

THE STATE OF NEW HAMPSHIRE
before the
PUBLIC UTILITIES COMMISSION

Public Service Company of New Hampshire

Petition for Approval of PPA with Laidlaw Berlin BioPower, LLC

Docket No. DE 10-_____

Motion for Confidential Treatment
Pursuant to RSA Chapter 91-A
and
N.H. Code Admin. Rules Puc § 203.08

Pursuant to RSA 91-A:5,(IV)(Supp.) and N.H. Code Admin. Rules Puc § 203.08, Public Service Company of New Hampshire ("PSNH" or the "Company") hereby requests confidential treatment and the issuance of a protective order for certain confidential, commercial, or financial information contained in the Power Purchase Agreement ("PPA") entered into by and between PSNH and Laidlaw Berlin BioPower, LLC ("LBB") dated June 8, 2010, and in the supporting testimony of Mr. Richard C. Labrecque. The information for which confidential treatment and protection is sought includes pricing data.

In support of this Motion for Confidential Treatment, PSNH says the following:

1. RSA 362-F:9 allows an electric distribution company to seek approval of multi-year purchase agreements with renewable energy sources for renewable energy certificates, in conjunction with or independent of purchased power agreements from such sources, to meet reasonably projected renewable portfolio requirements and default service needs.
2. N.H. Code Admin. Rules Puc § 203.08(a) provides that the Commission shall upon motion issue a protective order providing for the confidential treatment of one or more documents upon a finding that the document or documents are entitled to such treatment pursuant to RSA 91-A:5, or other applicable law.

3. Rule Puc § 203.08(b) requires a motion for confidential treatment to include:
 - i.) the documents, specific portions of documents, or a detailed description of the types of information for which confidentiality is sought; ii.) specific reference to the statutory or common law support for confidentiality; and, iii.) a detailed statement of the harm that would result from disclosure and any other facts relevant to the request for confidential treatment.

4. On June 8, 2010, PSNH entered into a Power Purchase Agreement (“PPA”) with Laidlaw Berlin BioPower, LLC (“LBB”) regarding LLB’s proposed 70 MW (gross) biomass fueled generating station in Berlin, New Hampshire (the “Project”), to purchase the RECs produced by the Project, as well as the energy and capacity produced from the Project .

5. The PPA was the result of protracted and detailed confidential negotiations. The PPA provides that the terms of that agreement are confidential and contains a confidentiality provision at Article 26.1. PSNH’s ability to enter into economic contracts can only be assured if potential negotiating partners are confident that their proposals and pricing remain confidential and do not become available, either directly or indirectly, to their competitors. The detailed pricing information contained in the PPA would not have been provided absent the assurance that the information would not be disclosed to the public.

6. The PPA’s confidentiality provision at Article 26.1 sets forth requirements for disclosure of contract information to any governmental authority or regulator for obtaining any approval, such as the filing of the PPA with the Commission for approval pursuant to RSA 362-F:9:

In the event disclosure is made pursuant to this provision, the Parties shall use reasonable efforts to minimize the scope of any disclosure and have the recipients maintain the confidentiality of any documents or confidential information covered by this provision, including, if appropriate, seeking a protective order or similar mechanism in connection with any disclosure.

The filing of the Motion for Confidential Treatment is intended to comply with this contractual term.

7. If the PPA's pricing provisions are not provided with confidential treatment, such disclosure would detrimentally impact both PSNH's ability to attract negotiating partners in the future, as well as LLB's competitive position in the marketplace.
8. RSA Chapter 91-A is commonly referred to as the "Right-to-Know Law." The Right-to-Know Law provides each citizen with the right to inspect government records in the possession of the Commission. However, under RSA 91-A:5, certain government records are exempted from the disclosure requirements of RSA Chapter 91-A. In particular, RSA 91-A:5, IV exempts from disclosure records pertaining to confidential, commercial, or financial information.
9. The New Hampshire Supreme Court has had the opportunity to discuss the requirements of the Right-to-Know Law on several occasions. Most recently, in *Professional Firefighters of New Hampshire v. Local Government Center, Inc.*, 2010 WL 323119, 6 (N.H.) (N.H., January 29, 2010), the Court noted: "The Right-to-Know Law does not guarantee the public an unfettered right of access to all governmental workings, as evidenced by the statutory exceptions and exemptions." *See also, Goode v. New Hampshire Office of Legislative Budget Assistant*, 148 N.H. 551, 553 (2002), and *Brent v. Paquette*, 132 N.H. 415, 426, (1989) ("[T]he Right-to-Know Law guarantees every citizen the right to inspect all public records except as otherwise prohibited by statute or RSA 91-A:5." (quotation omitted)).
10. The Court opined on the confidential, commercial, or financial information exemption of the Right-to-Know Law in *Union Leader Corp. v. New Hampshire Housing Finance Authority*, 142 N.H. 540 (1997), a case cited by the Commission dozens of times. In its decision, the Court noted:

The terms “commercial or financial” encompass information such as business sales statistics, research data, technical designs, overhead and operating costs, and information on financial condition. *Landfair v. United States Dept. of Army*, 645 F.Supp. 325, 327 (D.D.C.1986); see *Comstock Intern. v. Export-Import Bank of U.S.*, 464 F.Supp. 804, 806 (D.D.C.1979) (loan agreements are financial or commercial information). Whether documents are commercial depends on the character of the information sought. Information is commercial if it relates to commerce. See *American Airlines, Inc. v. Nat. Mediation Bd.*, 588 F.2d 863, 870 (2d Cir.1978).

142 N.H. at 553.

The Court also noted:

To best effectuate the purposes of our Right-to-Know Law, whether information is “confidential” must be determined objectively, and not based on the subjective expectations of the party generating it. “To determine whether [records] ... are exempt as confidential, the benefits of disclosure to the public must be weighed against the benefits of non-disclosure to the government.” *Chambers v. Gregg*, 135 N.H. 478, 481 (1992). We find instructive the standard test employed by the federal courts: To show that information is sufficiently “confidential” to justify nondisclosure, the party resisting disclosure must prove that disclosure “is likely: (1) to impair the [State’s] ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.” *National Parks and Conservation Ass’n v. Kleppe*, 547 F.2d 673, 677-78, (D.C.Cir.1976) (quotations omitted) (*National Parks II*).

Id. at 553-554 (internal citations omitted).

11. In determining whether commercial or financial information should be deemed confidential and private, the Commission has followed *Union-Leader* as well as the three-step analysis applied by the New Hampshire Supreme Court in *Lambert v. Belknap County Convention*, 157 N.H. 375, 382 (2008). The *Lambert* analysis requires: i) an evaluation of whether there is a privacy interest at stake that would be invaded by the disclosure -- when commercial or financial information is involved, this step includes a determination of whether an interest in the confidentiality of the information is at stake; ii) when a privacy interest is at stake, the public’s interest in disclosure is assessed; and, iii) when there is a public interest in disclosure, that interest is balanced against any privacy interests in nondisclosure. See *Unitil Energy Systems, Inc.*, Order No. 25,054, Docket No. DE

09-009 (December 18, 2009); *Public Service Company of New Hampshire*, Order No. 25,059, Docket No. DE 09-158 (December 31, 2009).

12. The Commission, using the *Union-Leader* and *Lambert* standards discussed above, has regularly granted confidentiality for pricing information similar to that contained in the PPA For example:

- a. “If public disclosure of confidential, commercial or financial information would harm the competitive position of the person from whom the information was obtained, the balance would tend to tip in favor of non-disclosure.” *Re National Grid plc*, 92 NHPUC 279, 326 (2007) (granting confidential treatment for information regarding system upgrades and capacity contain information that, if publicly disclosed, would likely harm its competitive interests and the interests of ratepayers who would ultimately bear the burden of increased contract costs resulting from disclosure);
- b. “Inasmuch as disclosure in this instance could negatively affect customers, we do not find the public's interest in review of the financial, commercially sensitive information sufficient to outweigh the interest that National Grid and its bidders have in maintaining confidentiality of such information.” *Re Granite State Electric Company dba National Grid*, 92 NHPUC 215, 219 (2007) (granting a protective order for information received by National Grid as part of a competitive RFP process including “a brief discussion of the selection of the winning bidder, a bidder key that identifies the suppliers who participated in the RFP, the comparative energy and capacity prices received from the bidders (including the estimated total cost according to the evaluation loads provided with the RFP), a ranking of the transactions offered by each bidder in terms of financial security (including consideration of reasonable extension of credit to National Grid and the creditworthiness of the supplier and the credit assurance offered), the information provided by each bidder in the

proposal submission forms, and, a redlined version of the negotiated purchase and sale agreement.);

- c. Regarding a series of contracts provided by PSNH: “The information in the documents is financially or commercially sensitive in the sense that its public disclosure would reveal information that could place Ensio Resources at a competitive disadvantage relative to other firms that purchase end products of coal-burning processes and PSNH at a competitive disadvantage in future negotiations with end-product purchasers.” *Re Public Service Company of New Hampshire*, 84 NHPUC 484, 485 (1999);
- d. Granting confidential treatment for bidder information obtained during the auction sale of the Seabrook Nuclear Generating Station: “Disclosure could result in competitive damage to bidders, and also impair the ability of the state to obtain such information in the future. Not only do we believe the information is commercially sensitive, we also believe that public disclosure of bids, bid analyses, financial assessments, and data related to the auction would chill future auction transactions, thereby limiting the results that might otherwise have been achieved.” *Re North Atlantic Energy Corporation*, 87 NHPUC 396, 399 (2002).
- e. Confidential treatment was granted for similar confidential, commercial, or financial information contained in the Power Purchase Agreement and Renewable Energy Certificate Option Agreement entered into between PSNH and Lempster Wind, LLC in Docket No. DE 08-077. *See*, Order No. 24,965, May 1, 2009, at 2.

WHEREFORE, PSNH respectfully requests that the Commission grant confidential treatment of the PPA’s confidential, commercial, or financial information by issuance of a protective order as requested herein. In accordance with N.H. Code of Administrative Rules Puc 203.08(g) the unredacted PPA and the unredacted testimony of Mr. Richard C. Labrecque should be labeled "Confidential," held in a secure location within the Commission's offices, and not disclosed to the public or any party other than the Commission staff without PSNH’s consent.

Respectfully submitted this 26th day of July, 2010.


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By:  _____

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CERTIFICATE OF SERVICE

I hereby certify that I served an electronic copy of this filing with the office of the consumer advocate pursuant to Rule Puc 203.02 (a)(4).



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