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PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

**Petitions for Approval of Renegotiated Power Supply
Arrangements**

Order Concerning Confidentiality of Documents

O R D E R N O. 23,983

May 31, 2002

This Order concerns the confidentiality of certain documents filed in the above-referenced dockets with the New Hampshire Public Utilities Commission (Commission) by petitioners Public Service Company of New Hampshire (PSNH) and Edison Mission Marketing and Trading (EMMT). On December 13, 2001, the Commission entered Order No. 23,870, reconsidering certain previously-made confidentiality determinations in connection with these dockets, requesting that the parties state their positions with regard to the applicable confidentiality issues. This Order is intended to resolve all such issues, which arise under the Right-to-Know Law, RSA 91-A.

**I. BACKGROUND, PROCEDURAL HISTORY AND POSITIONS OF THE
PARTIES**

Each of these dockets concerned the renegotiation of power purchase arrangements between PSNH and an independent

wood-fired power plant within PSNH's service territory. Docket No. DE 01-089 involved Whitefield Power and Light Company; the petition, as conditioned by a settlement agreement, was approved in Order No. 23,840 (November 9, 2001). Docket No. DE 01-090 concerned Bio-Energy Corporation; a settlement agreement in that docket was approved in Order No. 23,816 (October 19, 2001). The Commission did not reach the merits of Docket No. DE 01-091, concerning Hemphill Power and Light Company, because the petitioners requested on November 16, 2001 that the Commission close the docket without acting on the petition. The full procedural history of these proceedings is recited in the above-referenced orders as well as in Order No. 23,763 (August 23, 2001), which followed a Pre-Hearing Conference conducted jointly in all three dockets. That information will not be repeated here, except as directly relevant.

As noted in the Order reconsidering the confidentiality determinations, the Commission conducted its hearing in the Whitefield Power and Light docket, No. DE 01-089, on October 23, 2001. As of that date, certain confidentiality motions had already been resolved in favor of PSNH and EMMT, while others had been deliberated on October

18, 2001 without a written order ever issuing. At the October 23 hearing, the Office of Consumer Advocate (OCA) read into the record a newspaper article quoting a PSNH spokesperson as providing estimates of the ratepayer savings to be achieved in connection with the Bio-Energy and Whitefield renegotiations. Thereafter, on December 6, 2001, the Commission entered Order No. 23,859, approving the securitization¹ of approximately \$50 million in costs associated with the Whitefield renegotiation. In deciding to reconsider previous confidentiality determinations, we noted that it was our understanding that competitors of both PSNH and EMMT could

derive much of the data the companies seek to keep confidential by using the savings figures disclosed to the [newspaper], and the securitization figure set forth in Order No. 23,859, in light of the information as to the methodologies used by the two companies as contained in the documents publicly filed by the petitioners in the three dockets.

Order No. 23,870, slip op. at 5. While we noted that we did "not necessarily believe that the public disclosures have rendered irrelevant or too attenuated all of the privacy

¹ Securitization refers to the issuance of rate reduction bonds, the holders of which have a "secure expectation of payment" via stranded cost charges paid by customers. See RSA 369-B.

interests asserted by PSNH and EMMT so far in these proceedings," we concluded that the disclosures "have sufficiently altered the RSA 91-A calculus to require our revisitation of previous confidentiality determinations." *Id.* at 5-6. We also noted that it would "clearly be helpful and appropriate" in the circumstances if the movants clarified the extent of their continued privacy interests with respect to confidentiality motions that remained undecided. *Id.* at 6.

Both EMMT and PSNH submitted pleadings on December 24, 2001 in response to Order No. 23,870. EMMT disagreed with the hypothesis that the disclosures described above would allow its competitors to derive the Company's proprietary business information as contained in the documents filed with the Commission. According to EMMT, the documents contain "the complex confidential terms and conditions of EMMT's power supply restructuring arrangements" that could not be derived simply by applying the publicly disclosed figures. EMMT Motion to Continue Confidential Treatment at 2. With regard to the documents submitted in Docket No. DE 01-091, EMMT noted that the proposed transaction described therein did not close and the petition was ultimately withdrawn. Therefore, EMMT requested that the confidential documents submitted in that

docket simply be returned to EMMT and PSNH pursuant to Puc 204.06(h)(1).

PSNH took similar positions in its December 24, 2001 filing. The Company began by noting that the disclosures to the *Union Leader* were inadvertent and that PSNH takes no position on their accuracy. PSNH further pointed out that disclosure of the details of the securitization financing with regard to the Whitefield renegotiation only became known because similar plans with regard to Hemphill did not come to fruition, thus precluding the issuance of a securitization financing order that would have aggregated the relevant figures.

According to PSNH, notwithstanding what the Company characterizes as inadvertent and/or unpreventable disclosures, the Commission should not revise its confidentiality determinations with respect to non-disclosed information. In the view of PSNH, such additional disclosures would have a negative impact on PSNH's ability to negotiate future contract buyouts with other independent power producers, which yield ratepayer savings.

Finally, PSNH also requests the return of confidential documents pursuant to Puc 204.06(h)(1). PSNH's

request is broader than EMMT's, however. According to PSNH, the Commission should return not only documents relating to the withdrawn Hemphill petition but also with regard to the Bio-Energy and Whitefield proceedings because those dockets have now been concluded.

On May 24, 2002, Staff submitted a series of revised documents, the original versions of which had been previously submitted by PSNH in redacted and non-redacted confidential form. Staff noted that, based on discussions with EMMT and PSNH, the latter had agreed to make certain portions of previously redacted information from these documents public because these portions reflected information that had been disclosed at hearing. Staff noted that, as to the other documents at issue in Order No. 23,870, EMMT and PSNH were still invoking their rights to confidential treatment under RSA 91-A.

No party filed any pleading in opposition to PSNH or EMMT with regard to the matters discussed in Order No. 23,870. Staff did not take a position.

II. COMMISSION ANALYSIS

Order No. 23,763 contains a detailed discussion of the applicable principles under the Right-to-Know Law, which

we incorporate here by reference. As noted in that Order, the statute requires us to use a balancing test to make our confidentiality determinations. We are required to weigh the public's right to know information against any statutorily recognized privacy interests of PSNH and EMMT as the parties seeking confidential treatment. See Order No. 23,763, slip op. at 15-17.

The amount of savings that PSNH achieved on behalf of its customers via the arrangements involving EMMT and independent power producers is not the only commercially sensitive information that PSNH and EMMT have disclosed to the Commission. In essence, EMMT was able to assume PSNH's power purchase obligations, and renegotiate successfully with the independent power producers on a confidential basis, because of EMMT's expertise in structuring agreements that would be satisfactory both to the independent power producer as well as lending institutions that finance such transactions. As PSNH and EMMT correctly point out, the manner in which EMMT has exercised this expertise can reasonably be considered a trade secret of EMMT. EMMT's interest in maintaining the secrecy of these methodologies is high because it goes to the essence of the Company's business. PSNH's interest is also high because

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disclosures would attenuate the Company's future ability to persuade EMMT or other similar firms to work with PSNH on renegotiations that would achieve ratepayer savings.

On the other side of the equation, the public's interest in disclosure of this information is relatively low. The arrangements entered into between EMMT and the independent power producers in these dockets are not regulated or overseen by the Commission and are therefore not in the public domain.

In these circumstances, except with regard to the additional disclosures reflected in Staff's May 24 letter, the asserted privacy interests continue to outweigh the public's interest in disclosure with respect to all documents for which PSNH and EMMT have sought confidential treatment.

The only remaining issue is whether any documents should be returned to the companies pursuant to Puc 204.06(h)(1). We agree with EMMT that, as to the documents filed in the Hemphill proceeding, there is no reason for the Commission to retain any copies of confidential documents because the petition was withdrawn and never considered on its merits. The same cannot be said of the confidential documents submitted in the Whitefield and Bio-Energy dockets. Because the confidential documents submitted in those proceedings form part of the record considered by the Commission in ruling on the merits of those petitions, it would be inappropriate to return them notwithstanding the lack of any presently pending substantive issues in those cases.

Based upon the foregoing, it is hereby

ORDERED, that, except with regard to the documents appended to Staff's letter of May 24, 2002, all pending motions for confidential treatment are GRANTED; and it is

FURTHER ORDERED, that this determination is subject to the ongoing authority of the Commission, on its own motion or on the motion of Staff or any party or any other member of the public, to reconsider this Order in light of RSA 91-A, should circumstances so warrant; and it is

FURTHER ORDERED, that the Executive Director and Secretary shall return to the parties all copies of any documents filed under seal in Docket No. DE 01-091; and it is

FURTHER ORDERED, that the request of Public Service Company of New Hampshire for return of documents filed under seal in Docket Nos. DE 01-089 and 01-090 is DENIED.

By order of the Public Utilities Commission of New Hampshire this thirty-first day of May, 2002.

Thomas B. Getz
Chairman

Susan S. Geiger
Commissioner

Nancy Brockway
Commissioner

Attested by:

Claire D. DiCicco
Assistant Secretary