

STATE OF NEW HAMPSHIRE  
BEFORE THE  
NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION

In re: Petition for Approval of Power Purchase Agreement )      Docket No. DE 10-195  
with Laidlaw Berlin BioPower, LLC )

**OBJECTION TO MOTION FOR CONFIDENTIAL TREATMENT**

Bridgewater Power Company, L.P., Pinetree Power, Inc., Pinetree Power-Tamworth, Inc., Springfield Power LLC, DG Whitefield, LLC d/b/a Whitefield Power & Light Company, and Indeck Energy-Alexandria, LLC (collectively, the “Wood-Fired IPPs”) hereby object to the Motion for Confidential Treatment filed on November 19, 2010 by Public Service Company of New Hampshire (“PSNH”) requesting that the Commission issue a protective order to maintain the confidentiality of information provided in responses to Commission Staff data requests 1-17, 1-18, 5-4 and 5-6, pursuant to RSA 91-A and N.H. Code Admin. Rules PUC 203.08. In support of this Objection, the Wood-Fired IPPs state as follows:

1. PSNH in its motion asks the Commission to restrict access to the information contained in four of its responses to data requests issued by Commission staff to the Commissioners, Commission staff involved in this proceeding and the Office of Consumer Advocate, while prohibiting any disclosure to the public generally and to intervenors in this docket, including the Wood-Fired IPPs. PSNH cites the alleged competitively sensitive nature of the information included in these data request responses and the status of intervenors as potential competitors. These data requests seek discovery of information regarding bids, offers and proposals by renewable energy suppliers to sell energy, capacity and/or renewable energy certificates (“RECs”) to PSNH during the past few years (data request 1-17); bids and offers submitted to PSNH in connection with request for proposal solicitations conducted by PSNH

since 2008 (data request 1-18); the identities of purchasers of Class I RECs produced at Schiller Station Unit 5 during 2009 and 2010 and the amount bought by each such purchaser on a monthly basis (data request 5-4); and copies of all correspondence between PSNH and renewable energy developers concerning proposals made by the developers to sell RECs, energy or capacity to PSNH (data request 5-6).

2. In its motion, PSNH asserts that this information should not be disclosed to potential competitors, including the Wood-Fired IPPs, Concord Steam Corporation and other parties, claiming that potential harm to its interests may result from such disclosure.<sup>1</sup> PSNH even goes so far as to assert that it is not “reasonable or necessary to provide such information to the competitor-intervenors’ outside counsel” because – notwithstanding such counsel’s expressed willingness to execute an appropriate confidentiality agreement covering the information – “receipt of such information by outside counsel is tantamount to giving it to the competitors themselves.” Motion at 14. PSNH’s position is untenable and must be rejected by the Commission, in order to ensure that all parties may exercise their due process rights to prepare for and participate fully in this proceeding.

3. The New Hampshire Supreme Court has held that a party in a legal proceeding in New Hampshire is entitled to be “fully informed and have access to all evidence favorable to his side of the issue. This is true whether the issue is one which has been raised by him or by his opponents . . .” *Scotsas v. Citizens Insurance Co.*, 109 N. H. 386 (1969). *See also Yancey v. Yancey*, 119 N.H. 197, 198 (1979) (holding that New Hampshire takes a “liberal view of

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<sup>1</sup> PSNH waived the right to assert even this confidentiality claim as a result of its disclosure without restriction of pricing information related to the unsolicited sales offers submitted by two renewable energy developers, Concord Steam Corporation and Clean Power Development, LLC, in its response to Staff-01, Q-Staff-032-RV02 released to parties on November 15, 2010.

discovery”); *also cf. Barry v. Home*, 117 N.H. 693, 694 (1977) (stating intent of Superior Court Rule 35(b)(1) is to allow “very broad discovery”).

4. The Commission has confirmed that its policies are “consistent with Superior Court Rule 35(b) regarding the scope of discovery,” and that it requires parties “to show that the information being sought in discovery is relevant to the proceeding or is reasonably calculated to lead to the discovery of admissible evidence.” *City of Nashua*, Order No. 24,681 (October 23, 2006). The Commission has stated that “[d]iscovery should be relevant to the proceeding or reasonably calculated to the discovery of admissible evidence,” and the Commission “will deny a motion to compel discovery only ‘when [it] can perceive of no circumstance in which the requested data will be relevant.’” (citations omitted). *Re Public Service Company of New Hampshire*, 86 NH PUC 730, 731-732 (2001).

5. The Commission’s stated positions reflect important due process considerations in litigated regulatory proceedings. *See, e.g.*, N.H. Const. Pt. 1, Art 15 (right of due process established); N.H. Code Admin Rules Puc 203.09(a) (establishing intervenors’ right to discovery); RSA 541-A:33, IV and N.H. Code Admin. Rules Puc 203.24 (establishing right to full and effective cross examination for full and true disclosure of the facts); *Appeal of Office of Consumer Advocate*, 134 N.H. 651, 659-60 (1991) (applying N.H. Const. Pt. 1, Art 15 due process of law provisions to proceedings before the Commission).

6. Proposals to deny parties access to confidential information in particular have been disfavored by the Commission, because “whatever information we might reasonably rely upon in making a decision should be accessible to all Parties . . .” *North Atlantic Energy Corporation*, 87 NH PUC 396, 399 (2002), cited in *City of Nashua, Petition for Valuation Pursuant to RSA 38:9*, Order No. 24,495 (July 29, 2005). The Commission’s reluctance to deny

parties access to information that it may rely upon reflects important due process considerations in litigation, as noted above, that simply do not arise under standards applicable to public Right-to-Know Law requests and that are not a consideration in the balancing test applied to public disclosure inquiries pursuant to *Lamay v. New Hampshire Public Utilities Commission*, 152 N.H. 106 (2005).

7. The Wood-Fired IPPs have made it clear in their motions to compel that, if deemed warranted by the Commission, they are prepared to execute an appropriate confidentiality agreement prior to receiving material claimed to be confidential, consistent with the provisions of N.H. Code Admin. Rules PUC 203.08(j) (authorizing the Commission to “include in its protective order a directive that all parties receiving the material shall also treat it as confidential”). Such a confidentiality agreement may include restrictions on disclosure of protected information to the Wood-Fired IPPs’ competitive employees and limit distribution to their outside counsel and outside consultants. This latter condition is consistent with the approach endorsed by the Commission in similar circumstances. *Public Service Company of New Hampshire*, 89 NH PUC 226, 230 (2004) (given the competitively sensitive nature of the information sought to be disclosed, “PSNH may condition its provision of executed contract documents to counsel for the Existing Wood-Fired Plants subject to counsel’s agreement not to disclose the documents to their clients”); *Re Kearsarge Telephone Company*, 92 NH PUC 441, 444 (2007) (competitor-intervenor’s outside counsel “should continue to have review access to the documents . . . subject to appropriate protective agreement”, even though confidential information could be withheld from intervenor’s internal technical expert).<sup>2</sup>

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<sup>2</sup> In its motion PSNH cites the *Kearsarge Telephone* order and another recent Commission order, *Public Service Company of New Hampshire*, Docket No. DE 10-121, Order No. 25,167 (November 9, 2010), as examples of situations in which competitively sensitive information could be withheld from intervening parties who also were potential competitors. PSNH fails to inform the Commission that in *Kearsarge Telephone* the competitor’s outside

8. As a further accommodation to PSNH's concerns with respect to the potential competitive sensitivity of information provided to Commission staff in response to the four subject data requests, the Wood-Fired IPPs have agreed that the responses to data requests 1-17, 1-18 and 5-6 may be redacted to delete the names and other identifying information regarding the bidders, offerors or proponents, and that aggregated monthly sales information regarding sales of RECs for use in and out of New Hampshire may be provided in response to Staff data request 5-4.<sup>3</sup>

9. As noted above, PSNH asserts in its motion for confidential treatment that it is not "reasonable or necessary" to provide the requested information to outside counsel for intervenors who may have competitive interests, because "receipt of such information by outside counsel is tantamount to giving it to the competitors themselves." Motion at 14. PSNH effectively suggests that outside attorneys for the Wood-Fired IPPs and other intervenors – sworn officers of the court – cannot be trusted to comply with restrictions on disclosure and use of information contained in a binding confidentiality agreement executed by such counsel consistent with an order of the Commission. PSNH offers no specific factual basis to support this suggestion, nor does any such basis exist.

10. Because the materials PSNH has withheld from disclosure to intervening parties are relevant to the matters at issue in this docket and the Wood-Fired IPPs and other parties require access to these materials to prepare thoroughly and adequately for meaningful participation in this proceeding, PSNH should be compelled to disclose to all parties copies of

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attorney was permitted to have access to the information, subject to certain limitations, and in the more recent order there is no indication that the competitor offered to have access restricted to its outside counsel and outside consultants.

<sup>3</sup> This accommodation was proposed by intervenors and discussed by the parties who participated in the discovery conference conducted by hearings examiner Anne F. Ross on November 19, 2010.

the responses to Commission staff data requests 1-17, 1-18, 5-4 and 5-6, redacted as described in paragraph 8 above, and subject to any appropriate restrictions, if any, on further disclosure as the Commission deems necessary under the circumstances pursuant to PUC 203.08(j).


WHEREFORE, the Wood-Fired IPPs respectfully request that the Commission deny PSNH's Motion for Confidential Treatment or, in the alternative, grant the motion in part but require PSNH to provide copies of its responses to Staff data requests 1-17, 1-18, 5-4 and 5-6, redacted as discussed in the body of this objection, to all parties in this proceeding upon their execution of appropriate confidentiality agreements consistent with PUC 203.08(j).

Respectfully submitted,

BRIDGEWATER POWER COMPANY, L.P.,  
PINETREE POWER, INC.,  
PINETREE POWER-TAMWORTH, INC.,  
SPRINGFIELD POWER LLC,  
DG WHITEFIELD, LLC d/b/a WHITEFIELD POWER &  
LIGHT COMPANY, and  
INDECK ENERGY-ALEXANDRIA, LLC

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CERTIFICATE OF SERVICE

I hereby certify that, on this date, I caused the attached Objection to Motion for Confidential Treatment to be filed in hand and electronically to the Commission and electronically, or by U.S. Mail, first class, to the persons identified on the attached Service List in accordance with N.H. Admin. Code Rules PUC 203.11(a).

Date: November 23, 2010

  
David J. Shulock Esq.