

THE STATE OF NEW HAMPSHIRE
before the
PUBLIC UTILITIES COMMISSION

Public Service Company of New Hampshire
Default Energy Service Rate for 2012

Docket No. DE 11-215

Motion for Confidential Treatment Regarding Staff 1-15
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 Company's response to Staff Data Request 01-015. The information for which confidential treatment and protection is sought includes pricing data and contractor information contained in various contracts which contain confidentiality provisions and which is not otherwise publicly available.

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

1. In Data Request 01-015, Commission Staff asked the following question:
"Regarding October 14, 2011 Filing. Reference Baumann/Smagula testimony, page 3, lines 16-21. Please provide a detailed breakdown of all scrubber costs incurred and included in this filing. Please include in your response identification of the major sub-projects (e.g., chimney/stack, water treatment, etc.) as well as costs paid to individual contractors."
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. PSNH has entered into a number of contracts for the furnishing of engineering, equipment, construction services, etc. in support of the statutory mandate to install Scrubber technology at Merrimack Station.
5. These contracts were awarded by PSNH following use of a standard competitive procurement process. Requests for Proposals (“RFP”) were issued seeking bids to support the myriad needs of construction of the “Clean Air Project.” The Clean Air Project comprises the installation of the wet flue gas desulphurization system (the “Scrubber”) required by RSA 125-O:11, *et seq.*
6. The RFP bid processes were conducted as confidential processes. Execution of a confidentiality agreement between “Bidder” and “Owner” (i.e., PSNH) in reference to all documentation pertaining to the RFPs was included in each 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.”
7. The resulting contracts between the selected vendor and PSNH also contain restrictive confidentiality provisions. These provisions require 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 contracts ultimately awarded, would not have been provided by the bidders absent the assurance that the information would not be disclosed to the public.

8. The typical contract confidentiality provision sets forth requirements for disclosure of contract information to governmental authorities:

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 this Motion for Confidential Treatment is intended to comply with this contractual term.

9. Staff Data Request 01-015 seeks “a detailed breakdown of all scrubber costs incurred and included in this filing” “as well as costs paid to individual contractors.” The information sought falls within the contractual scope of being “Contractor's Proprietary Information” subject to contractual confidentiality protection. If the contract information 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 the vendors’ competitive positions in future bids made in the marketplace.

10. 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. The Commission applies a three-step analysis to determine whether information should be protected from public disclosure. *See, e.g., Unital Corporation and Northern Utilities, Inc.*, Order No. 25,014 (September 22, 2009), *Public Service Co. of New Hampshire*, Order No. 25,037 (October 30, 2009), and *Public Service Company of New Hampshire*, Order No. 25,167 (November 9, 2010). The first step is to determine if there is a privacy interest at stake that would be invaded by the disclosure. If such an interest is at stake, the second step is to determine if there is a public interest in disclosure. The Commission has held that disclosure that informs the public of the conduct and activities of its government is in the public interest; otherwise, public disclosure is not warranted. *Public Service Company of New Hampshire*, Order No. 25,167, slip. op. at 3 (November 9, 2010). If both of these steps are met, the Commission balances those interests in order to weigh the importance of keeping the record public with the harm from disclosure of the material for which protection is requested. Docket No. DE 10-121, Order No. 25,167, slip op. at 3-4; DE 10-257, Order No. 25187, slip op. at 8, citing, *Lambert v. Belknap County Convention*, 157 N.H. 375, 382 (2008).

11. PSNH and its vendors have a strong privacy interest in protecting the detailed cost breakdown for individual components of the Scrubber Project. The negotiated costs and resulting contracts were the result of a competitive and highly confidential bidding process. In addition, to protect the integrity of this process, each vendor submitted a bid subject to the provisions of confidentiality agreements with PSNH as described above. Maintaining the confidentiality of these bids (i.e., the detailed Scrubber costs) is critical in order to protect the competitive nature of the marketplace. Protecting the competitive functioning of

the marketplace in turn protects PSNH's customers. For example, the release of information dealing with confidential component-specific costs would allow competitors of various vendors to accurately calculate a particular vendor's future bids and its pricing structure so that a competitor could estimate and undercut its bids. In addition, public disclosure of vendors' contractual prices would impede PSNH's ability to obtain future bids from vendors if they knew that information submitted to PSNH as confidential is likely to be publicly disclosed. This would directly impact and inhibit the full and frank exchange of information between PSNH and vendors that is essential to ensuring the best evaluated prices are obtained for essential work at the plants.

12. This is exactly the type of harm against which the New Hampshire Supreme Court and the Commission have sought to protect. 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)).

13. 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).

14. 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).

15. The Commission, using the *Union-Leader* and *Lambert* standards discussed above, has regularly granted confidentiality for information similar to the type of information provided here. 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 which 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).

16. Given that the Company and its vendors have a substantial privacy interest in the information, the next consideration is whether there is any public interest in disclosure of the information. Public release of the costs of various project components will not shed any light on the conduct and activities of the Commission. “Under administrative rule Puc § 204.06 [predecessor to Puc § 203.08], the Commission considers whether the information, if made public, would likely create a competitive disadvantage for the petitioner; whether the customer information is financially or commercially sensitive, or if released, would likely constitute an invasion of privacy for the customer; and whether the information is not general public knowledge and the company takes measures to prevent its' dissemination.” *Re Northern Utilities, Inc.*, 87 NH PUC 321, 322, Docket No. DG 01-182, Order No. 23,970 (May 10, 2002). Here, any limited benefits of disclosing this detailed cost information clearly outweighs the harm

that would occur as a result of its disclosure. Moreover, the Company is producing a redacted version of the response to Staff 1-15 which provides non-confidential aspects of the cost information. As a result, the public will have access to overall cost information associated with this filing.

17. Due to the highly sensitive commercial and financial nature of the information contained in the response to Staff Data Request 1-15, PSNH further requests that the confidential response to Staff 1-15 not be supplied to the Conservation Law Foundation. It has been the Commission's practice in the past to grant protective treatment to confidential commercial information such as power supply and coal supply contracts and to restrict dissemination of that information to intervenors. *In Re Kearsarge Telephone Company*, Docket No. DT 07-027. In that decision the Commission stated, "It is well-established in the context of administrative proceedings that due process is a flexible concept, varying with the nature of the governmental and private interests that are implicated. *Matthews v. Eldridge*, 424 U.S. 319, 334 (1976)." *Id.* It is reasonable and permissible to restrict access to this information from the environmental litigant intervenors and competitive supplier intervenors in this proceeding. *See*, RSA 541-A:32, III. As the Company has previously informed the Commission in DE 10-261, it is the subject of federal court litigation with Conservation Law Foundation regarding issues surrounding Merrimack Station. The Company should not be required to produce highly confidential, commercially sensitive information to an adverse litigant when that litigant will have access to the aggregated financial information that is being provided to the public as part of this docket.

WHEREFORE, PSNH respectfully requests that the Commission grant confidential treatment to the Company's response to Staff 1-15 by issuance of a protective order as requested herein. In accordance with N.H. Code of Administrative Rules Puc 203.08(g) the unredacted response to Staff 1-15 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 and the Office of Consumer Advocate without PSNH's consent.

Respectfully submitted,

Public Service Company of New Hampshire

November 17, 2011
Date

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CERTIFICATE OF SERVICE

I hereby certify that, on the date written below, I caused the attached Motion for Protective Order to be served pursuant to N.H. Code Admin. Rule Puc §203.11.

November 17, 2011
Date

Gerald M. Eaton
Gerald M. Eaton

Public Service Company of New Hampshire
Docket No. DE 11-215

Data Request STAFF-01
Dated: 10/28/2011
Q-STAFF-015
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Witness: William H. Smagula
Request from: New Hampshire Public Utilities Commission Staff

Question:

Regarding October 14, 2011 Filing. Reference Baumann/Smagula testimony, page 3, lines 16-21. Please provide a detailed breakdown of all scrubber costs incurred and included in this filing. Please include in your response identification of the major sub-projects (e.g., chimney/stack, water treatment, etc.) as well as costs paid to individual contractors.

Response:

Attached is a breakdown of all scrubber costs incurred and included in the October 14, 2011 filing identifying major sub-projects, as well as the primary contractors. The project costs are tracked by sub-projects and multiple contractors support each of these sub-projects.

**An unredacted version of the attachment is being provided to the Commission under a Motion for Protective Order.