

**THE STATE OF NEW HAMPSHIRE**  
**before the**  
**PUBLIC UTILITIES COMMISSION**

Public Service Company of New Hampshire  
RSA 366:3 Affiliate Contract Filing

Docket No. DE 10-\_\_\_\_\_

**Motion for Confidential Treatment**  
**Pursuant to RSA Chapter 91-A**  
**and**  
**N.H. Code Admin. Rules Puc § 203.08**

Pursuant to RSA 91-A:5,(IV)(Supp.) and N.H. Code Admin. Rules Puc § 203.08, Public Service Company of New Hampshire ("PSNH" or the "Company") hereby requests confidential treatment and the issuance of a protective order for certain confidential, commercial, or financial information contained in the contract ("Contract") entered into by and between PSNH and its affiliate E. S. Boulos Company ("ESB") dated April 23, 2010. The information for which confidential treatment and protection is sought includes pricing data, such as overall contract cost, liquidated damages, pricing summaries, labor rates, and the cost of materials, services, and supplies, plant operational schedule information, and personal data relating to key personnel, such as name, address, telephone numbers, and e-mail addresses..

In support of this Motion for Confidential Treatment, PSNH says the following:

1. RSA 366:3 requires a public utility to file with the Commission a copy of any contract or arrangement, the consideration of which exceeds \$500, entered into between a public utility and an affiliate providing for the furnishing of managerial, supervisory, construction, engineering, accounting, purchasing, financial, or any other services either to or by a public utility or an affiliate.
2. N.H. Code Admin. Rules Puc § 203.08(a) provides 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.

3. Rule Puc § 203.08(b) requires a motion for confidential treatment to include:
  - i.) the documents, specific portions of documents, or a detailed description of the types of information for which confidentiality is sought; ii.) specific reference to the statutory or common law support for confidentiality; and, iii.) a detailed statement of the harm that would result from disclosure and any other facts relevant to the request for confidential treatment.
  
4. On April 23, 2010, PSNH entered into a contract with ESB entitled “Balance of Plant Electrical Installation Agreement for the Merrimack Station Clean Air Project” for the furnishing of construction services. Both PSNH and ESB are wholly-owned subsidiaries of Northeast Utilities. Thus, under RSA 366:1, PSNH and ESB are “affiliates.” The consideration of the Contract exceeds \$500. Thus, under RSA 366:3, PSNH is required to file the Contract with the Commission.
  
5. The Contract was awarded to ESB by PSNH following use of a standard competitive procurement process. A Request for Proposals (“RFP”) was issued seeking bids on balance of plant electrical installation for the Merrimack Station “Clean Air Project.” The Clean Air Project comprises the installation of the wet flue gas desulfurization system (scrubber”) required by RSA 125-O:11, *et seq.*
  
6. PSNH sought bids from eight vendors and received proposals for the contract work from five bidders, one of which was ESB. These bids were reviewed and scored based upon technical, commercial and financial attributes by a team composed of personnel from PSNH generation, Northeast Utilities Service Company (“NUSCO”) Purchasing and Legal, and the Clean Air Project’s external project program manager.
  
7. ESB provided the proposal which was determined to have the lowest total evaluated cost as well as having the highest overall computed technical evaluation score. Therefore, PSNH awarded the Contract to ESB. A redacted version of the

Contract has been provided from which the confidential information has been removed. In addition, the Commission has been provided with the unredacted confidential information.

8. The RFP bid process was conducted as a confidential process. Execution of a confidentiality agreement between “Bidder” (e.g., ESB) and “Owner” (i.e., PSNH) in reference to all documentation pertaining to the RFP was included in the RFP document. Under the requisite confidentiality agreement, “Confidential Information” was defined to include “any of either Party's proprietary information of a business and/or technical nature that is owned or controlled by Disclosing Party.” Use of such “Confidential Information” received from bidders was restricted, such that it “shall not be used for any purpose other than to formulate a response to the RFP or to evaluate such response.”
9. The Contract also contains a confidentiality provision at Article 19.7. This provision requires that confidential or proprietary information be held in confidence for a period of six years. Such confidential treatment is necessary to ensure that bidders provide robust, competitive responses to the RFP. The award of economic, competitively bid contracts can only be assured if potential suppliers are confident that their proposals and pricing remain confidential and do not become available, either directly or indirectly, to their competitors. The detailed commercial and financial information contained in the various bids, and included in the contract awarded to ESB, would not have been provided by the bidders absent the assurance that the information would not be disclosed to the public.
10. The Contract’s confidentiality provision at Article 19.7 sets forth requirements for disclosure of contract information to governmental authorities, such as the filing of the Contract mandated by RSA 366:3:

If Owner discloses Contractor's Proprietary Information to any Governmental Authority, Owner shall, to the extent it does not violate or fail to comply with any such request or order, advise Contractor prior to disclosure and, at Contractor's sole expense, cooperate in any effort by

Contractor to minimize the amount of Proprietary Information disclosed, secure confidential treatment of such Proprietary Information, or seek permission from such Governmental Authority to revise the Proprietary Information in a manner consistent with Contractor's interests, the interests of Owner, and in a manner that meets the requirements of the applicable Governmental Authority.

The filing of the Motion for Confidential Treatment is intended to comply with this contractual term.

11. If the Contract is not provided with confidential treatment, such disclosure would detrimentally impact both PSNH's ability to attract competitive bids in the future, as well as ESB's competitive position in future bids made in the marketplace. In this particular RFP process alone, the initial bid list included eight different vendors. Five of those vendors chose to submit bids. Disclosure of the Contract would reveal the specific confidential, commercial, or financial terms and conditions that the winning bidder offered, and thereby, could harm each party's ability to negotiate favorable contracts in the future.
12. RSA Chapter 91-A is commonly referred to as the "Right-to-Know Law." The Right-to-Know Law provides each citizen with the right to inspect government records in the possession of the Commission. However, under RSA 91-A:5, certain government records are exempted from the disclosure requirements of RSA Chapter 91-A. In particular, RSA 91-A:5, IV exempts from disclosure records pertaining to confidential, commercial, or financial information.
13. The New Hampshire Supreme Court has had the opportunity to discuss the requirements of the Right-to-Know Law on several occasions. Most recently, in *Professional Firefighters of New Hampshire v. Local Government Center, Inc.*, 2010 WL 323119, 6 (N.H.) (N.H., January 29, 2010), the Court noted: "The Right-to-Know Law does not guarantee the public an unfettered right of access to all governmental workings, as evidenced by the statutory exceptions and exemptions." *See also, Goode v. New Hampshire Office of Legislative Budget*

*Assistant*, 148 N.H. 551, 553 (2002), and *Brent v. Paquette*, 132 N.H. 415, 426, (1989) (“[T]he Right-to-Know Law guarantees every citizen the right to inspect all public records except as otherwise prohibited by statute or RSA 91-A:5.” (quotation omitted)).

14. The Court opined on the confidential, commercial, or financial information exemption of the Right-to-Know Law in *Union Leader Corp. v. New Hampshire Housing Finance Authority*, 142 N.H. 540 (1997), a case cited by the Commission dozens of times. In its decision, the Court noted:

The terms “commercial or financial” encompass information such as business sales statistics, research data, technical designs, overhead and operating costs, and information on financial condition. *Landfair v. United States Dept. of Army*, 645 F.Supp. 325, 327 (D.D.C.1986); see *Comstock Intern. v. Export-Import Bank of U.S.*, 464 F.Supp. 804, 806 (D.D.C.1979) (loan agreements are financial or commercial information). Whether documents are commercial depends on the character of the information sought. Information is commercial if it relates to commerce. See *American Airlines, Inc. v. Nat. Mediation Bd.*, 588 F.2d 863, 870 (2d Cir.1978).

142 N.H. at 553.

The Court also noted:

To best effectuate the purposes of our Right-to-Know Law, whether information is “confidential” must be determined objectively, and not based on the subjective expectations of the party generating it. “To determine whether [records] ... are exempt as confidential, the benefits of disclosure to the public must be weighed against the benefits of non-disclosure to the government.” *Chambers v. Gregg*, 135 N.H. 478, 481 (1992). We find instructive the standard test employed by the federal courts: To show that information is sufficiently “confidential” to justify nondisclosure, the party resisting disclosure must prove that disclosure “is likely: (1) to impair the [State'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.” *National Parks and Conservation Ass'n v. Kleppe*, 547 F.2d 673, 677-78, (D.C.Cir.1976) (quotations omitted) (*National Parks II*).

*Id.* at 553-554 (internal citations omitted).

15. In determining whether commercial or financial information should be deemed confidential and private, the Commission has followed *Union-Leader* as well as

the three-step analysis applied by the New Hampshire Supreme Court in *Lambert v. Belknap County Convention*, 157 N.H. 375, 382 (2008). The *Lambert* analysis requires: i) an evaluation of whether there is a privacy interest at stake that would be invaded by the disclosure -- when commercial or financial information is involved, this step includes a determination of whether an interest in the confidentiality of the information is at stake; ii) when a privacy interest is at stake, the public's interest in disclosure is assessed; and, iii) when there is a public interest in disclosure, that interest is balanced against any privacy interests in nondisclosure. See *Unitil Energy Systems, Inc.*, Order No. 25,054, Docket No. DE 09-009 (December 18, 2009); *Public Service Company of New Hampshire*, Order No. 25,059, Docket No. DE 09-158 (December 31, 2009).

16. The Commission, using the *Union-Leader* and *Lambert* standards discussed above, has regularly granted confidentiality for information similar to the PSNH/ESB Contract. For example:
  - a. “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.” *Re National Grid plc*, 92 NHPUC 279, 326 (2007) (granting confidential treatment for information regarding system upgrades and capacity contain information that, if publicly disclosed, would likely harm its competitive interests and the interests of ratepayers who would ultimately bear the burden of increased contract costs resulting from disclosure);
  - b. “Inasmuch as disclosure in this instance could negatively affect customers, we do not find the public's interest in review of the financial, commercially sensitive information sufficient to outweigh the interest that National Grid and its bidders have in maintaining confidentiality of such information.” *Re Granite State Electric Company dba National Grid*, 92 NHPUC 215, 219 (2007) (granting a protective order for information received by National Grid as part of a competitive RFP process including

“a brief discussion of the selection of the winning bidder, a bidder key that identifies the suppliers who participated in the RFP, the comparative energy and capacity prices received from the bidders (including the estimated total cost according to the evaluation loads provided with the RFP), a ranking of the transactions offered by each bidder in terms of financial security (including consideration of reasonable extension of credit to National Grid and the creditworthiness of the supplier and the credit assurance offered), the information provided by each bidder in the proposal submission forms, and, a redlined version of the negotiated purchase and sale agreement.);

- c. Regarding a series of contracts provided by PSNH: “The information in the documents is financially or commercially sensitive in the sense that its public disclosure would reveal information that could place Ensio Resources at a competitive disadvantage relative to other firms that purchase end products of coal-burning processes and PSNH at a competitive disadvantage in future negotiations with end-product purchasers.” *Re Public Service Company of New Hampshire*, 84 NHPUC 484, 485 (1999);
  - d. Granting confidential treatment for bidder information obtained during the auction sale of the Seabrook Nuclear Generating Station: “Disclosure could result in competitive damage to bidders, and also impair the ability of the state to obtain such information in the future. Not only do we believe the information is commercially sensitive, we also believe that public 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.” *Re North Atlantic Energy Corporation*, 87 NHPUC 396, 399 (2002).
17. The plant operational schedule information is commercially sensitive data that has been protected from disclosure in the past. Such information is treated as confidential by PSNH and is not shared with the public or with other ISO-NE

market participants. The release of the plant operational schedule information would put PSNH at a distinct competitive disadvantage and would impair PSNH's ability to negotiate the lowest possible costs of energy it purchases on the market during plant outages. The Commission has previously held that such information warrants protective treatment. *Re Public Service Company of New Hampshire*, 91 NHPUC 17 (2006) (granting protective treatment to the schedule for planned generation plant outages); *Re Public Service Company of New Hampshire*, 92 NHPUC 496 (2007) (the interests of PSNH and its customers in preventing public disclosure of the schedule, including the duration, of planned maintenance outages outweigh the public's interest in obtaining access to the information).

18. The Commission has found in the past that personnel information is entitled to confidential treatment. *Re Northern Utilities, Inc.*, 87 NHPUC 321 (2002); *Re Atkinson Woods Water, LLC*, 89 NHPUC 512 (2004) (finding that disclosure of information for which protection was sought would constitute an invasion of privacy); *Re Granite State Telephone, Inc.*, 90 NHPUC 52 (2005) (finding that disclosure of information for which protection was sought would constitute an unwarranted invasion of privacy); *Re Unitil Energy Systems, Inc.*, 92 NHPUC 91 (2007) (personal information such as home addresses and commercial information not otherwise publicly available); *Re Public Service Company of New Hampshire*, 92 NHPUC 195 (2007) (Name, address, phone numbers of individuals protected). There is little, if any, public interest in disclosure of the names, addresses, and phone numbers of individuals listed as “key personnel” by one of PSNH’s contractor’s. The privacy interest at stake that would be invaded by disclosure must be weighed against any such public interest. Disclosure would constitute an unwarranted invasion of privacy.

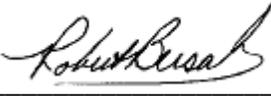
19. The confidential, commercial and financial information that has been removed from the redacted version of the Contract clearly involves a privacy interest that would be invaded by disclosure. Both PSNH and ESB routinely participate in the competitive construction services marketplace. Disclosure of the confidential,

commercial and financial information would damage PSNH's ability to attract competitive bids in the future, negatively affecting retail customers by increasing the cost of goods and services included in rates. Disclosure would also damage ESB's competitive position when bidding on future contracts. Contracts with suppliers and confidential bidding information have historically been granted confidential treatment by the Commission. *Unitil Energy Systems, Inc.*, 91 NHPUC 145, 150 (2006).

**WHEREFORE**, PSNH respectfully requests that the Commission grant confidential treatment of the Contract confidential, commercial, or financial information by issuance of a protective order as requested herein. In accordance with N.H. Code of Administrative Rules Puc 203.08(g) the unredacted Contract should be labeled "Confidential," held in a secure location within the Commission's offices, and not disclosed to the public or any party other than the Commission staff without PSNH's consent.

Respectfully submitted this 3rd day of May, 2010.

**PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE**

By:  \_\_\_\_\_

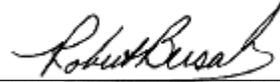
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**CERTIFICATE OF SERVICE**

I certify that on this date a copy of this Motion for Confidential Treatment  
was provided to the Office of the Consumer Advocate.

May 3, 2010

  
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