STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES
COMMISSION

DE 21-020

EVERSOURCE ENERGY AND CONSOLIDATED COMMUNICATIONS

Joint Petition to Approve Pole Asset Transfer

Order on Motion for Protective Order and Confidential Treatment

O R D E R N O. 26,609

April 13, 2022

This order denies in part and grants in part the Motion for Protective Order and Confidential Treatment filed by the Joint Petitioners on January 31, 2022.

I. PROCEDURAL HISTORY

On February 10, 2021, Public Service Company of New Hampshire d/b/a Eversource Energy (Eversource) and Consolidated Communications of Northern New England Company, LLC d/b/a Consolidated Communications (Consolidated) (together, Joint Petitioners), filed a petition (Petition) requesting that the Commission approve a transfer of interests in utility pole assets from Consolidated to Eversource pursuant to the terms of a Settlement and Pole Asset Purchase Agreement. In addition, the petition requested that the Commission approve Eversource's use of its Regulatory Reconciliation Adjustment (RRA) mechanism to recover costs associated with its purchase of Consolidated's interest in utility pole assets.

Also on February 10, 2021, the Joint Petitioners filed a Motion for Protective Order and Confidential Treatment seeking confidential treatment for the Joint Petitioners' Settlement and Pole Asset Purchase Agreement (Agreement). At that time, the Joint Petitioners did not file a redacted public version of the Agreement and

instead sought confidential treatment for the entire Agreement.

On February 23, 2021, the Office of the Consumer Advocate (OCA) filed a letter of participation in this matter. On March 29, New England Cable and Telecommunications Association, Inc. (NECTA) filed a petition to intervene, which was granted by the Commission.

Following a prehearing conference held on April 2, 2021, the Joint Petitioners and all other parties to this docket held a technical session related to several procedural matters, including confidentiality of the Agreement. The Joint Petitioners agreed to file a redacted, public version of the Agreement and did so on May 3, 2021.

On January 31, 2022, the Joint Petitioners filed a Motion for Protective Order and Confidential Treatment[1] (Motion) requesting the Commission to issue a protective order pursuant to RSA 91-A:5, IV and N.H. Admin. Rule Puc 203.08 affording confidential treatment to the redacted information contained within the Agreement, pre-filed testimony, pleadings, and other information exchanged between the parties to this docket and submitted to the Commission. On February 1, 2022, the OCA filed an objection to the Joint Petitioners' Motion. On February 11, 2022, Consolidated filed a motion for leave to respond to the OCA's opposition, which incorporated Consolidated's response to the OCA's objection.

The petition, motions, objections, and other docket filings, other than any information for which confidential treatment is requested of or granted by the Commission, are posted to the Commission's website at: https://www.puc.nh.gov/Regulatory/Docketbk/2021/21-020.html.

[1] The Joint Petitioners' previous Motion for Protective Order and Confidential Treatment has been withdrawn by the Joint Petitioners in light of developments since the filing of that Motion and the filing of the Motion under consideration in this Order.

II. POSITIONS OF THE PARTIES

A. Joint Petitioners

The Joint Petitioners argue that issuance of a protective order and confidential treatment of the redacted information are appropriate in this case because all of the information in the Agreement and pre-filed testimony of Eversource's witnesses contains information related to Consolidated's "confidential, commercial, or financial information," as those terms are used in RSA 91-A:5, IV. Additionally, the Joint Petitioners assert that the redacted information includes confidential information regarding the settlement of legal disputes between the Joint Petitioners.

The Joint Petitioners observe that Consolidated has engaged in similar asset sale transactions in other jurisdictions and may engage in similar transactions in the future. Accordingly, the Joint Petitioners argue that public access to the redacted information would place Consolidated at a competitive disadvantage in negotiating fees, pricing, and contractual terms with other parties in other locations. Thus, the Joint Petitioners assert that the information at issue is private, competitively sensitive financial information, public disclosure of which would harm Consolidated competitively and exposure of such information would be an invasion of privacy. In its reply to the OCA's objection, Consolidated argued that the information is similar in nature to information the Commission granted confidential treatment of in Docket DT 16-872, namely a key employee list determined to be non-public, commercially-sensitive operational information of a company engaged in a competitive industry subject to limited state regulation.

The Joint Petitioners also assert that there is little, if any, public interest in obtaining the redacted information. Even if there were a public interest in disclosing the information, the Joint Petitioners contend that such interest is outweighed by

Consolidated's interest in maintaining the confidentiality of the information.

With respect to the redacted information relating to settlement terms of legally disputed claims between the Joint Petitioners, they argue that disclosure of the settlement terms will negatively impact their respective leverage in future negotiations. The Joint Petitioners contend that disclosure of their settlement terms will increase the bargaining leverage of other parties in future negotiations and discourage future adverse claimants from making concessions in settlement negotiations or agreeing to certain provisions with one or both of the Joint Petitioners.

Therefore, the Joint Petitioners conclude that disclosure of the redacted information is not warranted in this case.

B. Office of the Consumer Advocate

The OCA objected to the Joint Petitioners' Motion. The OCA asserts that, according to the Agreement, Eversource's cost of purchasing telephone poles from Consolidated will be borne by Eversource's ratepayers — *i.e.*, the public. In light of that, the OCA argues that confidential treatment of the redacted information would contravene the meaning and intent of the Right-to-Know Law, RSA Ch. 91-A.

The OCA contends that no privacy or competitive interest of the Joint Petitioners is at stake here because, although the telephone service industry may be competitive, ownership of telephone poles in New Hampshire is a "monopolist's game." The OCA asserts that the Joint Petitioners' ability to maximize return on investment is not the sort of privacy interest the legislature had in mind when it adopted RSA 91-A:5, IV. Additionally, with regard to the redactions that speak to settlement terms of legally disputed claims between the Joint Petitioners, the OCA contends that the Joint Petitioners' desire to maintain leverage in future negotiations is not sufficient to overcome the public's interest in knowing the terms of the Agreement. Accordingly, the

OCA maintains that the Joint Petitioners' privacy interest in the redacted information is minimal.

By contrast, the OCA argues that the public's interest in disclosure is substantial. The OCA observes that the Right-to-Know Law gives the public the right to know "what its 'government is up to.'" *See New Hampshire Right to Life v. Director, N.H. Charitable Trust Unit*, 169 N.H. 95, 111 (2016). The OCA contends that, in this case, the Commission — a government body — is asked to consider the extent to which Eversource's ratepayers should be treated as a "silent virtual party" to the Agreement, since the ratepayers will bear the cost of Eversource's purchase of utility poles from Consolidated. Even if the Agreement is determined by the Commission to be in the public interest, the OCA argues that it is the terms of the deal that would reveal whether the Commission is exercising sound discretion in making that determination. Thus, the public's interest in knowing what the Commission is up to, and what information is relied upon to reach a decision, is significant in this case.

In sum, the OCA argues that the Joint Petitioners' privacy interest in the redacted information is minimal and the public's interest in disclosure is significant. Therefore, according to the OCA, a balancing test pursuant to RSA 91-A:5, IV, should be found to weigh in favor of public disclosure.

III. COMMISSION ANALYSIS

As a preliminary matter, Consolidated's February 11, 2022, motion for leave to file a reply to the OCA's objection to the Motion for Protective Order and Confidential Treatment is granted and Consolidated's reply is accepted for filing in this docket.

A. Right-to-Know Law Standard

As a general matter, the Right-to-Know Law provides members of the public with the right to inspect records in the possession of the Commission. *See* RSA 91-A:4,

I. The Right-to-Know Law is interpreted by the New Hampshire Supreme Court "with a view toward disclosing the utmost information in order to best effectuate [the] statutory and constitutional objective of facilitating access to public documents." *Seacoast Newspapers, Inc. v. City of Portsmouth*, 173 N.H. 325, 330 (2020). "Accordingly, although the statute does not provide for unfettered access to public records," its provisions are broadly construed in favor of disclosure and its exemptions are interpreted restrictively. *Id.* at 330-31.

"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 based upon the information submitted." Puc 203.08(a). The exemption that is commonly implicated by motions for confidential treatment is contained in RSA 91-A:5, IV. As relevant here, that paragraph exempts "[r]ecords pertaining to . . . confidential, commercial, or financial information . . . and other files whose disclosure would constitute an invasion of privacy" from public disclosure. *See* RSA 91-A:5, IV. Determining whether the exemption for "confidential, commercial, or financial information" applies requires an "analysis of both whether the information sought is confidential, commercial, or financial information and whether disclosure would constitute an invasion of privacy." *Union Leader Corporation v. Town of Salem*, 173 N.H. 345, 355 (2020), quoting *Union Leader Corp. v. N.H. Housing Fin. Auth.*, 142 N.H. 540, 552 (1997).

The New Hampshire Supreme Court has not adopted a single test to determine whether material is "confidential," although the Court has found "the standard test employed by the federal courts" instructive. *Union Leader Corp.,* 173 N.H. at 355. Under that standard, to establish that information is sufficiently "confidential" to

justify nondisclosure, "the party resisting disclosure must prove that disclosure is likely: (1) to impair the [government]'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." *Id.* (quotation omitted).

Whether documents are "commercial or financial" depends on the character of the information sought. *N.H. Housing Fin. Auth.,* 142 N.H. at 553. "Information is commercial if it relates to commerce." *Id.* Thus, "information may qualify as commercial even if the provider's . . . interest in gathering, processing, and reporting the information is noncommercial." *Id.* (quotation omitted). "Conversely, not all information generated by a commercial entity is financial or commercial." *Id.* (citation omitted).

Even if certain records are determined to be confidential, commercial, or financial information, "these categorical exemptions mean not that the information is *per se* exempt, but rather that it is sufficiently private that it must be balanced against the public's interest in disclosure." *Id.* Accordingly, whether the disclosure of "confidential, commercial, or financial information" results in an invasion of privacy involves a three-step analysis. *See Union Leader Corp.*, 173 N.H. at 355.

First, we must evaluate whether there is a privacy interest at stake that would be invaded by the disclosure. *Id.* Second, we assess the public's interest in disclosure. *Id.* Third, we balance the public interest in disclosure against the government's interest in nondisclosure and the individual's privacy interest in nondisclosure. *Id.* If no privacy interest is at stake, then the Right-to-Know Law mandates disclosure. *Id.* Further, "whether information is exempt from disclosure because it is private is judged by an objective standard and not by a party's subjective expectations." *Id.* The party resisting disclosure bears the burden of proving that the records should not be

disclosed. *See Union Leader Corp. v. City of Nashua*, 141 N.H. 473, 476 (1996).

B. Analysis

i. Redacted Information Related to the Agreement Generally

At the outset, we note that the redacted information contained in the Agreement, Petition, pre-filed testimony, and exhibits generally relates to the purchase price — and calculation and financing thereof — that Eversource would pay Consolidated to acquire the utility poles. The purchase price included in a purchase and sale agreement, and how that figure was calculated, is without question information that is "relate[d] to commerce." *N.H. Housing Fin. Auth.,* 142 N.H. at 553. Thus, the redacted information is "commercial or financial" information within the meaning of RSA 91-A:5, IV. *See id.*

Whether the information qualifies as "confidential" is a closer question. To establish that the information is sufficiently confidential to justify nondisclosure, the Joint Petitioners must show that disclosure is likely "to cause substantial harm to the competitive position of the person from whom the information was obtained." *Union Leader Corp.,* 173 N.H. at 355. The Joint Petitioners argue that the information is sufficiently confidential because Consolidated may engage in similar transactions in other locations in the future; thus, disclosure of the information would place Consolidated at a competitive disadvantage in negotiating fees, pricing, and contractual terms with other parties in other locations.

We recognize that disclosure of the purchase price and how it was calculated may provide some leverage to parties negotiating similar transactions in other locations with Consolidated in the future. However, there are a myriad of considerations that inform bargaining leverage in the negotiation of fees, pricing, and contractual terms when conducting a transaction such as the one at issue between

the Joint Petitioners, including the unique circumstances and market conditions surrounding the particular transaction and the laws and regulations governing the jurisdiction in which the transaction is to occur. We are not persuaded that the redacted information is "confidential" within the meaning of RSA 91-A:5, IV because the Joint Petitioners have not demonstrated that disclosure of the information is likely to substantially harm Consolidated's competitive position. Nevertheless, because we have concluded that the redacted information is "commercial or financial," we must conduct the three-part balancing test to determine whether disclosure of the information would result in an invasion of privacy. *See Union Leader Corp.*, 173 N.H. at 355.

First, we must evaluate whether there is a privacy interest at stake that would be invaded by the disclosure. *See id.* The privacy interest advanced by the Joint Petitioners' Motion is that disclosure of the redacted information would harm Consolidated's competitive position in a highly competitive industry and put the company at a competitive disadvantage in negotiating fees, pricing, and contractual terms with other parties in other locations. It is unclear, and the Joint Petitioners do not sufficiently explain, how disclosure of the purchase price in the Agreement — but not any of the other terms that have been disclosed — will put Consolidated at such a great competitive disadvantage going forward. Although in some cases the privacy interest identified by the Joint Petitioners may be significant, it is lessened in this case because it has not been demonstrated that disclosure of the redacted information will substantially harm Consolidated's competitive position. Furthermore, we disagree that this information is analogous to the "key employee list" in Docket DT 16-872 Consolidated referenced in its February 11, 2022, response to the OCA's objection. Although Consolidated is a company engaged in a competitive industry subject to

limited state regulation, that factor carries minimal weight where the proposed transaction will result in a rate impact on the customers of a fully rate-regulated electric distribution utility.

Next, we must assess the public's interest in disclosure. *See id*. In this case, the Commission has been asked to approve the Agreement in which Consolidated intends to sell at least a 50 percent ownership interest in over 346,000 utility poles to Eversource. Thus, this transaction relating to a public utility is of a substantial magnitude and whether the Commission approves the Agreement, and on what terms, will have an appreciable impact on electricity rates paid by the public. The purpose of the Right-to-Know Law is to provide the utmost information to the public about "what its 'government is up to.'" *See New Hampshire Right to Life*, 169 N.H. at 111. When the Commission is asked to approve a purchase and sale of public utility assets that will result in an increase in how much the public must pay for the benefit of the utility, the public cannot adequately know what the Commission is "up to" and whether it is acting in the public interest without knowing the cause of the increased rates, which will often be illuminated by the purchase price and financing of the agreement. Accordingly, we agree with the OCA that the public's interest in the redacted information is significant.

Finally, we must balance the public interest in disclosure against the government's interest and the individual's privacy interest in nondisclosure. *See Union Leader Corp.*, 173 N.H. at 355. For the reasons explained in the foregoing paragraphs, as well as the determination below granting confidential treatment to certain key pieces of information used to determine the final proposed purchase price, we conclude that the public's interest in disclosure of the redacted information relating to the purchase price in the Agreement outweighs the privacy interest asserted by the

Joint Petitioners. Accordingly, to that extent, the Joint Petitioners' Motion is DENIED.

ii. Redacted Information Related Specifically to Settlement of Claims

The Joint Petitioners' Motion also seeks confidential treatment for redacted information relating to settlement terms of legally disputed claims between them. They contend that disclosure of that information will decrease their bargaining power and increase the bargaining leverage of other parties in future negotiations, thereby discouraging adverse claimants from making concessions in settlement negotiations or agreeing to certain provisions with one or both of the Joint Petitioners.

The Agreement includes a full and complete settlement of all legal disputes between the Joint Petitioners, including vegetation management costs paid by Eversource since 2018. Settlement of those claims that Eversource had against Consolidated appears to have been a factor in negotiating the purchase price in the Agreement. Thus, the settlement terms bear directly on the purchase and sale of the utility assets and, therefore, are related to commerce. *See N.H. Housing Fin. Auth.,* 142 N.H. at 553. Accordingly, we proceed to the three-part balancing test. *See Union Leader Corp.*, 173 N.H. at 355.

We first evaluate whether there is a privacy interest at stake that would be invaded by the disclosure. *See id.* The Joint Petitioners seek to keep the terms of their settlement confidential to protect their ability to effectively negotiate settlements and to avoid discouraging adverse claimants from making concessions or agreeing to certain terms in settling claims with them. The commission recognizes that litigation is expensive and can damage business relationships, and therefore the ability to negotiate and settle claims fairly and effectively is important. The principle of favoring the settlement of litigation is well-established in New Hampshire and many other jurisdictions. *See G2003B, LLC v. Town of Weare*, 153 N.H. 725 at 728 (2006). Thus,

the Joint Petitioners' expectation that their settlement would remain private is objectively reasonable. *See Union Leader Corp.*, 173 N.H. at 355 (stating that "whether information is exempt from disclosure because it is private is judged by an objective standard and not by a party's subjective expectations.") Accordingly, the Joint Petitioners have a heightened privacy interest in the terms of their settlement of legal disputes between them.

We turn next to the public's interest in disclosure. *See id*. The public's interest in disclosure of the settlement terms reached by the Joint Petitioners is negligible in this case. Even though the claims that were settled tangentially related to public utilities, such as disputes over vegetation management and maintenance costs of telephone poles, they were purely private disputes between private parties. In accordance with the reasoning in the previous section of this order, the public's interest in the settlement terms would be weighty if the settlement resulted in Eversource paying a higher purchase price for the utility assets, which in turn might cause an increase in electricity rates for the public. However, the Petition and the Agreement are both clear that the legal claims were held by Eversource against Consolidated, and their settlement resulted in a deduction from the purchase price. Accordingly, the public has a nominal interest in the contents of the claims themselves and, at best, a minimal interest in how settlement of the claims impacted the purchase price of the utility assets.

Lastly, we balance the public interest in disclosure against the government's interest in nondisclosure and the individual's privacy interest in nondisclosure. *See id*. The Joint Petitioners have a notable privacy interest in their settlement terms because they negotiated and settled the private legal disputes between them with an objectively reasonable expectation that they would remain private, and disclosure could

negatively impact their ability to fairly and effectively negotiate settlements going forward. By contrast, the public has little interest in the settlement terms because neither the claims themselves nor the way in which they were resolved have the potential to impact the public in any meaningful way.

Therefore, we conclude that the Joint Petitioners' interest in nondisclosure of the terms upon which they settled the legal disputes between them outweigh the public's interest in knowing the terms of the settlement. Accordingly, the Joint Petitioners' Motion, to the extent it seeks confidential treatment of the settlement terms, is GRANTED.

Based upon the foregoing, it is hereby

ORDERED, that the Joint Petitioners' Motion for Protective Order and Confidential Treatment is GRANTED IN PART AND DENIED IN PART as set forth herein above.

By order of the Public Utilities Commission of New Hampshire this thirteenth day of April, 2022.

Daniel C. Goldner
Chairman

Carleton B. Simpson
Commissioner

Service List - Docket Related

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