

**STATE OF NEW HAMPSHIRE  
PUBLIC UTILITIES COMMISSION**

**DE 08-103  
DE 11-250**

**PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE**

**Motion for Protective Order and Confidential Treatment**

**Order on Motion**

**ORDER NO. 25,332**

**February 6, 2012**

**I. PROCEDURAL HISTORY**

The Commission opened Docket No. DE 08-103 to investigate the actions of Public Service Company of New Hampshire (PSNH or Company) in its installation of a flue gas desulphurization system (Scrubber) at Merrimack Station, PSNH's coal-fired electric generation facility in the Town of Bow. RSA 125-O:11 *et seq.* requires PSNH to install the Scrubber at Merrimack Station to reduce air pollution, including mercury emissions. In *Public Service Company of New Hampshire*, Order No. 24,898 (September 19, 2008), the Commission ruled, among other things, that in order to meet its obligations regarding a later determination of the prudence of the Scrubber installation, it would keep the docket open to monitor PSNH's actions as it proceeded with the installation.

In 2010, the Commission contracted with Jacobs Consultancy, Inc. (Jacobs) for a variety of consulting services, including the review of PSNH's installation of the Scrubber technology. On January 20, 2012, Staff filed with the Commission certain reports provided to Staff by Jacobs. The filing consisted of three quarterly reports and two copies of a "Due Diligence" report dated June 2011: a redacted (public) version and an unredacted (confidential) version.

Also on January 20, 2012, PSNH filed a motion for protective order and confidential treatment (Motion) of the redacted portions of the Due Diligence report, together with a copy of a confidentiality agreement between PSNH and Jacobs with an effective date of June 18, 2010. PSNH attached a copy of the confidentiality agreement to the Motion. PSNH claimed that the redacted information constituted confidential, commercial or financial information exempted from public disclosure pursuant to RSA 91-A:5, IV. PSNH did not claim confidential treatment for any information contained in the quarterly reports.

On January 30, 2012, the Office of Consumer Advocate (OCA) filed a joint objection (Objection) on behalf of itself, the Conservation Law Foundation (CLF), the Sierra Club (SC), TransCanada Power Marketing Ltd. and TransCanada Hydro Northeast Inc. (TransCanada) and New England Power Generators Association (NEPGA) (collectively, the Objecting Parties) to the Motion.<sup>1</sup> PSNH filed a motion for leave to reply to the joint objection and a Reply on February 1, 2012.

## **II. POSITIONS OF THE PARTIES**

### **A. Public Service Company of New Hampshire**

In its Motion, PSNH claimed that there were three categories of information in the Jacobs Due Diligence Report that constitute confidential, commercial, or financial information for which confidential treatment is legally appropriate: (1) bid information, including the identity of bidders who participated in the Scrubber contracting process and were not selected as the winning bidder, and the final bid scores; (2) the contract dollar amounts associated with each of the contracts; and (3) information relating to the discovery submitted by Jacobs to PSNH as part of its due diligence review which PSNH claimed was also the subject of a confidentiality

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<sup>1</sup> The cover letter indicated that the Objection was being filed in Docket No. 11-250. A corrected copy of the cover letter was filed on February 2, 2012 indicating that the Objection was being filed in Docket No. 08-103, which is consistent with the heading on the Objection.

agreement between PSNH and Jacobs. PSNH based its argument that the information is confidential and exempt from public disclosure on the three-step analysis that the Commission has adopted to determine whether information should be protected from disclosure. *See, e.g., Public Service Company of New Hampshire*, Order No. 25,313 at 11-12 (December 30, 2011). The Company noted that the Commission applies a three-step analysis pursuant to *Lambert v. Belknap County Convention*, 157 N.H. 375 (2008). PSNH said the first step of that analysis is to determine whether information requested for protection is confidential information within the meaning of the Right-To-Know statute, RSA Ch. 91-A. If there is a privacy interest, the second step requires the Commission to determine if there is a public interest in disclosure, i.e., whether the disclosure informs the public of the conduct of government activities. Finally, if the Commission finds there is both a privacy interest in non-disclosure and a public interest in disclosure, the Commission balances the interests in order to weigh the benefits of public disclosure with the harm that may result if the information is disclosed. PSNH Motion at 2.

### **1. Bidder Information**

PSNH said the Jacobs Due Diligence report describes the contracting process that PSNH used for the Scrubber project, including the issuance of requests for proposals (RFPs) for certain of the services to be procured. Appendix 8.4 of the Due Diligence report lists sixteen contracts associated with the Scrubber's construction which were granted pursuant to RFPs. Appendix 8.4 identifies the names of the bidders to whom the RFP was issued, the name of the bidder selected, and, in one case, the bid scores. PSNH seeks to protect the names of the unsuccessful bidders and the bid scores "to honor its legal obligation to the bidders as well as to maintain the integrity of its procurement processes" for any future RFPs it may issue. *Id.* at 3. PSNH said that the RFPs specifically contained a confidentiality provision which states that "[b]idders are 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 their competitors.”

*Id.* PSNH said that, given the highly competitive marketplace for the vendors’ services, the Company also entered into confidentiality agreements with vendors in connection with their RFP responses which assured PSNH that bidders would not release PSNH confidential information which was provided in order to prepare bids and information submitted by bidders as part of their RFP responses.<sup>2</sup> *Id.* at 3-4.

PSNH said that both the Company and the losing bidders have a privacy interest in their names and the scores of the bids. According to the Company, the bidders who participated in the RFP relied on the understanding that the information supplied in their responses would be maintained as confidential. PSNH said that the Commission has repeatedly recognized this privacy interest, citing *Unitil Energy Systems, Inc.*, Order No. 25,303 (December 15, 2011) in Docket No. DE 11-028, and *Granite State Electric Company*, Order No. 25,270 (September 12, 2011) in Docket No. DE 11-016, proceedings regarding the solicitation of wholesale power supply. PSNH also cited Order No. 25,303 to support its assertion that the Company has a privacy interest in bid scores. In the instant proceeding, PSNH argued that bid scores reflects the Company’s assessment of the bid which, if released, could have a chilling effect on the willingness of vendors to participate in future Company solicitations. *Id.* at 4-5.

Regarding the second step of the Commission’s analysis of motions for confidential treatment, PSNH asserted that disclosure of the information would not inform the public about the operation of government. According to the Company, disclosure of the identity of the losing bidders and the bid scores would not provide any insight into how Jacobs conducted its work in

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<sup>2</sup> According to PSNH, “confidential information” was defined to include “either Party’s proprietary information of a business and/or technical nature that is owned or controlled by a Disclosing Party.” *Id.* at 4.

evaluating PSNH's contracting process. PSNH concluded that there is no public interest in disclosure and thus the Commission's analysis goes no further. *Id.* at 5.

PSNH further argued that, even assuming a slight public interest in the disclosure of bidder identities and bid scores, the harm to PSNH's ability to elicit robust participation in future competitive solicitations and the resulting detriment to PSNH customers from its ability to obtain competitive pricing outweighs any benefit to the public from disclosure, citing Order No. 25,270. *Id.* at 5. PSNH requested that the Commission grant its motion and condition any disclosure of this category of confidential information upon the execution of a mutually agreeable non-disclosure agreement. *Id.* at 5-6.

## **2. Contract Price Information**

PSNH said it seeks protective treatment of contract pricing information also contained in Section 8.4 of the Jacobs Due Diligence report because the pricing information constitutes competitive, commercial, financial information which neither the Company nor the vendors have disclosed publicly and which was submitted in confidence as part of the RFP process and subject to contractual obligations of confidentiality. The specific information for which PSNH seeks confidential treatment is the final contract amount (including the not-to exceed amount) for each of the sixteen contracts.

According to PSNH, the Company's contracts with each of the vendors include a confidentiality provision which prohibits the Company from disclosing the contractors' proprietary information, including contract price, for periods ranging from five to six years from the date of receipt of the proprietary information. PSNH stated that the language regarding confidentiality is drafted in such a way as to include the agreement itself as confidential information that cannot be disclosed under its terms. *Id.* at 6. Further the confidentiality

agreement in the vendor contracts also requires PSNH to request a protective order in the event that the Company is required to disclose confidential information to any “Governmental Authority.” *Id.* at 7. Therefore, in applying the first step in the *Lambert* analysis of confidentiality, PSNH concluded that the contractors and the Company have a privacy interest in this information based on the contract terms. *Id.* at 7-8. PSNH also argued that the contractors have a further privacy interest in the contract price stemming from their interest in maintaining a competitive position in the marketplace, citing *New Hampshire Gas Corporation*, Order 25,281 at 8 (October 28, 2011) and *Public Service Company of New Hampshire*, Order No. 25,234 at 3 (June 14, 2011).

As to the second step of the confidentiality analysis, PSNH stated that the Commission must decide whether there is a public interest in disclosing the information. PSNH maintained that there is no public interest in disclosure of the information because its disclosure would not reveal anything regarding Jacobs’s review of the Scrubber installation. PSNH noted that if the Commission concludes that there is a public interest to disclosure, the Commission must then balance the privacy and public interests at stake. PSNH argued that the demand for installation of Scrubber technology is likely to increase, given environmental compliance obligations faced by coal-fired plants, and it is reasonable to expect that the contractors will want to continue to compete to provide the services that they offer. Citing Order Nos. 25,281 and 25,234, and *Electric and Gas Utilities*, Order 25,189 (December 30, 2010) in Docket No. 10-188 (CORE Electric Energy Efficiency and Gas Energy Efficiency Programs), PSNH maintained that the contractors should not be disadvantaged in their ability to compete for future work by disclosure of the pricing information in the contracts. PSNH concluded that the potential harm to the contractors and to PSNH resulting from public disclosure significantly outweighs any interest in

public disclosure. *Id.* at 10. PSNH said that while it does not object to providing the confidential information to the OCA and Staff, it requests that any protective order provide that this information only be disclosed upon the execution of a mutually agreeable non-disclosure agreement. *Id.* The Company further requests that, if the information is sought by any entity or individual that owns, has a member that owns, or any affiliate that owns coal-fired generation plants, such information be disclosed on an attorneys' eyes only basis. PSNH argued that this limitation is necessary since it is possible that Scrubber technology may be installed at such coal-fired generation plants in the future and they should not obtain an advantage on the pricing of such technology by virtue of their participation in this case. *Id.*

### **3. Jacobs Data Requests**

PSNH identified the information for which it requested protective treatment to be the list of data requests made by Jacobs, the text of which are set forth in Appendix 8.1 and identified in various footnotes through the Due Diligence report. *Id.* at 11. According to PSNH, Appendix 8.1 contains an extensive listing of documents provided to Jacobs in connection with the due diligence review and includes confidential documents. *Id.* at 12. PSNH sought to withhold disclosure of the data requests from the public and any party to the docket in light of the provisions of the confidentiality agreement attached to the Motion. *Id.* at 11. The confidentiality agreement recognized that "PSNH's construction of the FGD System, despite the legislative mandate to install this specific technology at Merrimack Station, is currently the subject of litigation and threats of litigation by various parties and thereby subject to heightened and extraordinary scrutiny." *Id.* For its argument, PSNH relied on sections 3 and 4 of the confidentiality agreement. The Company asserted that it provided extensive documentation to Jacobs based on the understandings set forth in the confidentiality agreement. *Id.* According to

PSNH, the confidentiality agreement expressly contemplates whether information could be released to the Commission, and created limitations on the provision of underlying documents to Staff in certain circumstances. *Id.* The Company asserted that this agreement was obtained from Jacobs because the Company was concerned not only with meeting its confidentiality obligations to third parties but also with maintaining the confidentiality of its own documents. PSNH concluded that the Company has a legitimate privacy interest in the data requests. *Id.* at 12.

As to whether disclosure of the Jacobs data requests would reveal the workings of the government and thus be in the public interest, PSNH asserted that the Due Diligence report states that Jacobs reviewed more than 3,000 pages of documents as part of its analysis and adequately identifies the subject matter areas of its inquiry. In PSNH's view, it is not necessary to know the identity of every document provided to Jacobs. *Id.*

PSNH further claimed that even if the Commission were to conclude that there was some public interest that would be served by publicly disclosing the information, the harm to the Company outweighs any public interest. PSNH said that it negotiated and entered into the confidentiality agreement with Jacobs in good faith and to require the public release of information that the Company understood would be treated as confidential would create and "untenable precedent" where regulated entities could never be sure that a contractual obligation of confidentiality would be respected. *Id.* at 12-13. According to the Company, if participants in the docket have questions about the Jacobs Due Diligence report, the Commission can determine an appropriate process for such inquiry. The Company opined that releasing the list of discovery questions submitted to the Company does not achieve that end. *Id.*



PSNH's motion for leave to reply was filed in response to the Objection to PSNH's Motion, in order to allow the Company to state its concerns regarding the release of the confidential version of the Jacobs Due Diligence report to the OCA and to address the procedural ability of signatories to the Objection to file a motion in this proceeding.

In its reply, PSNH maintained that there were two procedural deficiencies related to the Objection. First, PSNH said that the docket in which the Jacobs' reports were filed, DE 08-103, was opened as a repository for information about the status of the installation of the scrubber and that it is not an adjudicative docket. PSNH stated that only the Staff of the Commission and the OCA are participants, and that the Commission had granted no interventions in this proceeding.

PSNH noted that, according to the Objection, the OCA had received a confidential version of the Jacobs Due Diligence report, and the OCA represented to the Company's counsel that the copy was provided based on OCA's statutory authority to access confidential information pursuant to RSA 363:28, VI. PSNH said that the statute only permits the OCA to have access to such information in adjudicative proceedings and that there was "no legal basis upon which to disclose the unredacted Report to OCA." PSNH Reply at 1-2.

PSNH further argued that while the OCA was a participant in DE 08-103, the other signatories to the Objection were not granted intervenor status and thus have no ability to file a pleading in this case. *Id.* at 2. PSNH said "[a]t best, they are limited to public comment at a hearing or a prehearing conference as dictated by the Commission rules." *Id.* at 2-3. PSNH alleged that the OCA attempted to cure this procedural infirmity by reciting DE 11-250 in the subject matter line of its original cover letter enclosing the Objection and copying that docket on its filing, but stated that the Commission has not consolidated the two dockets.

Regarding the merits of the Objection, PSNH argued that the substantive position advanced in the Objection is contrary to Commission precedent and would create substantial disincentives for third parties to do business with New Hampshire utilities. With reference to bid information, PSNH argued that the OCA overlooks long-standing precedent in New Hampshire that bid information associated with default service is accorded confidential treatment and that the costs associated with the Scrubber are no different because both will be recovered through PSNH's default service rates. PSNH likened its solicitation for vendors related to the Scrubber installation to solicitations by Unitil Energy Systems, Inc. and Granite State Electric Company for power supply for their customers. In addition, PSNH argued that the fact that the Scrubber was mandated by law should not affect any analysis of whether the information meets the exemption requirements under RSA 91-A:5, IV, contrary to suggestions made in the Objection. *Id.* at 3.

PSNH repeated the assertion made in its Motion that no compelling public interest is served by the disclosure of the identities of the unsuccessful bidders since such disclosure sheds little light on the prudence of the Scrubber's construction and could cause harm to unsuccessful bidders. PSNH also argued that the Objection ignores the significant privacy interest of contractors who may seek to construct other scrubbers in the near future. According to PSNH, the public interest in knowing the individual contract amounts, as opposed to the total cost of the Scrubber project, is not strong enough to override the privacy interest of contractors. *Id.* at 4. Finally, PSNH addressed the Objection's claim that the confidentiality agreement between PSNH and Jacobs cannot restrict the Commission's disclosure of information obtained by its expert. PSNH said that if that claim is correct, the Commission "should have established ground rules for this proceeding from the outset that established what could be held in confidence and

what could not, instead of allowing its expert and the Company to enter into an agreement which according to the Joint Objection should now be partially disregarded.” *Id.* at 4-5. PSNH concluded by repeating its request that the Commission grant its Motion. *Id.* at 5.

## **B. OCA, CLF, SC, TransCanada and NEPGA**

The Objecting Parties addressed each of the three categories of information for which PSNH seeks confidential treatment.

### **1. Bid Information**

According to the Objection, PSNH relied on two sources for its claim that the bidders and PSNH have a privacy interest in the bid information: (1) the fact that the RFP provided to bidders contained a provision assuring the bidders that their “Sensitive, Confidential or Proprietary information” contained in the bid responses would not be shared with competitors; and (2) certain language in confidential agreements with vendors “in association with their responses to the RFP.” The Objecting Parties noted that PSNH also relied on recent energy service proceedings to support its privacy claim for the bid information. Objection at 4.

The Objecting Parties maintained that PSNH provided no objective demonstration that the unsuccessful bidders and PSNH have a privacy interest in the bid information. They argued that PSNH’s privacy argument is self-serving and circular: because the RFPs issued by PSNH “contain assurances about the information being kept confidential, PSNH needs to honor those assurances.” *Id.* at 5. The Objecting Parties opined that, as a regulated utility, PSNH knew that the Scrubber project was subject to the Commission’s prudence review and, therefore, should not have promised vendors that their identities or PSNH’s scores of the vendors’ responses to the Scrubber RFP would be kept confidential.

The Objecting Parties complained that PSNH failed to attach copies of the executed confidentially agreement to its Motion, thus preventing the parties from examining the scope of any confidentiality claim or the privacy interests asserted by PSNH. Further, they asserted that PSNH failed to establish that the information for which protective treatment has been sought has actually been held in confidence and concluded that no privacy interest has been demonstrated. *Id.* at 5.

The Objecting Parties argued that, assuming a privacy interest exists in the bid information, PSNH failed to demonstrate that this privacy interest outweighs the public's interest in disclosure of at least PSNH's scoring of the bids. *Id.* The Objection stated that the Commission will review the selection of vendors in its prudence review of the Scrubber project and the public has an interest in disclosure of the facts that will form the basis of the Commission's determination. According to the Objecting parties, there is a public interest in the disclosure of bid information that is supported by the Right-to-Know law. *Id.* at 6. The Objecting Parties argued that the relevance of the analysis of PSNH's bidding information and its disclosure outweighs any alleged privacy interest that PSNH or the unsuccessful bidders have in the bid scores, and they opined that the harm to losing bidders from disclosure of bid information that is now likely to be stale by the passage of time has likely diminished since the bids were submitted. *Id.* at 6-7. The Objecting Parties concluded that the alleged privacy interests are clearly outweighed by the public's interest in disclosure.

## **2. Contract Price Information**

As to PSNH's contention that the contract price information is confidential information which neither the Company nor the vendors have publicly disclosed and which is subject to contractual obligations, the Objecting Parties argued that PSNH failed to demonstrate that either

the successful vendors or PSNH have a privacy interest in the total amounts paid by PSNH for the services delivered by each of the vendors and asserted that just because PSNH claims it entered into “confidentiality” agreements to keep this information confidential does not mean it can avoid the public disclosure requirements of RSA 91-A. *Id.* at 7-8. The Objecting Parties further stated that, as with the bid information, PSNH failed to attach copies of the executed confidentiality agreements related to price information, thus preventing parties from being able to examine the scope of any confidentiality interest and failed to establish that the contract price information has actually been held in confidence by either PSNH, Jacobs or the contracting parties, and, therefore, failed to demonstrate that a privacy interest exists. *Id.* at 8.

The Objecting Parties noted that the Commission recently issued an order regarding a PSNH power purchase agreement that stated “the disclosure of [contract price] information is central to the public’s understanding of how the Commission evaluates” utility proposals and activities.<sup>3</sup> They claimed that PSNH offered no legitimate reason why the Commission should not treat this same type of information as confidential within the context of a prudence proceeding. The Objecting Parties opined that, absent disclosure of the pricing terms and details, the public’s ability to understand the Commission’s analysis and finding in this proceeding would be diminished. *Id.* at 8.

### **3. Jacobs’ Data Requests**

The Objecting Parties claimed that PSNH’s argument for confidential treatment of Jacobs’ data requests to PSNH is novel and perhaps unprecedented. *Id.* at 9. The Objecting Parties said that PSNH relied on three bases for its argument against disclosure: (1) pending litigation and threats of litigation require the Commission to protect the Jacobs Data Request

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<sup>3</sup> The Objection cited *Public Service Company of New Hampshire*, Order No. 25,158 (October 15, 2010) at 12 in Docket No. DE 10-195.

from public disclosure; (2) PSNH has a confidentiality agreement with Jacobs that prevents the release of this information; and (3) PSNH has a privacy right that allows it to withhold information not only from the public and intervenors, but also from the Commission and the OCA. *Id.* at 9.

The Objecting Parties said that the Commission has previously rejected “pending litigation and threats of litigation” as a basis for confidential treatment, citing *Public Service Company of New Hampshire*, Order No. 25,234 (June 14, 2011) at 10. The Objecting Parties said that PSNH’s argument regarding the alleged confidentiality of the Jacobs’ data requests is flawed because Jacobs is working on behalf of the Commission, and that PSNH would not be able to assert confidentiality if the same data requests were asked by the Commission or Staff. *Id.* The Objecting Parties maintained that PSNH has no basis to restrict the Commission’s disclosure of its expert’s questions through a confidentiality agreement or otherwise because Jacobs’ data requests are “information” created on behalf of the Commission in furtherance of its official function and are therefore “governmental records” as defined in RSA 91-A:1-a, III. *Id.* at 10-11. Therefore, the Objecting Parties concluded that PSNH has no privacy interest in the Jacobs Data Requests.

In the view of the Objecting Parties, because there is no privacy interest at stake, the Commission need not consider the public interest in disclosure. Nevertheless, according to the Objecting Parties, the public interest in disclosure is great because 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. *Id.* at 11. Further, the Objecting Parties opined that denying PSNH’s motion regarding the Jacobs’ data requests is both consistent with the plain language and spirit of Right-to-Know law and necessary for the public

understanding of the Commission's findings after its prudence review of the Scrubber installation, one of the most expensive utility projects in the state's history. *Id.* at 11. The Objecting Parties concluded by requesting that the Commission deny PSNH's motion in its entirety.

### **III. COMMISSION ANALYSIS**

At the outset, we will grant PSNH's motion for leave to reply in order to address PSNH's arguments regarding the nature of DE 08-103 and the status of intervenors to join in the Objection. PSNH argues that DE 08-103 is not an adjudicative proceeding and therefore there was no legal basis for disclosing to OCA a copy of the unredacted Jacobs Due Diligence report under RSA 363:28, VI.<sup>4</sup> While DE 08-103 was opened as an investigation, PSNH's argument ignores the fact that numerous motions for rehearing and related pleadings regarding the Commission's September 19, 2008 order in DE 08-103, Order No. 24,898,<sup>5</sup> were filed, and an appeal to the New Hampshire Supreme Court<sup>6</sup> of the Commission's November 12, 2008 order denying the motions for rehearing, Order No. 24,914, was taken, followed by further filings and actions in the docket. In short, to say that DE 08-103 was not an adjudicative proceeding is to elevate form over substance. In any event, we need not finally decide here whether DE 08-103 is properly characterized as an adjudicative proceeding within the meaning of RSA 363:28, VI because, as set forth below, we conclude that the Jacobs reports are directly relevant to Docket

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<sup>4</sup> RSA 363:28, VI provides that "[t]he filing party shall provide the consumer advocate with copies of all confidential information filed with the public utilities commission in adjudicative proceedings in which the consumer advocate is a participating party and the consumer advocate shall maintain the confidentiality of such information."

<sup>5</sup> Order No. 24,898 decided in part that "as a result of the Legislature's mandate that the owner of Merrimack Station install scrubber technology by a date certain, and its finding pursuant to RSA 125-O:11 that such installation of scrubber technology at PSNH's Merrimack Station is in the public interest of the citizens of New Hampshire and the customers of the station, the Commission lacks the authority to make a determination pursuant to RSA 369-B:3-a as to whether this particular modification is in the public interest."

<sup>6</sup> See *Appeal of Stonyfield Farm, Inc.*, 159 N.H. 227, 977 A.2d 1037 (August 5, 2009).

No. DE 11-250 and accordingly we are directing Staff to file the Jacobs reports, redacted in accordance with this order, in that docket as well.<sup>7</sup>

PSNH also argues that although the OCA is a participant in DE 08-103, the other entities that join in the motion are not and thus have no right to file proceedings in DE 08-103. Even accepting that the other entities are not formal parties to DE 08-103, the argument avails PSNH nothing and is not a basis for finding that the Objection is improper and/or should be disregarded, because one of the Objecting Parties, the OCA, is clearly a party to DE 08-103. In any event, we are considering the Motion, the Objection, and the Reply in connection with both DE 08-103 and DE 11-250.

Having dispensed with the procedural issues raised in PSNH's reply, we will now address the merits of its Motion. The Right-to-Know Law provides each citizen with the right to inspect public information in the possession of the Commission. RSA 91-A:4, I. We have had numerous occasions to rule on motions for confidential treatment in the context of confidential, commercial, and financial information regarding utilities and their affiliates. *See e.g., Unitil Corporation and Northern Utilities, Inc.*, Order No. 25,014 (September 22, 2009) and *Public Service Co. of New Hampshire*, Order No. 25,037 (October 30, 2009).

Following the approach used in these cases, we consider the three-step analysis applied by the New Hampshire Supreme Court in *Lambert v. Belknap County Convention*, 157 N.H. 375, 382 (2008) in determining whether the information identified by PSNH should be deemed confidential and private. First, the analysis requires an evaluation of whether there is a privacy interest at stake that would be invaded by the disclosure. If no such interest is at stake, the

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<sup>7</sup> Further, we are directing Staff, within 5 business days thereafter, to determine whether any additional documents filed in DE 08-103 should be filed in the record of Docket No. DE 11-250 and to identify any other documents filed in Docket No. DE 08-103 as to which administrative notice should be taken in DE 11-250. The parties in DE 11-250 will then have 7 days to file motions regarding disclosure of the redacted portions of the Jacobs Due Diligence report and/or objections to Staff's recommendations regarding administrative notice.



Right-to-Know law requires disclosure. *Id.* at 382-83. Second, when a privacy interest is at stake, the public's interest in disclosure is assessed. *Id.* at 383. Disclosure should inform the public of the conduct and activities of its government; if the information does not serve that purpose, disclosure is not warranted. *Id.* Finally, when there is a public interest in disclosure that interest is balanced against any privacy interests in non-disclosure. *Id.* We will analyze each category of information for which PSNH requests protective treatment in turn.

### **1. Bid Information**

PSNH requests protective treatment of two types of bid information – the identity of losing bidders and, in one instance, bid scores determined by PSNH. The vendors who responded to PSNH's RFPs are private firms and PSNH has made a credible argument that the losing bidders have a legitimate privacy interest in their identities. In addition, we find that public disclosure of the names of the bidders who did not win a Scrubber contract from PSNH will not materially advance the public's understanding of the Commission's analysis of the prudence of the Scrubber project costs. Because we find no public interest in disclosure, our analysis of the confidentiality of this information ends. We note, further, that the Objecting Parties do not argue that the identity of the unsuccessful bidders should be publicly disclosed.

The Objecting Parties do, however, argue that the bid scores should be publicly disclosed. We find that while the bidders and PSNH have a valid privacy interest in the bid scores, there is also a public interest in disclosure since details regarding the bid scoring by PSNH is relevant to the central issue to be determined in DE 11-250, *i.e.*, the prudence of PSNH's actions in constructing the Scrubber. Accordingly, we must balance the competing interests for and against public disclosure. In doing so, we conclude that based on the arguments presented, the privacy interest in non-disclosure of the bid scores outweighs the public interest in disclosure, a result

that is consistent with our rulings in default service cases. *See, e.g.*, Order No. 25,206 (March 21, 2011) at 7 in Docket No. DE 11-028, *Unitil Energy Systems, Inc.*

Whether the bid information should be disclosed to the parties is a separate question. PSNH's Motion requests that the Commission condition any disclosure of the identities of the unsuccessful bidders upon the execution of a mutually agreeable non-disclosure agreement. Motion at 6. We accept that request in directing PSNH to disclose the identities of the unsuccessful bidders to the parties.<sup>8</sup> The Motion is silent as to disclosure of the bid scores to parties. We note PSNH's offer to disclose contract price information otherwise protected from public disclosure, upon the execution of a mutually agreeable non-disclosure agreement and, if the information is sought by any entity or individual that owns, has a member that owns, or any affiliate that owns coal-fired generation plants, such information be disclosed on an "attorneys' eyes only" basis. PSNH argued that this later limitation is necessary because it is possible that Scrubber technology may be installed at such coal-fired generation plants in the future and they should not obtain an advantage on the pricing of such technology by virtue of their participation in this case. We conclude that disclosure of the bid scores to the parties will be made on the same terms as the unsuccessful bidder identities.

## **2. Contract Price Information**

The specific information for which PSNH seeks confidential treatment is the final contract amount (including the not-to exceed amount) awarded for each of the sixteen contracts. Although PSNH has not provided copies of the confidentiality agreements, we understand that the pricing information is a product of confidentially held business negotiations between PSNH and the various contractors and that the information has not been otherwise disclosed. For

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<sup>8</sup> In light of RSA 363:28, VI and our procedural rulings set forth above, we do not require the OCA to execute a separate non-disclosure agreement since it is already under a mandatory statutory duty not to disclose information contained in the Jacobs Due Diligence report for which we have provided protective treatment in this order.

purposes of our analysis of whether this information is subject to public disclosure, we will accept that the pricing information is confidential, commercial, or financial information in which PSNH and the contractors have a privacy interest.

The second step in the *Lambert* analysis requires us to examine whether there is a public interest in disclosure of the contract pricing information. DE 11-250 will require the Commission to analyze information regarding PSNH's decisions and actions in the installation of the Scrubber project. This analysis will necessarily include examination of both the contract amounts and the costs actually incurred by contractors on the Scrubber Project. We find that disclosure of the contract pricing information, including the not-to-exceed pricing, will shed light on the Commission's determinations regarding PSNH's decisions and actions in installing the Scrubber and therefore we conclude that there is a public interest in disclosing the contract pricing information.

Finally, we must determine whether the harm to PSNH and the contractors in disclosing the contract pricing outweighs the benefits of disclosure to the public. PSNH claims that it has a privacy interest in the pricing terms based on the express terms of the contracts and compares its interest in protection of this information to Granite State Electric Company's interest in protecting the cost of wholesale power it procures on behalf of its default service customers. Motion at 7. Unlike Granite State Electric Company, which solicits electric power supply on a quarterly basis in a highly competitive market, the contract prices PSNH seeks to protect are one-time costs and are fixed to the extent that the contract work has been completed. The fact that PSNH must recover these costs through the same default service rates, pursuant to RSA 125-O:18, is not a reason to afford them protection comparable to that which we have granted to wholesale power costs. We also note that wholesale power costs are protected for only a limited

period of time according to the Federal Energy Regulatory Commission. *See, e.g., Granite State Electric Company, d/b/a National Grid*, Order No. 25,270 at 9. We find that our decisions in Docket No. DG 11-212, *New Hampshire Gas Corporation*, Order No. 25,281(October 28, 2011) (granting protective treatment to gas supply costs and gas supply agreements) and Docket No. DE 10-261, *Public Service Co. of N.H.*, Order No. 25,234 (June 14, 2011) (granting protective treatment to prices and offers for sale of renewable energy certificates) cited by PSNH to support the strength of its privacy interest in contract pricing terms can be similarly distinguished.

PSNH's second privacy claim relates to the interest of its contractors in maintaining the confidentiality of the contract price information. PSNH claims that the contractors have an expectation that the pricing terms would be held confidential for a period of five to six years, depending on the contracts, and further argues that disclosure of the pricing terms will harm the contractors' ability to compete for services required by other power plants in their solicitation of services for the installation of a flue gas desulphurization system. We find that the possibility of such harm does not outweigh the public interest in being informed of the contract pricing. We, therefore, deny the Motion as to confidential treatment of the pricing terms, except that, to the extent any contracted work is ongoing at this time, PSNH shall make final pricing of the relevant contract(s) publicly available upon completion of the work.

### **3. Jacobs' Data Requests**

PSNH argues broadly that the data requests in the Jacobs due Diligence report be withheld from both the public and any party, based on the Confidentiality Agreement between Jacobs and PSNH. PSNH did not, however, identify any particular information or documents identified in the data requests that it believes should be granted such protection. The Confidentiality Agreement contains certain limitations on Jacobs' authority to disclose


information divulged by PSNH in connection with Jacobs' work under its contract with the Commission, including a provision that the documents that form the basis of Jacobs' conclusions shall not be provided to Commission Staff without prior permission of PSNH so that PSNH may seek an appropriate protective order. *See* Sections 3 and 4 of the Confidentiality Agreement attached to the Motion. As noted above, we have directed Staff to file the Jacobs reports in Docket No. DE 11-250 and consider these reports to be relevant to that docket. We have reviewed *in camera* the list of data requests (Appendix 8.1) and the data requests identified in footnotes throughout the Due Diligence report; information for which PSNH seeks protective treatment and conclude that, PSNH has not demonstrated that it has a valid privacy interest in this information. Jacobs conducted its review of PSNH's decisions and actions in connection with the Scrubber project on behalf of the Commission under a contract for consultant services with the Commission. We further conclude that the public interest is served by being able to understand the extent of Jacobs' investigation regarding the Scrubber Project and public disclosure of the list of data requests and the references in the footnotes will assist in the public's understanding of the determination ultimately made by the Commission in Docket No. DE 11-250 regarding the prudence of PSNH's actions. Accordingly, we will deny PSNH's Motion for confidential treatment of this category of information.


**Based upon the foregoing, it is hereby**

**ORDERED**, that Public Service Company of New Hampshire's Motion for Protective Order and Confidential Treatment is GRANTED in part and DENIED in part, as set forth herein. Staff is directed to file forthwith the Jacobs reports in Docket No. DE 11-250, redacted consistent with the terms of this order and to review the records filed in DE 08-103 to determine whether additional documents should be filed in Docket No DE 11-250. Staff is further directed,

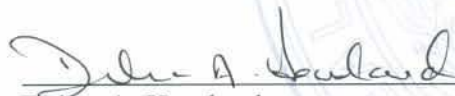
within 5 business days thereafter, to determine whether any additional documents filed in DE 08-103 should be filed in the record of Docket No. DE 11-250 and to identify any other documents filed in Docket No. DE 08-103 as to which administrative notice should be taken in DE 11-250. The parties in DE 11-250 will then have 7 days to file motions regarding disclosure of the redacted portions of the Jacobs Due Diligence report and/or objections to Staff's recommendations regarding administrative notice.

By order of the Public Utilities Commission of New Hampshire this sixth day of February, 2012.

  
Clifton C. Below  
Commissioner

  
Amy L. Ignatius  
Commissioner

Attested by:

  
Debra A. Howland  
Executive Director

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SERVICE LIST - EMAIL ADDRESSES - DOCKET RELATED

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Pursuant to N.H. Admin Rule Puc 203.11 (a) (1): Serve an electronic copy on each person identified on the service list.

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Docket #: 11-250-1 Printed: February 06, 2012

**FILING INSTRUCTIONS:**

- a) Pursuant to N.H. Admin Rule Puc 203.02 (a), with the exception of Discovery, file 7 copies, as well as an electronic copy, of all documents including cover letter with:
- DEBRA A HOWLAND  
EXECUTIVE DIRECTOR  
NHPUC  
21 S. FRUIT ST, SUITE 10  
CONCORD NH 03301-2429
- b) Serve an electronic copy with each person identified on the Commission's service list and with the Office of Consumer Advocate.
- c) Serve a written copy on each person on the service list not able to receive electronic mail.