

STATE OF NEW HAMPSHIRE  
BEFORE THE  
PUBLIC UTILITIES COMMISSION

Public Service Company of New Hampshire

Investigation of PSNH Installation of Scrubber Technology Station

Docket No. DE 08-103

**REPLY TO JOINT OBJECTION TO PSNH MOTION FOR PROTECTIVE ORDER  
AND CONFIDENTIAL TREATMENT**

Public Service Company of New Hampshire (“PSNH” or the “Company”) hereby replies to the Joint Objection filed by the Office of Consumer Advocate, the Conservation Law Foundation, the Sierra Club, TransCanada Power Marketing Ltd. and TransCanada Hydro Northeast Inc. and New England Power Generators to PSNH’s Motion for Protective Order and Confidential Treatment regarding the June 2011 JACOBS Consultancy report titled “New Hampshire Clean Air Project Due Diligence on Completed Portion” (the “Report”) relating to PSNH’s Clean Air Project at Merrimack Power Station. PSNH states as follows:

1. On January 20, 2012, the Commission Staff filed the Report in this docket (DE 08-103) as part of its investigation of the installation of scrubber technology at Merrimack Station. Contemporaneous with the filing of the Report, PSNH filed a Motion for Protective Order and Confidential Treatment requesting that the Commission issue a protective order regarding certain portions of the Report. The Motion was filed pursuant to RSA 91-A:5, IV which exempts from public disclosure confidential, commercial or financial information.

2. By way of background, DE 08-103 was opened by the Commission as a repository for information about the status of the installation of the scrubber. It is a non-adjudicative docket in which only the Staff of the Commission and the Office of Consumer

Advocate are participants. The Commission has not granted intervenor status to any person in the docket, and only Commission Staff, OCA and the Company are included on the service list for the docket.<sup>1</sup>

3. According to the Joint Objection, on January 26, 2012, the OCA received a copy of the confidential version of the Report. The Consumer Advocate represented to the Company's counsel that the unredacted Report was released to the OCA based on its statutory authority to access confidential information. However, RSA 363:28,VI applies only to adjudicative proceedings. It states "The filing party shall provide the consumer advocate with copies of all confidential information filed with the public utilities commission **in adjudicative proceedings** in which the consumer advocate is a participating party and the consumer advocate shall maintain the confidentiality of such information." (emphasis added). Had the legislature intended the OCA to obtain access to confidential information in non-adjudicative proceedings, it would have enacted a law allowing for such disclosures. But it did not. *See In re Alex C.*, 161 N.H. 231, 235 (2010). "We interpret legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include." Thus, there was no legal basis upon which to disclose the unredacted Report to OCA.

4. While the OCA is a participant in DE 08-103, in which the Report was filed, the other entities that join in OCA's objection to the Motion are not. They have not been granted intervenor status pursuant to RSA 541-A:32 and thus have no ability to file pleadings in this docket. At best, they are limited to public comment "at a hearing or a prehearing conference" as

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<sup>1</sup> Rule Puc 203.12 requires that the Commission provide notice of an adjudicative proceeding. None of the requirements of this rule were applied in this proceeding. Moreover, the very first words in Order No. 24,898 issued in this docket on September 19, 2008, refers to this proceeding as "This investigation...." Finally, in Order No. 24,914 issued in this docket on November 12, 2008, the Commission rejected claims made by TransCanada that "that the Commission should have commenced a full adjudicative proceeding, pursuant to RSA 541-A:1, IV and 541 A:31, I, and that failure to commence such a proceeding violated due process."

dictated by the Commission's rules. Puc 203.18. OCA attempts to cure this procedural infirmity by reciting DE 11-250 in the subject matter line of its filing letter, and copying that docket on its filing. However, the Commission has not consolidated the two dockets and the OCA cannot confer upon the parties in DE 11-250 any status in DE 08-103.

5. Setting aside these significant procedural defects, the substantive position advanced in the Joint Objection should be rejected because it is contrary to Commission precedent and would create substantial disincentives for third parties to do business with New Hampshire utilities. For example, the OCA argues that because customers will be paying for the scrubber, the Company should not have assured all bidders that bid information would be held in confidence or to successful bidders that contract prices would be confidential. Yet there is long-standing precedent in New Hampshire that bid information associated with default service is accorded confidential treatment based on the expectations of confidentiality that are established at the outset of those processes. *See* Motion at 4-5.

6. This is no different. The costs of the scrubber will go into PSNH's energy service rate, which is default service. The Company's customers pay for that service – and thus those costs – just as Unitil or Granite State Electric Company's customers pay for the costs of their default service, which are the result of another bidding process. While the Joint Objection attempts to distinguish the two, there is no conceptual difference; in both situations, utility customers are paying the costs for service received. In a similar vein, the fact that the scrubber was legislatively mandated does not affect the analysis of whether the information meets the exemption requirements under RSA 91-A:5, IV.<sup>2</sup> OCA would have the Commission believe that the mere existence of the mandate converts confidential information into public information. To do so would be a plain violation of RSA 91-A:5,IV.

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<sup>2</sup> For that matter, provision of "default service" also is legislatively mandated by RSA Chapter 374-F.

7. Further, the Joint Objection fails to make any compelling argument that public disclosure of the identities of the unsuccessful bidders advances the public interest in any way. What the public interest dictates is an understanding that the bid process itself was appropriate, a topic described in detail in the public portions of the Report. However, public disclosure of the names of the unsuccessful bidders sheds little light on the prudence of the scrubber's construction. But it could cause harm to the unsuccessful bidders who may not want their lack of success on this one project to be perceived negatively in solicitations in which they participate in the future.

8. Regarding the contract pricing information, the Joint Objection ignores the significant privacy interest of contractors who may seek to construct other scrubbers in the near future. Those contractors may be significantly disadvantaged if the final contract prices are disclosed, as that information could be used to undercut any future bid they may make or be used to place ceilings on contract prices in the future. The public's interest in knowing individual contract amounts – as opposed to the total cost of the scrubber project – is not strong enough to override this very real privacy interest on the part of contractors. The Commission should grant protective treatment to this information not only to ensure that these specific contractors are not harmed but also to foster an environment where third parties want to vie for business in New Hampshire knowing that whether they win or lose, their participation cannot potentially be used against them in the future.

9. Finally, the OCA seeks public disclosure of information subject to the Confidentiality Agreement between the Company and JACOBS Consultancy, claiming that the Agreement cannot restrict the Commission's disclosure of information obtained by its expert. If that is the case, the Commission should have established ground rules for this proceeding from

the outset that established what could be held in confidence and what could not, instead of allowing its expert and the Company to enter into an agreement which according to the Joint Objection should now be partially disregarded. The Commission should reject the OCA's invitation to undo this agreement.

WHEREFORE, PSNH respectfully requests that the Commission:

- A. Grant its Motion for Protective Order and Confidential Treatment; and
- B. Grant such other relief as is just and equitable.

Respectfully submitted,

Public Service Company of New Hampshire

By Its Attorneys

Dated: February 1, 2012

By:



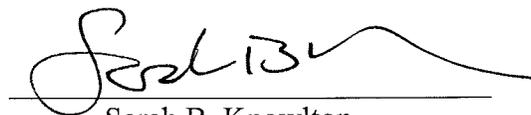
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Certificate of Service

I hereby certify that a copy of this Reply to Joint Objection to PSNH Motion for Protective Treatment and Confidential Treatment has been served electronically on the persons on the Commission's service list in this docket in accordance with Puc 203.11 this 1<sup>st</sup> day of February, 2012.



Sarah B. Knowlton