows it to withhold information not only from the public and intervenors in the case, but also from the Commission and the OCA, which is charged by statute with representing the interests of PSNH’s residential customers.

28. PSNH’s reliance is misplaced, and its request to protect the Jacobs Data Requests must be denied for several reasons.

29. First, with regard to the “pending litigation and threats of litigation” basis, the Commission has already rejected this argument from PSNH more than once in recent cases.

The Commission has previously rejected PSNH’s claims that pending or threatened litigation allow it to withhold information in a PUC docket. We

² It is unclear whether PSNH also seeks to prevent disclosure of certain information in Jacobs’ possession from the Commissioners.

also agree with CLF that potential plans for litigation by parties to a proceeding before the Commission are irrelevant to the balancing analysis required under the RSA 91-A framework

Order No. 25,234 in DE 10-261, June 14, 2011, at p. 10.

30. With regard to PSNH's argument that the Jacobs Data Requests are exempt from disclosure, the facts speak for themselves that this basis is flawed.
31. Jacobs is working on behalf of the Commission, assisting it with conducting a "due diligence" review of the Scrubber project. *See* Motion at p. 1 (Jacobs was retained by the Commission in January of 2011 "to conduct a due diligence review on the completed portion of PSNH's Scrubber Project at Merrimack Station and to monitor the project through completion.").
32. PSNH does not contend that had the Commission or its Staff directly propounded the Jacobs Data Requests, there would be any basis to maintain the confidentiality of these questions.
33. What PSNH is seeking to do by preventing disclosure of the Jacobs Data Request, however, is essentially the same as preventing the disclosure of a data request of the Commission or its Staff.
34. For the purposes of Jacobs' role in the Commission's prudency review and the Commission's relationship with Jacobs in that capacity (*i.e.*, Jacobs is the Commission's expert witness), PSNH has no basis to restrict the Commission's disclosure of its expert's questions – through a contract (*i.e.*, Jacobs Confidentiality Agreement) or otherwise.³ This type of government conduct (*i.e.*, questions of a regulatory agency to a regulated entity) is

³ To be clear, the Parties do not contend that PSNH cannot control through a confidentiality agreement Jacobs' disclosure of information to a person other than the Commission. That question is not before the Commission at this time. Rather, the question before the Commission is whether PSNH can control, through a confidentiality agreement with a Commission consultant, the Commission's disclosure of information to the public, which disclosure is governed by statute.

exactly the type of conduct that RSA 91-A requires be conducted in open and in a way that is transparent to the public. Jacobs Data Requests are “information create . . . *on behalf of* . . . [the Commission] in furtherance of its official function” and, consequently, “governmental records” as defined by RSA 91-A:1-a, III (emphasis added). In other words, PSNH has no privacy interest in the Jacobs Data Requests.

35. Because there is no privacy interest at stake, the Commission need not consider the public’s significant interest in disclosure of the Jacobs Data requests. *See, e.g.,* ¶ 10 *supra*.

Nonetheless, the public interest in the material that PSNH seeks to shield from public view is great. PSNH is a regulated utility that seeks to recover certain costs from ratepayers and the prudence of that investment is being investigated by the Commission. The public has a right to know how the Commission investigated the Scrubber costs, including what questions the Commission’s expert asked PSNH during this investigation.

36. Denying PSNH’s request to prevent disclosure of the Jacobs Data Request is entirely consistent with the plain language as well as the spirit of the Right-to-Know Law: ensuring the greatest possible public access to the actions, discussions and records of all public bodies; and ensuring the accountability of government agencies like the Commission to the public; preventing unreasonable restrictions on the public’s right of access to governmental proceedings and records.

37. The Commission “resolve[s] questions regarding the Right-to-Know law with a view to providing the utmost information to the public.” Order No. 25,168 in DE 10-195 (November 12, 2010), at p. 16. The public has a right to know the basis for the Commission’s findings after its prudence review, especially in light of the fact that the Scrubber is one of the most expensive utility projects in the state’s history.

38. Therefore, the Commission must deny the motion for confidential treatment with respect to all three categories of information: the Bid Information; the Contract Price Information; and the Jacobs' Data Request.

WHEREFORE, the Parties respectfully request the Commission:

- A. Deny PSNH's Motion; and
- B. Grant such other relief as justice may require.


Respectfully submitted,





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CERTIFICATE OF SERVICE

I hereby certify that a copy of this pleading was forwarded this day to the parties on the service list in this docket by electronic mail.

January 30, 2012


Meredith A. Hatfield