

THE STATE OF NEW HAMPSHIRE  
BEFORE THE  
PUBLIC UTILITIES COMMISSION

AQUARION WATER COMPANY OF NEW HAMPSHIRE, INC.

Docket No. DW 20-184

**MOTION FOR CONFIDENTIAL TREATMENT AND PROTECTIVE ORDER**

Aquarion Water Company of New Hampshire, Inc. (“Aquarion” or the “Company”) hereby requests that the New Hampshire Public Utilities Commission (“Commission”) grant pursuant to Puc 203.08 and RSA 91-A:5 protection from public disclosure of certain confidential, sensitive and proprietary information submitted in this docket. Specifically, the Company requests that the Commission protect from public disclosure certain information contained in the supporting attachment to Aquarion’s request for recovery of rate case expenses filed with this motion (the “Confidential Materials”).

As explained below, the Confidential Materials contain confidential commercial and financial information, proprietary vendor data and work product, and private banking and account information, the disclosure of which would constitute an invasion of privacy. As also explained below, certain of the Confidential Materials also contain information that is exempt for disclosure under the attorney-client privilege and attorney work product doctrines pursuant to RSA 541-A:5, XII and New Hampshire Supreme Court precedent.

In support of this motion, Aquarion states as follows:

**I. LEGAL STANDARD**

Puc 203.08(a) states 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.” The motion is to contain: “(1) The documents, specific portions of documents, or a detailed description of the types of information for which confidentiality is sought; (2) Specific reference to the statutory or common law support for confidentiality; and (3) A detailed statement of the harm that would result from disclosure and any other facts relevant to the request for confidential treatment.” Puc 203.08(b).

RSA 91-A:5, IV exempts certain governmental records from public disclosure, including “[r]ecords pertaining to internal personnel practices; confidential, commercial, or financial information . . . ; and personnel . . . and other files whose disclosure would constitute invasion of privacy.” In determining whether documents are entitled to exemption pursuant to RSA 91-A:5, IV, the Commission applies a three-step analysis to determine whether information should be protected from public disclosure. *See Lambert v. Belknap County Convention*, 157 N.H. 375 (2008); *see also Public Service Company of New Hampshire*, Order No. 25,313 (December 30, 2011) at 11-12. 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 stated that disclosure should inform the public of the conduct and activities of its government; if the information does not serve that purpose, disclosure is not warranted. *Electric Distribution Utilities*, Order No. 25,811 (September 9, 2015) at 5. If both steps are met, the Commission balances the privacy interest with the public interest to determine if disclosure is appropriate. *Public Service Company of New Hampshire*, Order 25,167 (November 9, 2010) at 3-4.

## **II. DESCRIPTION OF CONFIDENTIAL MATERIALS**

As required by N.H. Code Admin. Rules Puc 1905.03, Aquarion has included with its rate case recovery request detailed information supporting the rate case expenses incurred in this

proceeding. Included is information on the bidding processes and resulting contracts for the various vendors used in this case, and copies of invoices from legal counsel and other vendors that contain specific descriptions of the services rendered on various dates. Each of these documents contains, to varying degrees, information about the competitively bid billing rates to be charged to Aquarion. This billing information should be retained as confidential. Further, the Confidential Material include, for various vendors, private banking and account information necessary to process invoices and payments. This banking information should also be retained as confidential. Finally, invoices from Aquarion's outside counsel contain attorney-client privileged information, which should also be protected from disclosure.

As explained below in Section III, there is a privacy interest at stake in each of the Confidential Materials that would be invaded by public disclosure, and where the privacy interest substantially outweighs any public interest in disclosure. In addition, public disclosure of the Confidential Materials is not necessary to inform the public of the conduct and activities of its government, and thus disclosure is not warranted. *See Electric Distribution Utilities*, Order No. 25,811 (September 9, 2015) at 5.

### **III. DISCUSSION**

The Confidential Materials containing contract pricing and billing information and those that contain banking and account information are highly sensitive and confidential in nature and the Company has a strong privacy interest at stake relative to the information in those attachments. There are several factors that support a finding that this information should be granted protective treatment, including factors that affect the business interests of the Company and its counterparties, and the interests of the Company's customers who ultimately bear the cost of services and materials procured through negotiated contracts. The negotiated pricing, contract

and engagement terms included in these Confidential Materials were the result of competitive bid processes and negotiations between the Company and the winning bidders entering into the contracts. If the Company were required to disclose these competitively sensitive terms publicly in this docket, the Company would likely experience substantial difficulty in the future in negotiating successfully with potential contract partners and obtain competitive pricing, as disclosure could impair the ability of the Company to get potential vendors to agree to as favorable terms compared to other customers of the vendor or with previous contracts with the Company. In particular, with regard to disclosing the banking information of the vendors: disclosure would put the vendors' accounts at risk for fraud and would make it difficult for the Company to retain sufficient trust and credibility to engage those vendors or others in future business dealings.

Should Aquarion be ordered to disclose negotiated pricing, contract and engagement terms publicly in this docket, potential vendors and negotiating partners would be put on notice that their pricing information and other negotiated terms may be disclosed to the public in future Commission dockets and approval processes, including persons who are seeking to procure similar services from the vendor. This disclosure would therefore place the Company's vendors and consultants at a competitive disadvantage with respect to their ability to negotiate fees for services with existing and potential clients. As a result, the disclosure of this information would have a chilling effect on the Company's ability to: (1) attract vendors to bid due to risk and concern that the Commission will ultimately release proprietary pricing data to the public including future entities seeking the vendor's services; and (2) secure reasonable and attractive pricing from contract partners for the benefit of the Company's customers.

Additionally, the Confidential Materials containing negotiated pricing terms should be protected by the Commission and remain confidential because such information is competitively sensitive, and its disclosure could make RFP results less competitive and generally negatively impact the market. Should this information be made available to the public, the Company's vendors and consultants in this docket would be placed at a competitive disadvantage compared with their competitors because those competitors would have information by which to base future bids for providing services to the Company. This result would harm the Company to the extent that existing and potential vendors and consultants of the Company decide not to bid on future Company requests for services because of the potential competitive disadvantages that may arise should they do so. This has the added negative implication of depriving the Company of access to certain expertise necessary for Commission proceedings.

Any public interest in the billing information is satisfied by the fact that the Company does not seek to protect the total amounts paid by the Company to its vendors, and only the underlying detail that reveals competitive contract and pricing terms. Therefore, while the Company requests protective treatment for the components of the billing information (i.e., hours and specific rates), the public would still have access to the total amount billed. Moreover, the unredacted Confidential Materials are provided to the Commission, the Department of Energy and the Office of Consumer Advocate, which allows the details of the billings to be subject to investigation and scrutiny on behalf of customers. With respect to the private banking account information, the Company contends that there is no legitimate public interest in that information. In balancing the Commission's privacy analysis, the privacy interest of the Company and its vendors and consultants as counterparties outweigh and are aligned with the public interest because if the negotiated terms and pricing information were disclosed the Company would have

difficulty procuring like services from vendors in the future at the lowest cost, which would ultimately harm Aquarion customers.

The Commission has previously protected commercially sensitive, negotiated pricing information on the basis that the public's interest in disclosure is outweighed by the "substantial harm to the competitive positions" of the Company and its vendors, as well as the effect it would have on the Company's customers in higher costs. *Liberty Utilities Corp.*, Order No. 26,280 (August 1, 2019) at 4-5 (protecting negotiated pricing terms contained in gas supply contract); *Pennichuck East Utility, Inc.*, Order No. 26,222 (February 26, 2019) (protecting negotiated pricing and billing rates of utility's attorney); *Public Service Company of New Hampshire*, Order No. 26,617 (April 27, 2022) at 5-7 (protecting bid pricing, contracts and engagement terms).

With respect to banking information, the Commission has previously found that such information is "clearly" private. *Liberty Utilities (EnergyNorth Natural Gas) Corp.*, Order No. 25,690 (July 9, 2014) at 4. Moreover, the Commission has found that public interest in disclosing banking information is "negligible to non-existent". Order 26,617 at 8. The very same concerns attach to the Confidential Materials in this docket, and the Commission should follow its prior decisions and grant confidential treatment for the information.

Finally, the Confidential Materials include invoices from the Company's outside legal counsel, Keegan Werlin, which contain material that is confidential as well as material that is exempt from disclosure under the attorney-client privilege and attorney work product doctrines. RSA 541-A:5, XII exempts from disclosure information protected under the attorney-client privilege and attorney work product doctrines. The New Hampshire Supreme Court has held "that the attorney-client privilege may apply to information in a billing record that reveals the motive of the client in seeking representation, litigation strategy, or the specific nature of the

services provided . . . (billing statements that provided “an hour-by-hour rendition of the work performed for a client”, including identifying, by name, the people with whom the attorney talked, the topics they discussed, the subjects the attorney researched and the papers he reviewed “necessarily reveal[ed] strategies, confidential communications, and the thought processes behind the representation” and were privileged from disclosure).” *Hampton Police Ass'n, Inc. v. Town of Hampton*, 162 N.H. 7, 16 (2011).

The descriptions of work contained in the Keegan Werlin invoices provide exactly this type of information. The descriptions reveal litigation strategy, the specific nature of the services provided, hourly renditions of the work performed for the Company, including identifying, by name, the individual attorneys performing the work and the people with whom they talked, as well as the topics they discussed, and similar information. As such, these descriptions within the legal invoices constitute privileged information that is fully exempt from disclosure. However, other information in the legal invoices is restricted only on the basis of confidentiality (e.g., billing rates and contract terms) and thus such other information is appropriate for disclosure to the Commission, the Department of Energy and the Office of Consumer Advocate under the terms of this Motion. Accordingly, the Company is providing: (i) a public version of the rate case expense supporting documentation including fully-redacted Confidential Materials for filing to the docket; and (ii) a confidential version of the rate case expense supporting documentation contained in the Confidential Materials, which is being filed exclusively with the Commission, the Department of Energy and the Office of Consumer Advocate and shows all confidential information, with limited redactions for the specific work descriptions contained in the legal invoices that are subject to attorney-client and attorney work product privileges.

#### IV. CONCLUSION

Based on the foregoing, Aquarion and its vendors have privacy interests at stake that would be invaded by disclosure of information in the Confidential Materials. In addition, the disclosure of the Confidential Materials is not necessary to inform the public of the conduct and activities of its government and would not serve that purpose, and therefore disclosure is not warranted. *See Electric Distribution Utilities*, Order No. 25,811 (September 9, 2015) at 5. On balance, the harm that would result from public disclosure is substantially outweighed by the need for confidential treatment.

For the above reasons, Aquarion requests that the Commission grant this motion for confidential treatment and protective order.

Respectfully submitted,

**AQUARION WATER COMPANY OF NEW HAMPSHIRE, INC.**

Date: March 31, 2023

By:   
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**CERTIFICATE OF SERVICE**

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

A handwritten signature in black ink, appearing to be 'J. B.', is written above a horizontal line.

Date: March 31, 2023