STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

DE 10-261

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

2010 Least Cost Integrated Resource Plan

Order on Motions for Confidentiality

O R D E R N O. 25,234

June 14, 2011

On September 30, 2010, Public Service Company of New Hampshire (PSNH or Company) filed its 2010 Least Cost Integrated Resource Plan (LCIRP) pursuant to RSA 378:37, RSA 378:38, and Commission Order Nos. 24,945 (February 27, 2009) (PSNH's prior LCIRP filing), and 25,061 (December 31, 2009) (PSNH's Default Energy Service Rate Docket). Several parties were granted discretionary intervention, pursuant to RSA 541-A:32, II. Staff, together with the Office of the Consumer Advocate (OCA), and certain intervenors, have served discovery on the Company in this docket, as specified by the approved procedural schedule (as modified on February 24, 2011, March 31, 2011, and May 9, 2011).

In developing its responses to discovery, the Company has requested, by motion, confidential treatment for a host of information alleged to contain competitively sensitive information concerning the Company and entities with which it does business. Specifically, the Company seeks to protect information contained in its responses to: OCA 1-33 (and a related follow-up question asked by OCA during the March 30, 2011 technical session on this docket), OCA 1-39, OCA 1-49, and OCA 1-52; and Staff 1-47. Also, the Company seeks to protect information contained in its submissions to Staff and OCA provided on April 6, 2011, with an explanation of the mathematical model used by the Company's consultant, Levitan and

Associates, Inc. (Levitan), in developing Levitan's Newington Continuing Operation Study report, submitted as part of this LCIRP as ordered by this Commission in Order No. 25,061 (Levitan Explanation of Model). The Company also seeks to protect additional information submitted to OCA and Staff in connection with the Levitan Explanation of Model on May 13, 2011. For all of these responses, with the exception of the Levitan Explanation of Model, for which confidential treatment is requested by the Company *in toto*, the Company has provided both public and confidential versions of the information for which it now seeks confidential treatment, and the Company has disseminated the public versions of these materials among all parties. Thus, any grant of the motions will cover the information contained in the confidential versions and the public versions will remain disclosed.

The Right-to-Know Law, RSA 91-A:5, IV, states, in relevant part, that records of "confidential, commercial, or financial information" are exempted from disclosure. *See Unitil Corp. and Northern Utilities, Inc.*, Order No. 25,014 (September 22, 2009) at 2. In determining whether commercial or financial information should be deemed confidential, we first consider whether there is a privacy interest that would be invaded by the disclosure. *Unitil Corp. and Northern Utilities, Inc.*, Order No. 25,014, at 2-3. Second, when a privacy interest is at stake, the public's interest in disclosure is assessed. *Id.* at 3. 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. *Id.* Finally, when there is a public interest in disclosure, that interest is balanced against any privacy interests in non-disclosure. *Id.* This is similar to the Commission's rule on requests for confidential treatment. *See* N.H. Code Admin. Rules Puc 203.08; *see also Unitil Corp. and Northern Utilities, Inc.*, Order No. 25,014 (September 22, 2009) at 3.

In response to OCA 1-52, the Company provided to OCA and Staff, in attachments, pricing terms for contracts entered into with suppliers of Renewable Energy Certificates (RECs) and pricing offers made to the Company by REC suppliers. The Company contends that disclosure of this information would cause competitive harm, in that disclosure of the prices and offers of the Company's REC suppliers could discourage such suppliers from dealing with the Company in the future, for fear of having their price and offer terms disclosed to competitors. The Company also expressed concern that disclosure of REC prices and offers could provide a competitive advantage to certain intervenors on this docket, which also purchase RECs in the market.

We conclude that the information for which the Company seeks confidential treatment in these attachments to its response to OCA 1-52 is confidential commercial or financial information in that it impacts the financial positions of both the Company and its REC suppliers. Further, the Company and its REC suppliers have a privacy interest in the information because, for these types of market engagements, pricing terms (including offers) are key pieces of information on which much competition is based. *See Union Leader Corp. v. NH Housing Fin. Auth.*, 142 N.H. 540, 554 (1997), *cited in Unitil Corp. and Northern Utilities, Inc.*, Order No. 25,014 (September 22, 2009).

As to the public interest, the Company makes passing reference, without specificity, to "limited benefits" arising from disclosure of the information provided in these attachments to its response to OCA 1-52. We note that the public does have an interest in knowing that the Commission is scrutinizing the prices paid by the Company for its RECs, because the Company intends to recover the cost of RECs through rates. Further, the public has an interest in knowing how the Company selected its REC providers among various offers made, as the Company

expects its ratepayers to pay for the purchased RECs. In this instance, however, disclosure provides only limited benefit to the public related to the workings of government..

Balancing these interests, we conclude in this case that the interests of the Company and its REC suppliers outweigh those of the public. The disclosure of this information may place the Company and its REC suppliers at a disadvantage with respect to those with whom they would do business in the future, and could ultimately increase costs to ratepayers. We have found such information confidential in the past. *See Public Service Company of New Hampshire*, Order No. 24,895 (September 17, 2008) at 5. Accordingly, we conclude that the information in the attachments to OCA 1-52 is entitled to confidential treatment.

Next, the Company seeks to protect the rate and pricing information within the Company's contract with its outside consultant, Levitan, included in the attachments to the Company's response to Staff 1-47, provided to Staff and OCA. The Company argues that this information (pricing for services and hourly billing rates) is commercially sensitive, and that disclosing the information would cause competitive harm to Levitan, because it will allow Levitan's competitors to know what Levitan charges for its services, and could harm Levitan's bargaining power with prospective clients. The Company also argues that disclosure of these pricing terms could harm the Company's competitive position, as disclosure of Levitan's pricing in this case could have a chilling effect on the Company's ability to attract outside service providers for future engagements, if such potential providers had an expectation that their pricing terms would be disclosed to competitors as a consequence of being retained by PSNH.

We conclude that the information within these attachments is confidential commercial or financial information in that it impacts the financial positions of both the Company and Levitan. Further, the Company and Levitan have a privacy interest in the information because, for these

types of engagements, rates and pricing are key pieces of information and are the basis on which much competition is based. *See Union Leader Corp.*, 142 N.H. at 554.

As to the public interest, the Company does not identify its own position regarding the parameters of the public interest. Nonetheless, we find that the public does have an interest in knowing that the Commission is scrutinizing the prices paid by the Company for the consultants it uses, such as Levitan, because the Company intends to recover those costs through rates. While a redacted version of the contract between the Company and Levitan is available to the public for its inspection, that availability does not satisfy the public interest in knowing whether the Company is paying reasonable rates for the services it uses. On the other hand, we do not find that the pricing information provides the public with useful background on the workings of government.

Balancing these interests, we conclude in this case that the interests of the Company and Levitan outweigh those of the public. The disclosure of this information may place the Company and Levitan at a disadvantage with respect to those with whom they would do business in the future. We have found such information confidential in the past. *See EnergyNorth Natural Gas, Inc. d/b/a National Grid NH*, Order No. 25,208 (March 23, 2011) at 11. Accordingly, we conclude that the information in the attachments to the Company's responses to Staff 1-47 for which protection is sought by the Company is entitled to confidential treatment.

The Company next seeks to protect from public disclosure, the entire Levitan Explanation of Model provided to Staff and OCA on April 6, 2011. (The Company also provided additional explanation related to the Levitan Explanation of Model to Staff and OCA on May 13, 2011; for this information, the Company seeks the same protection requested in its April 8, 2011 motion for confidential treatment pertaining to the Levitan Explanation of Model,

for the same reasons. We will consider the April 6 and May 13 submissions to be subject to the same request for confidential treatment contained in the Company's April 8 motion for confidential treatment). According to the Company, the Levitan Explanation of Model and May 13 additional explanation contain proprietary modeling information created by its consultant Levitan, which are confidential trade secrets. The Company argues that Levitan has a privacy interest in its proprietary models, in that disclosure of this information would cause great competitive harm to Levitan, far outweighing any limited benefits to the public interest arising from disclosure.

We agree with the Company that the proprietary models and equations created by Levitan are commercial information in which a strong privacy interest resides. Further, competitive harm may befall Levitan if this modeling-related information and equations are disclosed. *See Union Leader Corp.*, 142 N.H. at 554. We also agree that the public's interest in disclosure of the internal workings of Levitan's model is slight (though the public interest in Staff's and OCA's ability to independently examine and verify the Levitan modeling is great), especially in light of the fact that the information at issue has no bearing on the workings of government. Thus, in weighing these interests we conclude that the Company's motion for confidential treatment should be granted for the Levitan Explanation of Model and the May 13, 2011 additional explanation provided to OCA and Staff. This position is consistent with our previous conclusions related to such modeling-related information. *See EnergyNorth Natural Gas, Inc. d/b/a National Grid NH*, Order No. 25,208 (March 23, 2011) at 10.

Next, the Company seeks to protect certain information provided to OCA and Staff in an attachment to its response to OCA 1-33, and the corrected attachment provided to OCA and Staff on April 15, 2011, in response to a request by OCA at the March 30, 2011 technical session. The

attachments subject to the Company's motion for confidential treatment present the Company's capital budgets for the 2011-2015 period, on an annual, non-itemized, whole-dollar basis, for its Schiller, Newington, and Merrimack generating units, and, as provided in the corrected attachment submitted on April 15, its combined hydroelectric generating units. (The Company has publicly disclosed a version of this attachment with the capital budgets for Newington Station being made visible, with the figures for Schiller and Merrimack Stations redacted). In its motion for confidential treatment, the Company asserts that these budget capital expenditure dollar amounts are confidential, commercially-sensitive financial information. The Company claims that, if disclosed, the budget figures would enable "certain sophisticated market participants" to predict the Company's maintenance schedules for its generating units, which, given the seasonality of plant maintenance in this State, could give competitive power suppliers enhanced bargaining power in the Company's negotiations for supplemental power supplies during maintenance-related outage periods. The Company also claims that contractors that could potentially provide plant maintenance services to the Company would also have enhanced bargaining power for the contracting of such services, due to their ability to forecast the Company's maintenance schedules using the five-year budget figures. These effects of disclosure would, in the Company's view, cause competitive harm. The Company also argues that intervenors on this docket that serve as competitors of the Company in the power supply markets would have an advantage over non-intervenor market participants in bidding for the Company's supplemental power-supply needs if the intervenors had access to the capital-budget information as a result of disclosure of this information.

On April 18, 2011, intervenors TransCanada Power Marketing Ltd. and TransCanada Hydro Northeast Inc. (together, TransCanada) filed an objection to the Company's motion for

confidential treatment related to OCA 1-33, with which Staff, the OCA, the Conservation Law Foundation (CLF), the New England Power Generators Association, Inc., Granite Ridge Energy, LLC, and the Sierra Club concurred. In its objection, TransCanada argues that there is a strong public interest in disclosure of the budget figures requested in OCA 1-33, in light of the importance of the Company's future capital planning to the statutory purposes of the LCIRP process. Moreover, along with other arguments, TransCanada rejects the Company's position that disclosure of its 2011-2015, non-itemized, capital budgets for its generation units would somehow enable third parties to predict the Company's planned outage and maintenance schedules, as the figures do not specify the type of investments to be made in each plant, or whether such investments would implicate an outage. TransCanada also notes that, in certain other contexts, the Company has made itemized capital expenditure budgets for its generation facilities publicly available. (In an April 27, 2011 response to TransCanada's objection, the Company reiterates its position that the non-itemized budget figures provided in response to OCA 1-33 would, in fact, provide third party competitors, contractors, and suppliers with advance knowledge of its planned plant outages, thereby causing competitive harm as outlined above).

We acknowledge that the capital budgets provided by the Company in response to OCA 1-33 are financial information used by the Company in its organizational planning; however, we do not identify a privacy interest that would be violated by disclosure of this information to the public. The Company has not adequately demonstrated that actual competitive harms would result from disclosure of these general, non-itemized figures to third parties. The relationship between plant maintenance and plant outages, the primary mechanism of competitive harm pointed to by the Company in its arguments for non-disclosure, is far from clear. We agree with

TransCanada that many plant maintenance items would not necessarily implicate plant outages for the Company.

Moreover, even if supplemental power suppliers, contractors, and competitors were somehow, against all indications, able to determine the Company's actual plant maintenance schedules for 2011-2015 with any useful degree of specificity from this information, the current market realities would militate against competitive harm to the Company. The current power-supply picture in New England is one of excess, not scarcity; we expect that the Company would be able to procure needed power from the market at reasonable terms. If market conditions were different, we could have come to a different conclusion, however, given that the threshold requirement of an invasion of privacy resulting from competitive harm has not been met, we conclude that we must deny the Company's motion for confidential treatment regarding its response to OCA 1-33, and allow public disclosure of the information pursuant to RSA 91-A.

In attachments to its responses to OCA 1-39 and OCA 1-49, the Company provided OCA and Staff with certain internal planning documents related fuel procurement and emissions-control planning for the Company's generation facilities. These documents contain information related to the Company's expected consumption of coal, fuel-price assumptions, dispatch assumptions, confidential bid account numbers for the Company's participation in the Regional Greenhouse Gas Initiative (RGGI) system, and emission-level projections, among other matters. The Company asserts that these documents contain confidential internal planning information that is not disclosed outside of the Company, the disclosure of which would result in competitive harms in relation to coal suppliers (due to loss of bargaining power for pricing terms resulting from suppliers' knowledge of the Company's fuel-consumption plans). The Company also argues that third-party competitors in the power-supply market field, including certain

intervenors on this docket, would gain competitive advantage from knowledge of the Company's RGGI bid account number and internal emissions-control strategies. Also in relation to RGGI strategies, the Company points to potential competitive harms arising from reduced bargaining power in the context of RGGI allowance acquisitions from third-party sellers of RGGI allowances, resulting from such parties' knowledge of the Company's plans if the information is disclosed.

We agree with the Company that is has a privacy interest in the information provided in the responses to OCA 1-39 and OCA 1-49. Although the Company does not address the RSA 91-A factor of public interest in disclosure in its motion, we are obligated to do so. There does not appear to be a strong public interest in disclosure based upon the information providing the public with insight into the activities of government *per se*; on the contrary, the information relates to the Company's own internal plans. Instead, a strong public interest in this information arises from the purposes of the LCIRP statutory framework of RSA 378:37 and RSA 378:38. As noted in CLF's objection to the Company's motion related to OCA 1-39 and OCA 1-49, this information could be relevant to an assessment of the adequacy of the Company's planning process as it relates to impacts on the environment. We also agree with CLF that potential plans for litigation by parties to a proceeding before the Commission are irrelevant to the balancing analysis required under the RSA 91-A framework; instead we must consider the Company's privacy interests in non-disclosure in our analysis. As a result, we find that the balance tips against disclosure of the material provided by the Company in response to OCA 1-39 and OCA 1-49 to competitors of PSNH. Likewise, we find that the balance tips against disclosure of this information to the public at large, as this would have the same effect as direct disclosure of the information to the Company's competitors. We do find that the balance tips in favor of

disclosure of this information to non-competitor intervenors in this docket contingent upon execution of nondisclosure agreements with the Company. This would enable the public's interest in the Commission having a full examination of environmental issues on this docket to be satisfied, while protecting the Company against competitive harms.

Based upon the foregoing, it is hereby

ORDERED, that the motions for confidential treatment with respect to the Company's responses to OCA 1-52, and Staff 1-47, the Levitan Explanation of Model, and related materials, are granted as set forth above, except to the extent that the information may have been publicly disclosed elsewhere since the motions were filed; and it is

FURTHER ORDERED, that the motion for confidential treatment with respect to the Company's responses to OCA 1-33, and related materials, is denied; and it is

FURTHER ORDERED, that the motion for confidential treatment with respect to the Company's responses to OCA 1-39 and OCA 1-49 is granted in part and denied in part, as set forth above; and it is

FURTHER ORDERED, that these rulings on the motions for confidential treatment are, consistent with Puc 203.08(k), subject to the Commission's on-going authority, on its own motion, on the motion of Staff, or on the motion of any member of the public, to reconsider the Commission's determinations.

By order of the Public Utilities Commission of New Hampshire this fourteenth day of June, 2011.

Thomas B. Getz
Chairman

Clifton C. Below
Commissioner

Amy L. Ignatius
Commissioner

Attested by:

Debra A. Howland
Executive Director