

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

DG 22-073

MOTION FOR CONFIDENTIAL TREATMENT AND PROTECTIVE ORDER

Unitil Energy Systems, Inc. (“Unitil” or the “Company”) respectfully requests that the New Hampshire Public Utilities Commission (the “Commission”) grant protection from public disclosure of certain confidential information submitted as part of the enclosed supplemental filing in this docket pursuant to Puc 203.08 and RSA 91-A:5. Specifically, the Company requests the Commission protect from public disclosure certain confidential, proprietary, and commercially sensitive information contained in the following exhibits: Exhibit SP-1, Exhibit SP-3, Exhibit SP-4, Exhibit SP-5, Exhibit SP-6, and Exhibit SP-7 (each a “Confidential Attachment” and collectively the “Confidential Attachments”). Appendix A summarizes the specific types of confidential information in each Confidential Attachment.

I. LEGAL STANDARD

Puc 203.08(a) states that 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.” In determining whether confidential, commercial, or financial information within the meaning of RSA 91-A:5, IV is exempt from public disclosure, the Commission applies a three-step balancing test to determine whether a document, or the information contained within it, falls within the scope of RSA 91-A:5, IV. *Northern Utilities, Inc.*, DG 17-070, Order No. 26,129 (May 2, 2018) at 15 (*citing Liberty Utilities (EnergyNorth) Natural Gas Corp.*, Order No. 26,109 (March 5, 2018) at 23). First, the Commission inquires whether the

information involves a privacy interest and then asks if there is a public interest in disclosure. *Id.* Next, the Commission balances those competing interests and decides whether disclosure is appropriate. *Id.* When the information involves a privacy interest, disclosure should inform the public of the conduct and activities of its government, but if the information does not serve that purpose, disclosure is not warranted. *Id.*

II. DISCUSSION

On October 30, 2022, Unitil filed a petition requesting that the Commission find the Company's proposed 4.99 megawatt photovoltaic generating facility is in the public interest (the "Kingston Solar Project" or the "Project") pursuant to New Hampshire Revised Statutes Annotated ("RSA") 374-G. RSA 374-G requires project proponents to provide an analysis of the costs and benefits of their proposal. Accordingly, the Company prepared analyses of the costs and benefits of the Project (and accompanying testimony), which chiefly relied upon cost estimates, billing rates, and pricing information provided by third party vendors in response to a preliminary Request for Proposals ("RFP") for an Engineering, Procurement, and Construction ("EPC") contractor (the "Preliminary EPC RFP"). The Company's filing also contained a confidential and proprietary price quote for renewable energy certificates ("RECs") provided by a third party vendor. The Company's initial filing was accompanied by a Motion for Confidential Treatment and Protective Order.

After the initial filing, Unitil moved to Stage 2 of its procurement process and issued a Final EPC RFP on November 30, 2022. The Company received responses to the Final EPC RFP on January 20, 2023 and selected ReVision Energy ("ReVision") as the Project's EPC contractor, subject to negotiating and executing a final contract. The Company has revised its Benefit-Cost Analysis with updated cost, pricing, and performance estimates from the Final

EPC RFP and prepared supplemental testimony to explain, among other things, the updates to the assumptions and inputs in the Benefit-Cost Analysis. The Confidential Attachments provided as part of the Company's supplemental filing contain the confidential, proprietary, and commercially sensitive information discussed below and summarized in Appendix A.

RSA 91-A:5(IV) expressly exempts from the public disclosure requirements any records pertaining to "confidential, commercial or financial information." RSA 91-A:5, IV; *Union Leader Corp. v. New Hampshire Housing Finance Authority*, 142 N.H. 540 (1997). Application of this exemption requires "analysis of both whether the information sought is confidential, commercial, or financial information, and whether disclosure would constitute an invasion of privacy." *Unitil Corp. and Northern Utilities, Inc.*, DG 08-048, Order No. 25,014 (Sept. 22, 2009) at 2. The Commission's rule on confidential treatment of public records, Puc 203.08, also recognizes that confidential commercial or financial information may be appropriately protected from public disclosure pursuant to an order of the Commission. The determination of whether to disclose confidential information involves a balancing of the public's interest in full disclosure with the countervailing commercial or private interests for non-disclosure.

For the reasons set forth below, public disclosure would invade the privacy interests at stake in each of the Confidential Attachments, and the privacy interests substantially outweigh any public interest in disclosure. Public disclosure of the Confidential Attachments is not warranted because such disclosure is not necessary to inform the public of the conduct and activities of its government.

**a. Commercially Sensitive and Confidential Cost Estimates, Pricing Information,
and Proposed Contract Terms**

Exhibits SP-1, SP-4, SP-5, and SP-7 contain commercially sensitive and confidential cost

estimates, pricing information, and proposed contract terms.

Disclosure of the cost estimates, pricing information (and information that can be used to derive this information), and proposed contract terms provided by third-party vendors would put them at a competitive disadvantage by revealing the commercial rates they charge for materials and services on a competitive basis and the contract terms they offer for those materials and services. It also would adversely affect the Company and its customers because third-party vendors would be discouraged from responding to the Company's RFPs and negotiating with the Company if doing so would result in the release of commercially sensitive and confidential business information. This could have the effect of increasing costs to the Company, and ultimately to customers, if the Company cannot procure or negotiate for cost-effective products and services because it cannot assure confidential, protective treatment of confidential pricing information. *See Granite State Electric Company*, DE 12-023 (Mar. 27, 2021) at 9 (finding that disclosing bidder price information would likely impede the utility company's ability to engage suppliers in competitive bidding in the future, which would, in turn, make it more difficult to obtain its supply needs at competitive prices and might thereby increase rates to customers). Simply put, pricing information and contract terms must remain confidential to preserve the Company's ability to cost-effectively procure products and services for the benefit of customers.

The Company is providing redacted versions of Exhibits SP-1, SP-4, SP-5, and SP-7 for the public record. Therefore, although the Company is requesting protective treatment for the cost estimates, pricing information, and contract terms for certain components of the Project, the public will still have access to information about estimated costs, benefits and bill impacts. *See EnergyNorth Natural Gas, Inc.*, Order No. 25,064 at (Jan. 15, 2010) at 12 ("[P]ublically available versions of all the documents contain a good deal of information concerning the

costs of the underlying engagements”).

The Commission has historically treated pricing information and contract terms from vendors and potential vendors as confidential. *See e.g., Northern Utilities, Inc.*, Order No. 26,710 (Oct. 24, 2022) at 5 (finding a privacy interest in the details of the costs, pricing, and negotiated terms of the contract at issue); *Liberty Utilities (EnergyNorth Natural Gas) Corp. d/b/a Liberty Utilities*, Order No. 26,166 (Aug. 1, 2018) at 6 (finding that the terms of a gas supply agreement constitute sensitive commercial information that warrant confidential treatment); *Abenaki Water Co. Inc.*, Order No. 25,945 (Sept. 26, 2016) at 7 (protecting billing rates because it could damage competitive positions to the detriment of ratepayers); *Electric and Gas Utilities*, Order No. 25,189 (Dec. 30, 2010) at 20 (finding “that the harm of public disclosure of the competitive energy efficiency labor and materials pricing and commercially sensitive contract terms outweighs the benefits of disclosure.”); *Unitil Energy Systems, Inc.*, Order No. 25,303 (April 13, 2007) at 8 (finding that disclosing information provided in response to an RFP, including pricing information, would likely hamper Unitil’s ability to engage suppliers in competitive bidding in the future, and that would, in turn, make it more difficult to meet its needs at competitive prices and might thereby increase rates to customers); *Unitil Energy Systems, Inc.*, Order No. 24,742 (April 13, 2007) at 3-5 (finding that billing rate information is properly treated as confidential.); *National Grid plc, et al.*, Order No. 24,777 (July 12, 2007) at 86 (“If public disclosure of confidential, commercial or financial information would harm the competitive position of the person from whom the information was obtained, the balance would tend to tip in favor of non-disclosure.”).

In DE 17-189, the Commission granted protective treatment for pricing information that is similar to information the Company seeks to protect in this proceeding. In DE 17-189,

Liberty Utilities (Granite State Electric) Corp. d/b/a Liberty Utilities (“*Liberty*”) sought protection for proposed pricing for various components of systems, software, and other services submitted by Sunrun, Inc. (“Sunrun”) as part of an informal RFP response. *Liberty*, Order No. 26,209 (Jan. 17, 2019) at 44. The Commission found that although the public may have some interest in disclosure of Sunrun’s pricing information, the public interest was outweighed by the interests of Sunrun in maintaining the confidentiality of this proprietary, commercially sensitive, and non-public information. *Id.* The same logic applies to the Confidential Attachments in this case and there is no reason for the Commission to depart from its long-established precedent in this proceeding.

b. Commercially Sensitive and Proprietary Production Profile Information

Exhibits SP-4, SP-5, and SP-6 contain commercially sensitive and proprietary production profile information.

The production profile information (e.g., hourly energy produced) provided by ReVision and presented in Exhibits SP-4, SP-5, and SP-6 was produced by a subscription-based software tool called HelioScope. The business model for this commercial solar software product relies on providing it for a fee. If the Commission ordered dissemination of the data produced by the HelioScope model to the public, then it would harm the business interests of the vendor because individuals and entities who want access to this data and proprietary analysis would not need to pay for it. Consequently, disclosure would have a chilling effect on the Company’s ability to engage product and service providers because those vendors may fear that the Commission will release their proprietary work product, data, methodologies, and analyses, which would undermine their businesses. This would disadvantage the Company, to the extent that product and service providers determine in the future not to bid on the Company’s RFPs because of the

potential commercial disadvantages that may arise should they do so.

In the Commission's privacy analysis, the privacy interest of the Company, ReVision, and the HelioScope vendor are aligned with the public interest because if the proprietary data and analysis produced by this software is disclosed, the Company could have difficulty procuring products and services in the future. The Company's difficulty in procuring products and services would ultimately harm customers due to the increased costs to procure or develop products and services through other limited means. For example, the Company may receive fewer responses from vendors willing to provide such products and services or vendors may increase the amount charged to the Company to compensate for the risk of disclosure of their proprietary work product and analysis. At the other end of the scale, the public's interest in disclosure of the proprietary, commercial data and analysis is slight because the information at issue has no bearing on the workings of government.

The Commission has historically treated proprietary software and the data produced by that software as confidential. *See e.g., Pennichuck Water Works, Inc.*, Order No. 26,726 (Nov. 18, 2022) at 3-4 (finding that a proprietary business model and software formulae in that model constitutes confidential and sensitive commercial information); *Liberty*, Order No. 26,209 (Jan. 17, 2019) at 43-44 (protecting descriptions of how the vendor's proprietary software platform operates); *Northern Utilities, Inc.*, DG 20-078, Order No. 26,385 at 11 (July 28, 2020) ("We are cognizant that the analyses and related documents are copyright protected and were provided to the Company without authority to share the information publicly. Consequently, public release of the analyses could harm the Company's ability to obtain this type of information in the future, because it could violate the terms of its agreement with the publishers and would harm the competitive interests of the publishers of the copyrighted

materials if such information were provided to the public free. Those factors make the interest in nondisclosure more substantial.”).

c. Commercially Sensitive and Proprietary Response to RFP

Exhibit SP-3 is ReVision’s commercially sensitive and proprietary narrative response to the Company’s RFP. Exhibit SP-3 has economic and commercial value because ReVision’s competition could use it to their benefit and to ReVision’s detriment. That economic and commercial value is critical to the short and long-term business interests of ReVision. Thus, the privacy interest in Exhibit SP-3 is significant¹ and it should be protected as confidential, in its entirety, to preserve its economic and commercial value. At the other end of the scale, the public’s interest in disclosure of Exhibit SP-3 is slight because the information at issue has no bearing on the workings of government.

Although there has been considerable residential solar development in New Hampshire, the development of large, utility-scale solar projects is still in a relatively nascent stage.² Therefore, the manner in which ReVision structures, compiles, and presents its bid package for utility-scale solar projects has substantial economic and commercial value. If Exhibit SP-3 is not protected, other companies would be granted detailed insight into ReVision’s bidding and business strategy, competitors would be able to model their bid packages after ReVision’s bid package, and/or companies could distinguish their bid packages to gain an unfair competitive advantage. Consequently, public disclosure of Exhibit SP-3 would result in significant commercial harm to ReVision and could potentially undermine the developing utility-scale solar market in which the state of New Hampshire has an economic development interest.

¹ Unitil has discussed the disclosure of Exhibit SP-3 with ReVision, and ReVision has informed the Company that it considers its narrative response to the RFP to be proprietary and confidential, in its entirety.

In addition, disclosure of Exhibit SP-3 would put bidders on notice that their bids may be made public in future solicitations. Rather than risk their competitive positions in the market, prospective bidders may determine not to bid on the Company's (or other regulated utilities') RFPs. That result would deprive the Company and its customers of robust, competitive procurements for products and services. The award of economic, competitively bid contracts can only be assured if potential suppliers of goods and services are confident that their proposals will remain confidential and do not become available, either directly or indirectly, to their competitors.

The Commission has previously found that information similar to Exhibit SP-3 is competitively sensitive and confidential. *See e.g., Pennichuck Water Works, Inc.*, Order No. 26,726 (Nov. 18, 2022) at 3-4 (finding that a proprietary business model and software formulae in that model constitutes confidential and sensitive commercial information); *Liberty*, Order No. 26,376 (June 30, 2020) at 14 (finding that the consultant's work product was unlikely to inform the public of the Commission's regulatory activities and should be protected); *Liberty*, Order No. 26,209 (Jan. 17, 2019) at 43-44 (protecting descriptions of how the vendor's proprietary software platform operates); *Abenaki Water Company*, Order No. 25,840 (Nov. 13, 2015) at 2-3 (finding Abenaki's consultant has a privacy interest in his spreadsheets because they are his work product and could be used by competitors to his commercial disadvantage); *North Atlantic Energy Corporation*, Order No. 23,986 (June 5, 2022) at 10 ("[P]ublic disclosure of bids, bid analyses, financial assessments, and data related to the auction would chill future auction transactions, thereby limiting the results that might otherwise have been achieved."). There is no reason for the Commission to depart from past practice in this case.

² See Exh. KES-1, at Bates pages 000006-000008.

Pursuant to Puc 201.04(b), all information within a document asserted to be confidential must be redacted. However, because the Company is seeking to protect Exhibit SP-3 in its entirety, a redacted version would have little to no practical value. Accordingly, the Company respectfully requests, pursuant to Puc 201.05, that the Commission waive the requirement to produce a redacted version of Exhibit SP-3.

d. Commercially Sensitive and Confidential REC Price Quote

Exhibit SP-7 contains a REC price quote from a price sheet provided to the Company by a third-party REC broker. The price sheet is copyright protected.

The REC price information has commercial value to the third-party REC broker. If the REC price was disclosed in this proceeding, it would impair the commercial value of that information because parties would have free and unrestricted access to that information. Thus, the REC broker plainly has a privacy interest in this information.

The Commission has previously determined that the public's interest in copyrighted, proprietary and confidential information was not as weighty as the countervailing interest in non-disclosure:

We are cognizant that the analyses and related documents are copyright protected and were provided to the Company without authority to share the information publicly. Consequently, public release of the analyses could harm the Company's ability to obtain this type of information in the future, because it could violate the terms of its agreement with the publishers and would harm the competitive interests of the publishers of the copyrighted materials if such information were provided to the public for free. Those factors make the interest in nondisclosure more substantial.

Northern Utilities, Inc., DG 20-078, Order No. 26,385 (July 28, 2020) at 11.

The Commission should reach the same conclusion in this case. Disclosure of the REC price quote would not provide the public with information about the conduct or activities of the Commission or other parts of the New Hampshire government. Accordingly, disclosure is

not warranted.

In summary, on balance, the substantial interest in obtaining cost-effective products and services from third-party vendors significantly outweighs the interest in public disclosure. Accordingly, a ruling in favor of this balance and granting this motion is in the best interest of customers. *See EnergyNorth Natural Gas, Inc.*, Order No. 25,064 (Jan. 15, 2010) at 12 (finding that disclosure of billing rate information may place the Company and its service providers at a disadvantage with respect to those with whom it would do business, ultimately causing harm to the Company's ratepayers in future rate cases).

III. CONCLUSION

For the above reasons, Unitil requests that the Commission issue an order protecting the above-described information from public disclosure and prohibiting copying, duplication, dissemination or disclosure of it in any form. The Company further requests that the protective order extend to any discovery, testimony, argument, and briefing relative to the confidential information.

WHEREFORE, Unitil 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; and
- B. Grant such further relief as may be just and appropriate.

Respectfully Submitted,

UNITIL ENERGY SYSTEMS, INC.

By:

A handwritten signature in black ink, reading "Matthew Campbell". The signature is written in a cursive style with a horizontal line underneath it.

Matthew C. Campbell
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Dated: February 20, 2023.

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of February 2023, a copy of the foregoing Motion was electronically delivered to the Service List for this proceeding.

A handwritten signature in black ink, reading "Matthew Campbell", written in a cursive style. The signature is positioned above a horizontal line.

Matthew C. Campbell