

**THE STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION**

DG 21-104

NORTHERN UTILITIES, INC.

**MOTION FOR PROTECTIVE ORDER
AND CONFIDENTIAL TREATMENT**

NOW COMES Northern Utilities, Inc. (“Northern” or the “Company”) and, pursuant to NH RSA 91-A:5, IV and N.H. Code of Administrative Rules (“N.H. Admin. Rules”) Puc 203.08, respectfully moves the New Hampshire Public Utilities Commission (“Commission”) to issue a protective order which accords confidential treatment to the rate and billing information for consultants who performed work for Northern, and certain information about other clients of those consultants, included on select pages between Bates pages 000007 through 000151, and between Bates pages 000166 through 000409, of the documents filed with the Company’s request for recovery of rate case expenses in the instant proceeding consistent with Puc 1905.03. Northern has filed this information with the Commission and submitted it to the Department of Energy and the Office of Consumer Advocate with the understanding it will be maintained as confidential until the Commission rules on the within Motion.

In support of this Motion, Northern states as follows:

I. Standard of Review

1. The Commission has recently clarified its analysis regarding its determinations pertaining to confidential, commercial or financial information under RSA 91-A:5, IV. As noted in Order No. 26,609 (April 13, 2022), as a general matter the Right-to-

Know Law, RSA 91-A:4, provides members of the public with the right to inspect records in the possession of the Commission and the 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.” Order No. 26,609 at 5-6 (quoting *Seacoast Newspapers, Inc. v. City of Portsmouth*, 173 N.H. 325, 330 (2020)) (brackets omitted). Further, though 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.” Order 26,609 at 6.

2. The exemption that is commonly implicated by motions for confidential treatment before the Commission, including the instant motion, is RSA A:5, IV, which provides, in relevant part, that “[r]ecords pertaining to . . . confidential, commercial, or financial information . . . and other files whose disclosure would constitute an invasion of privacy” are exempt from public disclosure. *See* RSA 91A: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.’” Order No. 26,609 at 6 (quoting *Union Leader Corporation v. Town of Salem*, 173 N.H. 345, 355 (2020)).
3. As noted by the Commission, 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. Order No. 26,609 at 6. Under that standard, 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.* at 6-7 (quoting *Union Leader Corp.*, 173 N.H. at 355).
4. Whether documents are sufficiently “commercial or financial” to qualify under the Right-to-Know law depends on the character of the information sought. As described by the Commission “[i]nformation is commercial if it relates to commerce” and “may qualify as commercial even if the provider’s interest in gathering, processing, and reporting the information is noncommercial.” *Id.* at 7 (quoting *Union Leader Corp. v. N.H. Housing Fin. Auth.*, 142 N.H. 540, 552 (1997)) (ellipsis omitted). “Conversely, not all information generated by a commercial entity is financial or commercial.” *Id.*
 5. Once a determination is made as to whether records are confidential, commercial, or financial information, the Commission will engage in a three step analysis where the Commission will first “evaluate whether there is a privacy interest at stake that would be invaded by the disclosure.” *Id.* Next, the Commission will assess the public’s interest in disclosure, and finally, it will balance the public interest in disclosure against the government’s interest in nondisclosure and the individual’s privacy interest in nondisclosure. *Id.* Ultimately, whether information is exempt from disclosure is judged by an objective standard and not by a party’s subjective expectations. *Id.* When the information involves a privacy interest, disclosure should inform the public of the conduct and activities of its government; if the information does not serve that purpose, disclosure is not warranted. *Northern Utilities, Inc.*,

Order No. 26,129 at 15 (May 2, 2018) (citing *Liberty Utilities (EnergyNorth) Natural Gas Corp.*, Order No. 26,109 at 23 (March 5, 2018)).

II. Analysis

6. The specific information for which Northern seeks protection is the information about the contract and billing arrangements and rates of Northern's consultants for the provision of testimony and support for Cost of Equity, revenue decoupling, depreciation, and the accounting and marginal cost studies and rate design in this case. The consultants providing those services were hired via a competitive Request for Proposal ("RFP") process and it is the contract rates (and billing hours applied to those rates) for which Northern seeks protection. Additionally, as part of their RFP responses, certain of the consultants provided information about other clients for whom they had performed work. Those consultants desire to keep the information about those unrelated engagements confidential to assure that their analyses and other information from those matters is not disclosed in this case. The information covered by this motion is essentially identical to the information the Commission saw as worthy of confidential treatment in another recent case. *See Public Service Company of New Hampshire d/b/a Eversource Energy*, Order No. 26,617 (April 27, 2022).
7. As an initial matter, the specific information for which Northern is seeking protection is unquestionably commercial or financial information as covered by RSA 91-A:5 and its disclosure would be harmful to Northern and its consultants. The information in issue relates specifically to the terms and conditions of the consultants' engagements with Northern, to the rates negotiated and paid for the services they agreed to provide, and to the scope of their consulting work for other entities.

Disclosure of the consultants' contract and billing information would put them at a competitive disadvantage by divulging the rates they charged for work awarded either through the RFP or negotiation and would adversely affect the Company because in future dockets consultants would be discouraged from working with the Company if doing so would result in release of confidential business information. The disclosure of the redacted information would similarly discourage bidders from participating in response to future RFPs, thereby harming the Company and, ultimately its customers. Likewise, if bidders have confidentially provided information about other engagements – in which they may also have been engaged on a confidential basis – to demonstrate to Northern their experience in the field, disclosing that information may discourage those bidders from participating in future RFPs. As a result, the disclosure of this information would have a chilling effect on the Company's ability to: (1) attract contract partners who may fear that the Commission will ultimately release proprietary pricing data to their other customers; and (2) secure reasonable and attractive pricing from contract partners for the benefit of the Company's customers. Accordingly, disclosure is likely to cause substantial harm to the competitive position of Northern, from whom the Commission obtained the information. Moreover, should this information be made available to the public, the Company's vendors and consultants would be placed at a competitive disadvantage vis-à-vis their competitors because such competitors would have information on which to base future bids for providing services to the Company. Thus, there is a likelihood of substantial harm to those consultants as well.

8. Having made plain that the information in issue is commercial or financial information, the disclosure of which would be harmful to Northern and its customers, Northern submits that the information should be protected from disclosure. In reference to the three-part test applied by the Commission, the first criterion relates to the privacy interest at stake. As discussed above, Northern (and ultimately its customers) as well as the various consultants, have an interest in protecting the confidential bidding, billing, and rate information of the consultants because it will help to assure that Northern will be able to engage in competitive RFPs in the future in which interested parties will be willing to bid. Maintaining the confidentiality of their bid and award information helps to assure that Northern will be able to attract bidders and have a meaningfully competitive process, all to the ultimate benefit of customers. Accordingly, Northern submits that the privacy interest in the information is high.
9. With respect to the public interest, Northern recognizes that there is some public interest in knowing the costs for which the Company seeks recovery. That interest, however, is tempered by the quality of the information which would be made public in the case – the total amount paid by the Company for the consultants' efforts. Therefore, while the Company requests protective treatment for the components of the billing information (e.g., hours and specific rates), the public would still have access to the total amount billed. Moreover, full disclosure of the confidential information is provided to the Commission, the Department of Energy, and the Office of Consumer Advocate, which allows the details of the billings to be subject to investigation and scrutiny.

10. In balancing the interests, the privacy interest of the Company and its counterparties outweighs the public interest because if the negotiated terms and pricing information were disclosed, the Company would have difficulty procuring like services from vendors in the future at the lowest cost, which would ultimately harm the Company's customers. Accordingly, the Company and its vendors have privacy interests at stake that would be invaded by disclosure of the confidential information. In addition, the disclosure of the Confidential Attachments is not necessary to inform the public of the conduct and activities of its government and would not serve that purpose because the ultimate costs for which recovery is sought are already disclosed. Therefore, disclosure is not warranted. *Northern Utilities, Inc.*, Order No. 26,129 at 15. On balance, the harm that would result from public disclosure is outweighed by the need for confidential treatment.

WHEREFORE, Northern respectfully requests that the Commission:

- A. Issue an appropriate order that exempts from public disclosure and otherwise protects as requested above the confidentiality of the above-described information designated confidential submitted herewith; and
- B. Grant such further relief as may be just and appropriate.

Respectfully submitted

NORTHERN UTILITIES, INC.

By its Attorney:



Matthew J. Fossum
Senior Counsel

Dated: August 18, 2022

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Certificate of Service

I hereby certify that on August 18, 2022, a copy of the foregoing was electronically served upon the service list for this proceeding.



Matthew J. Fossum