STATE OF NEW HAMPSHIRE

BEFORE THE

PUBLIC UTILITIES COMMISSION

Public Service Company of New Hampshire

Petition for Adjustment to Energy Service Rates

Docket No. DE 16-822

Opposition of the Office of the Consumer Advocate to
Motion for Protective Order and Confidential Treatment

NOW COMES the Office of the Consumer Advocate ("OCA"), a party in this docket, and opposes the motion for protective order and confidential treatment submitted by petitioner Public Service Company of New Hampshire (PSNH) on July 27, 2017. In support of this pleading the OCA states as follows:

1. This matter has been concluded on its merits. On June 28, 2017, the Commission issued Order No. 26,033 in this docket, approving after hearing the request of PSNH to increase its default "Energy Service" rate pursuant to RSA 374-F:2, I-a from 11.17 cents per kilowatt-hour to 11.66 cents.
2. During the merits hearing conducted on June 22, 2017, counsel for Commission Staff asked PSNH witness Frederick B. White about a particular component included in the Energy Service rate: costs associated with the controversial power purchase agreement (PPA) between PSNH and Burgess Biopower, a biomass generation facility located in Berlin and formerly known as Laidlaw Berlin Biopower. According to Exhibit 5, based on actual data and estimates for what was then the remainder of 2017, the Burgess

Biopower PPA accounted for $36,053,000 of PSNH's total cost of providing Energy Service – a figure that translates to fully 1.1 cents of the overall 11.66-cent rate.

3. Staff counsel asked Mr. White what portion of that $36,053,000 is "over market" – i.e., in excess of the cost PSNH would incur if it purchased the same amount of wholesale electricity and capacity from the regional markets overseen by the regional transmission organization ISO New England. Tr. 6/22/17 at 30, lines 18-19. As noted in the PSNH motion, the issue is of more than passing concern because a mechanism in the Commission-approved PPA – the so-called Cumulative Reduction Fund – limits to a cumulative total of $100 million the extent to which Burgess Biopower can pass over-market costs through to PSNH's Energy Service Customers. *See* PSNH Motion at 1-2.
4. Mr. White answered the question but, before doing so, he indicated that his response "may be confidential information." Tr. 6/22/17 at 30, lines 20-24. He later provided PSNH's estimate of when the $100 million cap on the recovery of over-market costs would be reached. *Id.* at 41, lines 15-21. Mr. White's expression of concern that he was about to discuss confidential information was the first indication at the hearing that PSNH would be seeking confidential treatment of a part of the record in this docket.
5. As this issue arose, it was Chairman Honigberg and not counsel for PSNH who raised the question of whether the information to which Mr. White was testifying is entitled to confidential treatment under the applicable rules and statutes. *See id.* at 31, lines 20-24 and 32, line 1 ("Is a motion required by the Company to get confidential treatment for this? I know it was filed as a discovery response under the rule that says we can claim it there. But then I think doesn't the rule also then say that a motion has to be filed?")

Counsel for PSNH claimed an entitlement to confidential treatment based on N.H. Code of Admin. Rules Puc 201.06 and 201.07, which cover certain "routine" utility filings.

6. To allow the hearing to continue in these circumstances, the Chairman ruled that the Commission would treat the information in question as "confidential for now." Tr. 6/22/17 at 37, lines 14-15. He instructed the parties to confer after the hearing in the hope of resolving the issue, adding that otherwise PSNH would have to "file something to keep [the information] confidential going forward." *Id.* at lines 15-20. The parties conferred but were unable to resolve the dispute over confidentiality.

7. Therefore, PSNH now moves for an order designating as confidential, and not subject to public disclosure under RSA 91-A, both Exhibit 9 (originally furnished as the response to Staff Data Request 4-8)[1] and portions of the hearing transcript containing Mr. White's related testimony about both the "over market" costs of the Burgess Biopower contract and the expected timeline for reaching the cap on such cost recovery. For the reasons that follow, PSNH has not demonstrated an entitlement to the requested confidential treatment and the motion should therefore be denied.

8. The first ground for denial of the motion is procedural. Through its request, PSNH is seeking to circumvent the procedures the Commission has established by rule for confidentiality determinations.

9. Certain "routine filings" are putatively confidential pursuant to Puc 201.06, in which case they are deemed confidential until there has been a request for public disclosure pursuant to Puc 201.07 and the Commission has determined that non-disclosure is warranted

[1] Exhibit 9 is PSNH's response to Staff Data Request 4-8, a two-part query. First Staff asked PSNH to "describe the status of the Cumulative Reduction fund (CRF) for 2014, 2015, 2016 and 2017 to date." Then Staff asked: "When does the Company expect to reach the $100 million CRF threshold?" The response of PSNH is comprised of a specific dollar figure for each of the years specified and an estimate of the month and year when the $100 million threshold will be reached.

pursuant to the balancing test applicable pursuant to RSA 91-A:5 and the judicial gloss thereupon. The information for which PSNH seeks confidential treatment here is not part of a "routine filing" within the meaning of Puc 201.06. Although the rule covers certain information submitted in default service proceedings, *see* Puc 201.06(a)(15), data relating to the recoverability of over-market costs of a PPA is not on the list of items covered by the rule.

10. This is a matter of pure common sense. There is nothing routine about the Burgess Biopower PPA, which was the subject of highly contentious approval proceedings in Docket No. DE 10-195. *See, e.g.*, Order No. 25,213 (April 18, 2011) (approving contract, with partial dissent of one commissioner). The mechanism limiting the recovery from ratepayers of over-market costs in this contract was at the center of the controversy, so much so that as a condition of regulatory approval the Commission modified the mechanism in an effort to make it more protective of customers. *See id.* at 97-98 (describing the originally proposed mechanism as "a step in the right direction" but "too limited and too remote as proposed") and 50 ("The OCA calculated that over the 20-year term of the PPA [as proposed], the over-market payments for energy, capacity and RECs could exceed $400 million").

11. Given the inapplicability of the rule entitling "routine" material in default service proceedings to putatively confidential treatment, PSNH should have but did not follow the dictates of Rule Puc 203.08, which governs material exchanged in discovery that a party believes is entitled to confidential treatment. Puc 203.08(e) required PSNH to move for confidential treatment of its response to discovery request Staff 4-8 "at or prior to the commencement of the hearing in the proceeding." Instead, PSNH waited until its

witness, Mr. White, expressed concerns about the possible confidentiality of his live testimony – essentially springing this issue on the Commission and the OCA in the middle of answering a question on cross-examination. PSNH should not be allowed to flout the Commission's procedural rules in this manner.

12. Even if the Commission were inclined to allow PSNH to ignore the agency's elaborate and well-developed rules for addressing confidentiality issues in an orderly and predictable manner, PSNH's request for confidential treatment should be denied on its merits.

13. As PSNH notes, the Commission's rules and the applicable New Hampshire Supreme Court caselaw interpreting the relevant provisions of the Right-to-Know Law (RSA 91-A:5[2]) involve a three-step analysis in which the Commission first determines whether public disclosure of the information at issue involves a privacy interest, then considers "whether the public has an interest in disclosure of the information," and, finally, balances the two and denies the request for confidential treatment if the disclosure interest outweighs the privacy interest. *See Consolidated Communications Holdings, Inc.*, Order No. 26,040 in Docket No. DT 16-872 (July 11, 2017) at 9; *Union Leader Corp. v. New Hampshire Housing Finance Authority*, 142 N.H. 540, 553-555 (1997) (establishing balancing test). PSNH's request fails at all three steps.

14. According to PSNH, there is a "substantial privacy interest" at issue here because (1) the terms of the underlying power purchase agreement oblige its parties "to treat the information exchanged under the agreement as confidential unless disclosure is required by law (or is otherwise deemed necessary)," PSNH Motion at 3, and (2) the information

[2] The specific provision at issue is RSA 91-A:5, IV, which provides in relevant part that "confidential, commercial, or financial information" is "exempted from the provisions of this chapter," i.e., RSA 91-A. The effect of this language is to authorize but not require agencies to treat certain information as confidential.

is "highly sensitive competitive information that could reveal how the Plant prices its power for sale in the competitive wholesale marketplace," *id.* at 4.

15. The first asserted privacy interest is devoid of merit. As the New Hampshire Supreme Court made clear in the *New Hampshire Housing Finance Authority* case, the "subjective expectations" of the party that furnished the information to the government are irrelevant. *N.H. Housing Finance Auth.*, 142 N.H. at 553 (citations omitted). To hold otherwise would be to permit the parties of any PPA filed with the Commission to assure its complete confidential treatment merely by agreeing to such treatment in the contract. The Commission has never interpreted RSA 91-A:5 in such a bootstrapping fashion and neither has the Court. Indeed, a denial of confidential treatment here would not supersede the language of the PPA in light of its reference to legally required disclosure.

16. The second asserted privacy interest is too conclusory to be cognizable. It amounts to mere speculation – disclosure, according to PSNH, "*could* reveal how the Plant prices its power" (emphasis added). At the very least, PSNH ought to be obliged to come forward and explain how the difference between prices set in a seven-year-old power purchase agreement and prices prevailing on wholesale markets in the years 2014, 2015, 2016 and 2017 reveal anything about the actual operations of the biomass plant in Berlin – particularly in the absence of additional data in the public record.[3] Given the Court's instructions to construe disclosure exemptions in RSA 91-A "restrictively" and "with a view to providing the utmost information in order to best effectuate the statutory and

[3] In arguing to the contrary, PSNH at page 4 of its motion relies on an order issued eight years ago that granted without discussion (or opposition) a motion for confidential treatment which had been filed by an intervenor that withdrew from the case. *See Public Service Co. of N.H.*, Order No. 24,965 (May 1, 2009) in Docket No. DE 08-077 (concerning power purchase agreement between PSNH and Lempster Wind, LLC). The OCA has no reason to doubt this is the most persuasive authority PSNH could uncover to support the proposition that parties involved in wholesale electricity markets are automatically entitled to confidential treatment of information they prefer to avoid disclosing.

constitutional objective of facilitating access to all public documents," *id.* at 546 (citations omitted), casual and unelaborated claims of privacy interests have no place in this discourse.

17. Even assuming PSNH has asserted a privacy interest the Commission could credit, the remainder of the utility's analysis is cosmically unpersuasive as the utility moves through the required analysis. Conceding there is "some public interest in the confidential information" because "the price that [PSNH] pays for energy under the PPA is a factor in the setting of [PSNH's] Energy Service rate," the company "does not view this interest as substantial." PSNH Motion at 4-5. This is a howler of an understatement with respect to the public's interest in disclosure.

18. For purposes of the RSA 91-A:5 balancing test, the public's interest in disclosure is a matter of "informing the citizenry about the activities of their government" – or, in other words, "to provide the utmost information to the public about what its government is up to." *Lamy v. New Hampshire Public Utilities Commission*, 152 N.H. 106, 110 (2005) (citations omitted). In the context of this particular subject – the effect of the Burgess Biopower PPA on PSNH's retail electric rate – public disclosure of the information in question could not be more probative of what the government has been up to since PSNH first sought approval of this PPA in 2010. As already noted in Paragraph 10 above, the mechanism by which the Commission limited customer exposure to above-market costs associated with the power purchase agreement was front and center in a highly contentious proceeding decided in 2011. It is widely believed that the OCA's position in that docket cost a former Consumer Advocate her job later that year. *See, e.g.*, Matthew Spolar, "Berlin Biomass Project Cited in Vote Against N.H. Consumer Advocate," Berlin

Daily Sun, Nov. 29, 2001 (discussing 3-2 Executive Council vote against confirmation).[4] The point is not to reignite a six-year-old controversy but, rather, to suggest that the actual financial effects of the Cumulative Reduction Fund are highly probative of what various organs of state government (including *both* the Commission and the OCA) were "up to" in 2011 and might be "up to" more contemporaneously in light of ongoing efforts by PSNH to add new elements to rates for public policy reasons. *See, e.g.*, Order No. 25,950 (Oct. 6, 2016) in Docket No. DE 16-241 (rejecting as a matter of law a PSNH petition to include natural gas pipeline capacity in nonbypassable distribution rates), *rehearing denied*, Order No. 25,970 (Dec. 7, 2016), *appeal pending* (N.H. Supreme Court, Case No. 2017-0007). The public's interest in disclosure is anything but insubstantial here.

19. Finally, even if the Commission were to accept PSNH's conclusory and self-serving notions of the harms attendant to public disclosure, and even if the Commission were to conclude that the public's interest in disclosure is not as compelling as we have described it here, no rational application of the balancing test could result in a decision to deem this material worthy of confidential treatment. According to PSNH, the privacy interest outweighs the disclosure interest because "[h]aving additional information about the current status of the Cumulative Reduction, or about [PSNH's] projections relating to it, changes nothing about the operation of the Cumulative Reduction and would not "provide any greater insight into the operation of the Cumulative Reduction beyond what is already publicly available." PSNH Motion at 5-6. In reality, the question of whether

[4] The cited newspaper article is available at http://www.berlindailysun.com/newsx/local-news/1758-berlin-biomass-project-cited-in-vote-against-nh-consumer-advocate.

disclosure changes anything is not the fulcrum on which the applicable balancing test rests.

20. The Commission has already determined *three times* that financial information related to this power purchase agreement is subject to public disclosure under the balancing test, in circumstances where the arguments about the asserted privacy interest were far more compelling than anything PSNH has interposed here. *See* Order No. 25,158 (Oct. 15, 2010) in Docket No. DE 10-195 at 13-14 ("Absent disclosure of the pricing terms and details, the public's ability to understand how the Commission reaches a finding on most of [factors statutorily applicable to contract approval] would be diminished"), *rehearing denied,* Order No. 25,168 (Nov. 12, 2010), and Order No. 25,174 (Nov. 24, 2010) in Docket No. DE 10-195 at 12-16 (ordering disclosure of financial information related to bids that competed with the Burgess Biomass proposal, but concluding that bidder identities should remain confidential). It would be absurd to reach a different result now, six years later, when we have actual financial results with which to assess efforts undertaken in 2011 to protect the public.

21. As the Commission observed in Order No. 25,168, when PSNH persisted in its initial effort to shroud the financial terms and effects of this contract in secrecy, the Burgess Biopower PPA "is not simply a contract between private parties. . . . PSNH is a regulated public utility and if the PPA is found reasonable, then PSNH would be in the position of seeking recovery from ratepayers of the costs incurred under the contract by PSNH. . . . Further, the terms for which PSNH seeks protective treatment are not underlying financial terms or provisions that are secondary to the principal purpose of the contract. They are the very core of the proceeding before us." Order No. 25,168 at 11. With

particular reference to the Cumulative Reduction mechanism at issue here, the Commission in Order No. 25,168 observed that this agreement "warrants a full and *transparent* review." *Id.* at 14 (emphasis added). The public had a compelling interest in assessing whether the Commission got it right in 2011 and that interest is no less compelling today when there is actual data about the efficacy of the Cumulative Reduction mechanism.

WHEREFORE, the OCA respectfully request that this honorable Commission:

A. Deny the motion of Public Service Company of New Hampshire for confidential treatment of Exhibit 9 and the testimony related to the exhibit, and

B. Grant any other such relief as it deems appropriate.

Sincerely,

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Certificate of Service

I hereby certify that a copy of this Objection was provided via electronic mail to the individuals included on the Commission's service list for this docket.

D. Maurice Kreis