

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DE 16-822

**PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE
D/B/A EVERSOURCE ENERGY**

2017 Default Service

Order Denying Confidential Treatment

O R D E R N O. 26,064

October 17, 2017

In this Order, the Commission denies Eversource Energy's motion for confidential treatment of information relating to the "Cumulative Factor" and "Cumulative Reduction" associated with Eversource's power purchase agreement with Laidlaw Berlin Biopower, LLC.

I. PROCEDURAL HISTORY

On July 27, 2017, Public Service Company of New Hampshire d/b/a Eversource Energy (Eversource) filed a motion seeking confidential treatment of the information contained in its response to Data Request Staff 4-8 (marked as Exhibit 9 at the June 22, 2017, hearing in this docket) and the related testimony at hearing. *See* Hearing Transcript of June 22, 2017 (6/22/17 Tr.), at 30-31 and 40. Staff 4-8 requested information regarding the value of the Cumulative Reduction that is part of the Eversource power purchase agreement (PPA) with Laidlaw Berlin Biopower, LLC, now known as Burgess Biomass. The Office of the Consumer Advocate (OCA) filed an objection on August 2 and a subsequent clarification on August 3. Eversource responded to the OCA's clarification on August 3. Eversource and the OCA debated at length Eversource's motives and whether Eversource properly filed its request for protective treatment under the Commission's rules, in particular N.H. Admin. Rules Puc 201.06, 201.07, and 203.08.

The Commission, however, generally does not permit replies to objections, nor does the Commission permit responses to those replies. The Commission need only address here whether the information is exempt from disclosure or should be made available to the public pursuant to RSA 91-A and Commission precedent.

II. POSITIONS OF THE PARTIES AND STAFF

A. Eversource

Eversource placed the information that it claims is confidential in the following context. The “Cumulative Factor” and “Cumulative Reduction” are defined terms in the PPA. Those terms relate to the difference in the price of the power purchased under the PPA as compared to the cost of power in the Independent System Operator-New England (ISO New England) marketplace. Eversource Motion at 1. According to Eversource:

Under the application of the Cumulative Factor, if the cost of power Eversource pays under the PPA exceeds the cost of power in the ISO New England marketplace, a credit is created for the future benefit of Eversource; that credit is termed the Cumulative Reduction. ... [I]f the Cumulative Reduction grows to more than \$100 million, the amount over \$100 million is applied as an offset in the following year to the cost of the purchases Eversource would otherwise make under the PPA.

Id. at 1-2.

Eversource asserted that there is a substantial privacy interest in information relating to the status of the Cumulative Reduction because the PPA requires its signatories to treat information they exchange as confidential, and Eversource has sought to minimize any disclosures. *Id.* at 2-3. Eversource also claimed that the status of the Cumulative Reduction would disclose information about the finances and operation of the Burgess Biomass generation plant that could reveal how that plant prices its power in the competitive wholesale marketplace,

causing the owners of the plant competitive harm. *Id.* at 3-4. Eversource pointed out that the Commission has protected similar information in other dockets. *Id.* at 4.

While Eversource conceded that there is a public interest in the information, Eversource does not view the interest as substantial and believes that the public's interest in the information is outweighed by the potential competitive harm to the owners of the Burgess Biomass Plant. *Id.* at 4-5. Eversource argued that the public is already aware of the existence of the Cumulative Reduction, its purpose, and its terms. According to Eversource, having additional information would not further inform the public of the Commission's activities, or change the benefits and burdens of the PPA, or provide greater insight into the Cumulative Reduction beyond what is already publicly available. *Id.* at 5.

B. OCA

The OCA explained that the information claimed to be confidential by Eversource relates to the over-market portion of Eversource's \$36,053,000 estimated cost of power under the PPA for the year 2017. The OCA said that the cost of \$36,053,000 comprises 1.1 cents of the 11.66 cents per kilowatt hour energy service rate approved by the Commission in this docket. OCA Opposition at 1-2. The OCA also stated that the response to Staff 4-8 includes the status of the Cumulative Reduction specific dollar amounts for each year from 2014 through 2017, and an estimate of the month and year when the Cumulative Reduction will equal \$100 million. *Id.* at 3 fn. 1.

Regarding the substance of Eversource's motion, the OCA argued that "subjective expectations" of confidentiality, and hence the parties' confidentiality obligations under the PPA, are irrelevant. *Id.* at 6. The OCA asserted that denial of confidential treatment by the

Commission would not, in fact, conflict with the confidentiality provisions of the PPA because the PPA recognizes that disclosure may be legally required. *Id.*

The OCA characterized Eversource's argument regarding competitive harm as "conclusory" and Eversource's weighting of private versus public interests as "unpersuasive" because Eversource understated the public's interest in disclosure. *Id.* at 7. According to the OCA, the public's interest in disclosure of the actual financial effects of the Cumulative Reduction is substantial, because those effects would help explain the Commission's actions when the Commission approved the PPA and in light of ongoing efforts by Eversource to add new elements to rates for public policy reasons. The OCA pointed out that the Commission previously determined that information related to the PPA is subject to public disclosure, even though the privacy interests asserted at the time the PPA was under review were more compelling than the interests raised here. The OCA concluded that "[t]he public had a compelling interest in assessing whether the Commission got [the Cumulative Reduction mechanism] right in 2011 and that interest is no less compelling today when there is actual data about the efficacy of the Cumulative Reduction mechanism." *Id.* at 9-10.

C. Staff

Staff argued that the information is not confidential because over-priced power from Burgess Biopower is included in the calculation of rates, and the Cumulative Reduction is a companion to that and impacts ratepayers. 6/22/17 Tr. at 36-37. Staff pointed out that the Commission made the entire PPA a public document when it approved the PPA. Staff also argued that the over-market costs are not confidential because they can be calculated using the per megawatt hour price set out in the PPA, and the market price of energy which is publicly available. *Id.* at 38.

III. COMMISSION ANALYSIS

Under RSA 91-A:5, IV, records of “confidential, commercial, or financial information” are exempted from disclosure, and the New Hampshire Supreme Court has adopted a three-step test for determining whether certain documents meet this designation. *See, e.g., Union Leader Corp. v. N.H. Housing Fin. Auth.*, 142 N.H. 540, 552-54 (1997); *Lambert v. Belknap County Convention*, 157 N.H. 375, 382-83 (2008). The first consideration is whether disclosure of the information sought to be protected involves a privacy interest. The second is whether the public has an interest in disclosure of the information. Finally, the public’s interest in disclosure is balanced against the privacy interest at stake to determine whether disclosure is warranted. *See, e.g., segTEL, Inc. d/b/a First Light Fiber*, Order No. 25,825 at 5-6 (October 13, 2015). Our determination of whether information is confidential must be based on an objective test and is not determined by the parties’ subjective expectations. *Union Leader Corp. v. N.H. Housing Fin. Auth.*, 142 N.H. at 553.

While we find that Eversource has a privacy interest in keeping information related to the Cumulative Factor and Cumulative Reduction confidential, Eversource’s interest is outweighed by the public interest in the information. Our decision to deny Eversource’s motion for confidential treatment is influenced by the fact that the PPA provision that describes the mechanics of the Cumulative Factor and Cumulative Reduction are publicly known, that the base price of energy is publicly known, and the market price for energy is publicly known. Consequently, the information that Eversource seeks to protect is easily derived, and its interest in keeping the information confidential is less weighty. Likewise, we find that Eversource’s contract obligation to attempt to protect the scope of disclosure of information exchanged with

its contracting party is of limited weight, as the contract provision specifically references legally required disclosure.


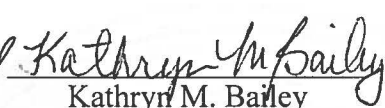

We are also influenced by the reasoning underlying the Commission's earlier decision to make public detailed pricing provisions of the PPA when it first approved the PPA. In *Public Service Company of New Hampshire*, Order No. 25,158 at 12-14 (October 15, 2010), the Commission denied a motion by Eversource to protect detailed pricing information under the PPA, including the base price to be paid for energy under the PPA. The Commission did so because disclosure of pricing details was central to the public's ability to understand how the Commission could find that the PPA is in the public interest, primarily in relation to the statutory public interest factors of "the efficient and cost-effective realization of the purposes and goals of [RSA Chapter 362-F], and meeting least cost planning principles." *Id.* at 13. The information that Eversource seeks to protect here is the track record that would permit the public to understand whether the statutory public interest factors have in fact been met. We find that the public has a material and substantial interest in knowing whether those factors have been met, and hence, in reviewing the information that Eversource seeks to protect. Because the over-market costs reflected in the Cumulative Reduction will be passed on to rate payers, the public has an additional interest in reviewing the information.

Consequently, we find that the public's interest in reviewing the information outweighs the interests in keeping the information confidential, and we deny Eversource's motion.

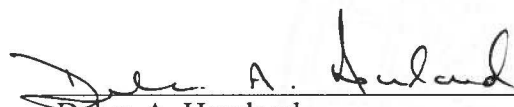
Based upon the foregoing, it is hereby

ORDERED, Eversource's Motion for Protective Order and Confidential Treatment is hereby DENIED.

By order of the Public Utilities Commission of New Hampshire this seventeenth day of October, 2017.

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| Martin P. Honigberg Chairman | Kathryn M. Bailey Commissioner | Michael S. Giaimo Commissioner |

Attested by:


Debra A. Howland
Executive Director

SERVICE LIST - EMAIL ADDRESSES- DOCKET RELATED

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 #: 16-822-1 Printed: October 17, 2017

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
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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.**