

STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

Re: Aquarion Water Company of New Hampshire

Docket DW 12-085

MOTION FOR PROTECTIVE ORDER AND CONFIDENTIAL TREATMENT

Aquarion Water Company of New Hampshire (“Aquarion” or the “Company”), in accordance with NH Admin. Rule Puc 203.08, hereby moves the New Hampshire Public Utilities Commission (the “Commission”) to grant confidential treatment to certain information provided to the Commission Staff and Intervenors in the course of the discovery process in the above-captioned docket. In support of its motion, Aquarion states as follows:

During the course of the discovery process, Aquarion provided responses to several rounds of data requests propounded by the Staff, Office of the Consumer Advocate (“OCA”), and Intervenors Town of Hampton (“Hampton”) and Town of North Hampton (“North Hampton”). Nine (9) of these responses contained confidential information that Aquarion provided only to the Staff, OCA, Hampton and North Hampton. Rather than seek confidential treatment for each data response, Aquarion submitted its confidential responses with the Commission accompanied by written statements of intent to file a motion pursuant to N.H. Admin. Rule Puc 203.08(d). The data request responses for which the Company now seeks confidential treatment are as follows:

- A. OCA 2-11 and OCA 2-12;
- B. Staff 2-7, Staff 2-10 and Staff 2-22;
- C. Hampton 2-1 and 2-2; and
- D. North Hampton 1-3 and 1-7.

I. The Commission Should Grant Confidential Treatment to Data Requests Seeking Information Relating to the Company’s Non-Officer Salaries to Avoid an Unwarranted Invasion of Privacy

1. The Company seeks confidential treatment of salary information related to its non-officer employees in response to the following Data Requests:¹ OCA 2-11, OCA 2-12, Staff 2-7, Staff 2-10, Hampton 2-1, and Hampton 2-2.

2. The information submitted in response to the above requests that pertains to non-officer salary and compensation should be exempted from disclosure pursuant to RSA 91-A:5, IV, which protects “personnel . . . and other files whose disclosure would constitute an invasion of privacy.” As the Commission has frequently noted, New Hampshire courts apply a three-step analysis when considering whether disclosure of governmental records constitutes an invasion of privacy. First, the Court evaluates whether there is indeed a privacy interest at stake that would be invaded by disclosure; second, whether there is a public interest in disclosure; and third, whether the public interest in disclosure outweighs the individual privacy interest in nondisclosure. *See Lamy v. N.H. Pub. Utilities Comm’n*, 152 N.H. 106, 109 (2005); *N.H. Civil Liberties Union v. City of Manchester*, 149 N.H. 437, 440 (2003).

3. There is a clear privacy interest in the non-officer compensation information provided in response to the above requests. The Company’s non-officer employees have an expectation of privacy in the compensation they receive and while it is expected that employee salary expenses will be subject to scrutiny in a rate case, it is not expected that individual

¹ In its responses to these data requests, the Company redacted information related to both officer and non-officer salaries. Since filing those responses, however, it has come to the Company’s attention that the salaries of its officers have been publicly disclosed to regulators in both Massachusetts and Connecticut. Because the information relating to officer salaries is already in the public domain, the Company has prepared supplemental responses to Data Requests OCA 2-11, OCA 2-12, Staff 2-7, Staff 2-10, Hampton 2-1, and Hampton 2-2 where the officer salary information is no longer redacted. Accordingly, the Company is no longer seeking protective treatment with respect to that information.

employees will be identified and their otherwise private salary information publicly disclosed. This information is not disclosed to the public, as it is the Company's practice to maintain private personnel information, including any materials or data specific to individual employees, in strict confidence.

4. There is no significant public interest advanced by disclosure of the compensation information produced in the responses described above, and the Commission commonly grants requests for confidential treatment of non-officer salary information submitted pursuant to N.H. Admin. Rule Puc 1604.01(14) that is not otherwise publicly disclosed. *See, e.g., Northern Utilities, Inc.*, DG 01-182, Order No. 23,970 at 8-9 (May 10, 2002) (protecting employee names and wages).

5. The Company is concerned that public disclosure of the compensation paid to its non-officer employees in connection with salary expenses for which the Company is seeking recovery may expose those employees to an invasion of their privacy by the media or other members of the public. The Company only seeks confidential treatment of the employees' names and corresponding salaries, but not the aggregate amount of that salary expense. As such, disclosure of the aggregate salary information will provide the public with information about the conduct or activities of the Commission or other parts of New Hampshire state or local government, *see Public Service Co. of N.H.*, DE 09-158, Order No. 25,059 at 14-15 (December 31, 2009), thus satisfying the public's interest without compromising the privacy interest of the Company's employees. *See also Energy North Natural Gas, Inc. d/b/a National Grid NH*, DG 10-017, Order No. 25, 119 (June 25, 2010) at 10-11 (striking balance between public's interest and employee privacy interest by requiring production of information in aggregate form).

6. Public disclosure of the names and the salary information of the Company's non-officer employees that are part of the Company's rate case will expose those employees to a potential invasion of privacy. Furthermore, public disclosure of any information beyond the aggregate salary expense will not reveal information about the conduct or the activities of the Commission or other parts of New Hampshire state or local government, and there is no significant public interest outweighing the employees' privacy interest. For these reasons, the Company should grant confidential treatment to the salary and compensation information related to the Company's non-officer employees produced in response to the data requests set forth above.

II. The Commission Should Grant Confidential Treatment to Proprietary and Competitively Sensitive Information of the Company and Entities with Which the Company Does Business

7. RSA 91-A:5, IV states, in relevant part, that records pertaining to "confidential, commercial, or financial information" are exempt from public disclosure. As noted above, the Commission has routinely recognized that confidential treatment should be granted to competitively sensitive or proprietary information under the 91-A:5 exemption for "confidential, commercial, or financial information." *See, e.g., Northern Utilities, Inc.*, DG 10-034, Order No. 25,085 at 9; *Unitil Corp. and Northern Utilities, Inc.*, DG 08-048, Order No. 25,014 at 6 (Sept. 22, 2009). For the reasons set forth below, the Commission should similarly grant confidential treatment to Staff Data Requests 2-22, North Hampton 1-3 and North Hampton 1-7.

A. Response to Data Request Staff 2-22 Relating to Federal and State Tax Returns

8. Data Request Staff 2-22 requests copies of the Company's state and federal income tax returns for 2010 and 2011. The information provided in response to Data Request Staff 2-22, specifically, Attachments A, B (Part 1 and Part 2), C and D, contain the Company's

federal and state tax returns for 2010 and 2011. Such information falls squarely within the statutory definition of “confidential, commercial or financial information” and is entitled to protection.

9. The Company is not a publicly traded company and as a matter of routine, does not release its returns or any of the confidential information contained in its federal or state tax returns to the public. Moreover, the Company is a subsidiary whose tax information is reported on the consolidated return of its parent, Macquarie Utilities, Inc. (“MUI”). The consolidated returns at issue here also include information regarding all of the parent’s other subsidiary companies, including the parent’s non-regulated subsidiaries. The Company desires to protect information regarding the financial position of MUI from other equity investors with whom MUI and other investment entities owned by affiliates of MUI compete for making infrastructure investments. Public disclosure of any information related to the financial strength or position of MUI or these other related entities could put them at a strategic disadvantage in future acquisitions. The information contained in the tax returns is not public and therefore disclosure of that information to the public could put MUI and its affiliates at a competitive disadvantage, causing harm to those businesses.

10. The Commission has afforded protective treatment for the production of the tax returns of a parent corporation, where the company was not publicly traded and the company routinely kept its tax records confidential. *See Sacoridge Water, Inc.*, DW 05-054, Order No. 24,561 (December 9, 2005). The Commission expressly noted that, with respect to the production of tax records, “the benefits of non-disclosure outweigh the benefits of public disclosure.” *Id.* at 10.

11. Where, as here, the public disclosure of confidential financial and competitively sensitive information would create a competitive disadvantage for the Company, its parent, and for all other entities whose financial information is reported on the parent's consolidated tax returns, protective treatment is appropriate. *See Connecticut Valley Electric Co.*, DE 01-098, Order No. 23,760 at 2 (August 16, 2001) (motion to keep certain state tax information confidential granted where information at issue constituted confidential and competitively sensitive material the release of which would put company at competitive disadvantage); *see also, Atkinson Woods Water, LLC*, DW 04-001, Order No. 24,364 at 3 (August 26, 2004) (personal tax returns of water utility owner engaged in construction and real estate business would put petitioner at competitive disadvantage if publicly disclosed). Accordingly, as the Commission has previously recognized, any balance to be struck in this instance should be struck in favor of maintaining confidentiality of the Company's and its parent's private financial and competitively sensitive business information.

B. Responses to Data Requests North Hampton 1-3 and North Hampton 1-7 Relating to Contractor Bidding Information

12. Data Request North Hampton 1-3 sought information relating to Request for Proposals ("RFP") for construction services issued by the Company and responses to those RFPs. Data Request North Hampton 1-7 requested the Company to identify instances where the contract was awarded to a company other than the lowest bidder.

13. Attachment B to the Company's response to Data Request North Hampton 1-3 contains, among other things, information relating to proposals from the outside service providers engaged by the Company in response to request for proposals. This information submitted by these service providers in their proposals includes competitively sensitive

information such as cost estimates and rates for service. The Company seeks confidential treatment for this competitively sensitive information.

14. Similarly, Data Request North Hampton 1-7 discloses specific pricing information submitted in response to an RFP issued by the Company.

15. The rate and pricing information provided by vendors in response to Data Requests North Hampton 1-3 and North Hampton 1-7 is confidential, competitively sensitive business information in which the Company and its service providers have a privacy interest. The Commission has previously recognized that a utility and its service providers have a privacy interest in such information. *EnergyNorth Natural Gas, Inc. d/b/a National Grid NH*, DG 08-009, Order No. 25,064 at 11-12 (January 15, 2010).

16. Disclosure of pricing information, hourly rates, and overall cost estimates as set forth in the proposals will cause Aquarion and its service providers competitive harm. Specifically, disclosure of this information will put the Company's service providers at a competitive disadvantage by divulging to competitors the rates that they charge for services. The providers' competitors would use such information to their strategic advantage when competing for work in the future. Furthermore, disclosure of the service providers' rate and pricing information will erode the providers' respective abilities to maintain a strong position when bidding for work in the future.

17. Public disclosure may also cause consultants and other vendors to refrain from competing for work with the Company or other petitioners appearing before the Commission. Ultimately, this would harm ratepayers who would bear the burden of lost savings that would otherwise result from a competitive bidding process.

18. To the extent that there is any public interest in access to the rate and pricing information contained in the responses to North Hampton 1-3 and North Hampton 1-7, it is minimal. Only the commercially sensitive information has been redacted from these responses and the ultimate cost of the contracts resulting from the RFPs has been submitted to and will be evaluated by the Commission.

19. The Commission has found similar arguments to be credible and concluded that a company's interest in confidentiality outweighed any public interest in disclosure. See, e.g., *EnergyNorth Natural Gas, Inc. d/b/a National Grid NH*, DG 08-009, Order No. 25,064 at 11-12. The Commission should similarly grant confidential treatment to Attachment B to North Hampton 1-3 and North Hampton 1-7.

WHEREFORE, Aquarion Water Company of New Hampshire respectfully requests that the Commission:

- A. Grant this Motion for Protective Order and Confidential Treatment; and
- B. Grant such other relief as is just and equitable.

Respectfully submitted,

Aquarion Water Company of New Hampshire

By Its Attorneys

MCLANE, GRAF, RAULERSON & MIDDLETON, P.A.

Dated: May13, 2013

By: _____



Steven V. Camerino, Esq.

Patrick H. Taylor

11 South Main Street, Suite 500

Concord, NH 03301

Telephone (603) 226-0400

Email: steven.camerino@mclane.com

patrick.taylor@mclane.com

Certificate of Service

I hereby certify that a copy of this Motion for Protective Order and Confidential Treatment has been electronically served and mailed by first class mail, postage prepaid, to the service list in this case.



Patrick H. Taylor