

STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

Docket No. DE 17-189

Liberty Utilities (Granite State Electric) Corp. d/b/a Liberty Utilities

Petition to Approve Battery Storage Pilot Program

Motion for Confidential Treatment and for Waiver of Puc 203.03(a)

Liberty Utilities (Granite State Electric) Corp. (“Liberty”), through counsel, respectfully moves the Commission pursuant to RSA 91-A:5 and Puc 203.08 to grant confidential treatment of the *APUC Initial Cyber Security and Impact Assessment Report*, dated September 19, 2019 (“Report”), and to grant a waiver of Puc 203.03 so that the Company need only file paper copies of the confidential version of the Report.

In support of this motion, Liberty represents as follows:

Background.

1. The order approving the battery storage pilot program directed Liberty to take a number of steps related to cyber security, including the filing of three documents:

Liberty must file [1] a written certification signed by Mr. Eck, and also by a senior executive responsible for cybersecurity initiatives, confirming that such evaluations have been completed and conclusions reached, together with [2] documentation describing in reasonable detail the supporting methodologies used in such determinations and include with [3] a copy of its amended Cybersecurity Plan. The filing of Liberty’s Cybersecurity Plan may be submitted confidentially pursuant to Puc 201.06(a)(16).

Order No. 26,209 at 40 (Jan. 17, 2019) (numbering in brackets added). Liberty previously filed the written certification and the amended Cybersecurity Plan.

2. As confirmed by Commission Staff and the Safety Division, Liberty has completed all the required cyber security review tasks. Staff Memorandum of February 13, 2020, at 3; Safety Division Memorandum of February 7, 2020, at 2.
3. The Safety Division also declared the Company's evaluations and supporting documents to be sufficient:

I recently reviewed [the Report] as well as the company's amended Cybersecurity Plan and found that the [1] certification, [2] documentation, and [3] amended plan are sufficient to meet the requirements described in the Order.

Safety Division Memorandum at 2 (numbering added).
4. Commission Staff concurred: "Staff believes that, pending its filing of the [Report], Liberty has satisfied the conditions related to cybersecurity as specified in the Order." Staff Recommendation of February 13, 2020, at 3.
5. Liberty had not previously filed the Report pending resolution of Liberty's and Tesla's concerns over confidentiality of such a filing. Liberty has resolved those concerns and, therefore, now files the Report subject to the requests in this motion for confidential treatment of the marked portions of the Report and to accept only paper copies of the confidential version of the Report.

Motion for Confidential Treatment.

6. Liberty seeks confidential treatment of the shaded or redacted sections of the Report pursuant to the procedure outlined in Puc 203.08 and pursuant to the exemptions from public disclosure embodied in RSA 91-A:5, IV and XI.

7. RSA 91-A:5, IV protects from public disclosure documents that contain “confidential” and “commercial” information. The Report contains competitively sensitive information including the configuration and capabilities of Tesla’s systems, how they interact with Liberty’s systems, and references to relationships between Liberty, Tesla, and third parties.

8. RSA 91-A:5, XI exempts from public disclosure the following:

XI. Records pertaining to information technology systems, including cyber security plans, vulnerability testing and assessments materials, detailed network diagrams, or other materials, the release of which would make public security details that would aid an attempted security breach or circumvention of law as to the items assessed.

The Report documents Liberty’s “comprehensive evaluation of the cybersecurity risks raised by the battery storage pilot program [and] an evaluation of the relevant vendors’ practices,” Order No. 26,209 at 40, and thus contains information that is exempted under the following language of RSA 91-A:5, XI: “information technology systems,” “vulnerability testing and assessments materials, detailed network diagrams,” and information “the release of which would make public security details that would aid an attempted security breach.” These sections of the Report thus fall squarely within the exemption of RSA 91-A:5, XI.

9. Pursuant to *Lambert v. Belknap County Convention*, 157 N.H. 375 (2008), the Commission applies a three-step analysis to determine whether information should be protected from public disclosure. *See, e.g., Public Serv. Co. of N.H.*, Order No. 25,313 at 11-12 (Dec. 30, 2011).

10. The first step under *Lambert* is to determine if there is a privacy interest at stake that would be invaded by disclosure. If so, the second step is to determine if there is a

public interest in disclosure that would inform the public of the conduct and activities of its government. Otherwise, public disclosure is not warranted. *Public Serv. Co. of N.H.*, Order No. 25,167 at 3 (Nov. 9, 2010). If these first two steps are met, the Commission must then weigh the public interest benefits of disclosure against the harm disclosure may cause, and determine which outweighs the other. *Lambert*, 157 N.H. at 385; Order No. 25,167 at 3-4.

11. Applying this test here, Liberty can demonstrate, first, that there are privacy interests in the Report's confidential information. This privacy interest arises from several sources.

12. Commission rules incorporate RSA 91-A:5 as the authority under which parties may seek confidential treatment:

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

Puc 203.08(a). As stated above, RSA 91-A:5, IV exempts from public disclosure records that constitute "confidential, commercial, or financial information," and RSA 91-A:5, XI specifically protects the cyber security information that is the core of the Report.

13. Under RSA 91-A:5, IV, the Commission has regularly ruled that competitively sensitive information constitutes such "confidential, commercial, or financial information." *See Consolidated Communications Holdings*, Order No. 26,040 at 9 (July 11, 2017) (Commission granted confidential treatment of "information [that] represents non-public, commercially-sensitive financial and operational information of companies engaged in a competitive industry that is subject to limited state regulation in New Hampshire").

14. Although there is no Commission or court precedent applying RSA 91-A:5, XI (it has only been in effect since August 4, 2019¹), that exemption's specific language clearly recognizes a privacy interest in the Report's confidential information.
15. Another source of privacy interests is a confidentiality agreement between Tesla and Liberty which allowed the sharing of confidential information that allowed the two entities to collaborate on the cybersecurity review, and which protected the confidentiality of the information so shared. Through this agreement, Tesla and Liberty have expressed a privacy interest in the confidential information from the outset of their working relationship, some of which is in the Report.
16. Liberty has thus established strong privacy interests in the Report's confidential information, satisfying the first *Lambert* factor.
17. The second question in the *Lambert* analysis is whether there is a public interest in disclosure of the Report's confidential information; that is, whether releasing the information lends any insight into the workings of the Commission as it relates to this case. The specific language of RSA 91-A:5, IV and XI demonstrates the Legislature's policy directive that disclosure of the confidential information in the Report is not in the public interest. Public disclosure of the Report's confidential information would cause competitive harm to a third party, Tesla, and would provide a roadmap of how to hack Liberty's and Tesla's systems. Also, the specific Tesla and Liberty software that allows the battery project to work, and how that software communicates between the companies is information not relevant to the public's understanding of the Commission's analysis in this proceeding. The public's interest lies in the merits of Liberty's battery storage

¹ See Laws 2019, Ch. 54:1 (2019 HB 329).

program -- whether it is wise to implement a battery storage pilot program and whether Liberty's particular plan is technologically feasible and economically prudent.

Withholding from public view the competitively sensitive information and details of the cyber security review will not impair that transparency of the Commission's review and decision making, as already embodied in Order No. 26.209.

18. Liberty submits that there is no public interest in disclosure of the confidential information against which the Commission needs to balance Liberty's and Tesla's substantial privacy interests in the confidential information. The *Lambert* inquiry should end here with a finding that the Report's confidential information should be granted protected status.

19. In the event one were to conclude that there may be some public interest in the Report's confidential information, the third step of the *Lambert* analysis asks whether that interest in transparency outweighs the harm that would result from disclosure. As stated above, disclosure would cause Tesla substantial competitive harm and would expose Tesla, Liberty, and the battery storage program to cyber security risks that the Report was designed to guard against. These risks easily outweigh any public interest in disclosure of the software details discussed in the Report.

20. Since disclosure would not advance the public's understanding of the Commission's work in this docket, but would cause competitive harm to Tesla and substantially increase the cyber risks to Tesla, Liberty, and Liberty's customers, the substantial interests in confidentiality easily outweigh any conceivable public interest in disclosing the Report's confidential information.

21. For these reasons, Liberty asks that the Commission issue a protective order preventing the public disclosure of the confidential information described above and which is shaded or redacted in the Report.

Waiver of Puc 203.03(a).

22. Finally, to the extent applicable, the Company seeks a waiver of Puc 203.03(a), which generally requires the submission of an electronic version of all documents filed with the Commission.² The Company seeks this waiver so that it may file only paper copies of the confidential version of the Report in order to reduce the risk of disclosure, either through inadvertence or malfeasance.

23. A waiver may not be required here because the more specific rule that governs the filing of confidential information may effectively override the general rule requiring electronic filing of documents. Puc 203.08(f), which applies specifically to the filing of confidential documents, only requires the Company to “furnish 7 copies of the [confidential] document,”³ and does not require the filing of an electronic version of the confidential document. Since seven paper copies is the normal requirement for all Commission filings, *see* Puc 203.02(a)(1), the absence of a requirement to electronically file confidential documents in the rule otherwise governing the filing of such information suggests that filing of an electronic version of the confidential materials is not required.

² Puc 203.03(a) provides: “Each person filing a document shall, in addition to the paper filing required by Puc 203.02 or otherwise, electronically file each document, to the extent practicable, in an electronic file format compatible with the computer system of the commission.”

³ Puc 203.08(f): “When a party provides the commission or staff with a document accompanied by a motion for confidential treatment or a statement of intent to file such a motion, the party shall furnish 7 copies of the document.”

If the Commission agrees and finds that the absence of a specific requirement in Puc 203.08(f) to file an electronic copy of the confidential document effectively preempts the general requirement in Puc 203.03(a) to “electronically file each document,” this request for a waiver is unnecessary.

24. However, to the extent the Commission finds that the rules generally do require the electronic filing of confidential documents, Liberty seeks a waiver of that requirement as to the confidential version of the Report.

25. Liberty seeks a waiver because of the added risk of disclosure that arises from the electronic filing process itself and from the existence of electronic versions of the Report at the Commission. The electronic filing process itself increases the risks of inadvertent disclosure (a mistyped email address while filing or forwarding the Report, a mistaken posting on a public section of the Commission’s website, etc.), and the existence of an electronic copy within the Commission’s systems increases the risk of malicious hacking of the Report (it is easier for an outside actor to gain access to the Report through the internet than to walk into the building and take a paper copy of the Report off someone’s desk).

26. Given the extreme sensitivity of the Report’s confidential information (essentially a roadmap to how one could hack the battery storage program) and the substantial harm that could result from disclosure, it is appropriate to waive the electronic filing requirement and to accept only paper copies of the Report.

27. The Commission “shall waive the provisions of any of its rules ... if the commission finds that: (1) The waiver serves the public interest; and (2) the waiver will not disrupt the orderly and efficient resolution of matters before the commission.” Puc

201.05(a). A waiver of the electronic filing requirement “serves the public interest” for the reasons stated above – it greatly reduces the risk of inadvertent or malicious disclosure of the confidential information.

28. A waiver also will “not disrupt” the resolution of this docket. The Commission has already approved the battery storage program, and Commission Staff and the Safety Division have found the cybersecurity review described in the Report to be sufficient. The filing of the Report merely fulfills the reasonable expectation to have its information on file at the Commission and available for the Commission to understand precisely how Liberty satisfied the Order’s cybersecurity conditions. The waiver will have no effect on the Order, on other parties, or on how the program is to be implemented and reviewed.

29. The requested waiver of the electronic filing rule thus satisfies the requirements of Puc 201.05.

WHEREFORE, Liberty respectfully asks that the Commission:

- A. Grant this motion for confidential treatment as to the information highlighted in the confidential version of the Report, and redacted in the public version; and
- B. Grant a waiver of the requirement in Puc 203.03 to file an electronic copy of the confidential version of the Report and accept only paper copies;
- C. Grant such other relief as is just and reasonable and consistent with the public interest.

Respectfully submitted,
Liberty Utilities (Granite State Electric) Corp. d/b/a
Liberty Utilities



Date: March 9, 2020

By: _____

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Certificate of Service

I hereby certify that on March 9, 2020, a copy of this motion has been forwarded electronically to the service list.



By: _____

Michael J. Sheehan