

DE 02-075

**NORTH ATLANTIC ENERGY CORPORATION,  
THE UNITED ILLUMINATION COMPANY,  
NEW ENGLAND POWER COMPANY,  
NEW HAMPSHIRE ELECTRIC COOPERATIVE, INC.  
AND  
Canal Electric Company**

**Proceeding to Approve the Sale of Seabrook Station Interests  
Order Approving Confidential Treatment**

**O R D E R    N O.    **23,986****

**June 5, 2002**

**I.    INTRODUCTION**

This order addresses the terms under which Parties to this proceeding will be granted access to Confidential Information submitted by J.P. Morgan Securities Inc. (JPMorgan), the asset sales manager and auction advisor on Seabrook Station. On May 17, 2002, JPMorgan filed a Motion for Protective Order and Confidential Treatment with the New Hampshire Public Utilities Commission (Commission). The motion indicates that as the exclusive asset sales manager and auction advisor, JPMorgan seeks to ensure certain information it has submitted to the Commission, as Exhibits to the Report of Auction, is kept confidential.

The information for which confidential treatment is being sought consists of two separate categories, which JPMorgan identifies as "Internal Confidential Information" and "Bidder

Confidential Information." Internal Confidential Information is information prepared and/or assembled by JPMorgan or the Seabrook selling owners for soliciting bids. Bidder Confidential Information relates to correspondence from third party bidders including bids and materials related to bid analysis.

JPMorgan asserts that Attachments E, G and H to its Auction Report should be treated as Internal Confidential Information as the information is sensitive, commercial and/or proprietary which is not generally available to the public. JPMorgan also maintains that the selling owners and the prospective bidders had an expectation that the information exchanged during the course of the auction process would be kept confidential because if it were disclosed, it would cause competitive damage.

Likewise, JPMorgan contends that the Bidder Confidential Information, which is attached as items I and J to the Auction Report, should be kept confidential for the same reasons as the Internal Confidential Information. They also ask for more restrictive treatment of the Bidder Confidential Information, as that material derives from the third party bidders who entered a confidentiality agreement with JPMorgan which permitted disclosure only to JPMorgan, the selling owners,

state and federal regulators, state attorneys general and state public advocates.

The Bidder Confidential Information, JPMorgan alleges, has been treated with paramount confidentiality throughout the auction process, where even the selling parties have only accessed the documents with names and identifying information redacted. JPMorgan states that the ability to maintain the bid proposals with the strictest security allowed for maximum participation in a robust competitive auction. They assert that the bidders have a strong and legitimate expectation of confidentiality since the nature and structure of the bid proposals might reveal sensitive aspects of their competitive market strategies.

## **II. PROPOSED TREATMENT OF THE INFORMATION**

JPMorgan has suggested different methods of treating the confidential material that has been categorized as Internal or Bidder Confidential Information. They suggest the differing provisions have been developed to balance the legitimate interests of both the parties and the public. They also suggest, however, that both sets of Confidential Information be subject to a Protective Order.

**A. Internal Confidential Information**

Internal Confidential Information which consists of Attachments E, G, and H to the Auction Report would be deemed confidential and will be available pursuant to a protective order and the following:

The Internal Confidential Information would be provided to the Commissioners and the Commission Staff in accordance with the Protective Order.

One numbered set of the Internal Confidential Information would be provided to the OCA and the staff of the OCA in accordance with the Protective Order and where each member of the OCA executes an Acknowledgment and Agreement to be bound by the terms of the Protective Order.

Should the OCA obtain a consultant, one numbered set of the Internal Confidential Information would be provided to the consultant upon disclosure of the name of the consultant and the office location the information will be maintained, provided that the consultant and each member of the consultant's staff who will access the material executes an Acknowledgment and Agreement to be bound by the terms of the Protective Order.

One numbered set of the Internal Confidential Information would be provided to any other Party to the proceedings where the Party, each member of the party's staff or

retained professionals who has access to the material executes an Acknowledgment and Agreement to be bound by the terms of the Protective Order. If JPMorgan disagrees with a request by a Party for the confidential material, the matter would be submitted to the Commission for prompt resolution.

**B. Bidder Confidential Information**

JPMorgan suggests Bidder Confidential Information should be made available only to the Commission, the OCA and the selling owners. They assert Attachments I and J to the Auction Report and any other information which may be requested of JPMorgan relating to third party bids or any analysis conducted by on behalf of JPMorgan should be subject to a Protective Order that allows disclosure in the following manner:

1) Bidder identities and any information that might reveal identity would be redacted.

2) Documents constituting Bidder Confidential Information would be maintained in a data room at the Concord offices of Cleveland, Waters & Bass, for review during normal business hours, by the OCA, the staff of the OCA or any consultant retained by the OCA and any selling owner who is an applicant in the docket together with their staff or outside retained professionals. Each of these parties would be required

to execute an Acknowledgement and Agreement to be bound by the terms of the Protective Order.

3) Bidder Confidential Information would be available to the Commissioners or Commission staff at the Commission building.

If any authorized recipient of the Bidder Confidential information makes notes or summaries concerning the information, those notes or summaries would also be deemed Confidential and be subject in all respects to the Protective Order. The notes or summaries must be kept in a confidential manner at the reviewing parties' respective offices.

Only the persons described herein would be authorized recipients. The information could only be disseminated to another person, after notice and opportunity for hearing and upon a subsequent order of the Commission.

### **C. Terms of Protective Order**

JPMorgan requests that each Party deemed eligible for either or both of the Internal Confidential Information or Bidder Confidential Information materials be subject to a Protective Order that binds the Parties not to use or disclose any of the material for any other purpose than to prepare for and conduct the proceedings of this docket. They suggest the Protective Order require each authorized recipient of the material to keep

the Confidential Information secure and to maintain a written log of all individuals granted access to the material. They also urge that no copies of the Confidential Information be made or removed from an authorized location.

In conducting discovery, JPMorgan urges if Confidential Information is used the material should be confined to a separate document that is prominently labeled "Confidential and Proprietary Information." The same treatment is requested if the material is used in any motion, brief or other writing. According to JPMorgan, the discovery request, brief, motion or other writing may however, cite the information by title or Exhibit reference without disclosing the Confidential Information contained therein.

JPMorgan also requests that where the material is used during the course of a public hearing the record be closed to any person not subject to the Protective Order. Moreover, JPMorgan requests that the hearing be limited to those who are authorized recipients of the material. The transcript of the hearing that includes discussion related to Confidential Information should also be sealed, noting that the material is "Confidential and Proprietary."

Should Confidential Information be disclosed to any persons other than an Authorized Recipient, JPMorgan requests that they be immediately informed of all facts relating to the disclosure. JPMorgan also requests that where the production of Confidential Information inadvertently omits the designation of confidential or proprietary, the omission will not be deemed a waiver of the confidentiality.

Finally, JPMorgan requests that all copies of the Confidential Information, including notes or summaries of Bidder Confidential Information, shall be either destroyed or returned to JPMorgan no later than thirty days after the final decision in the docket.

### **III. OBJECTIONS TO MOTION**

The only Party to submit a response to JPMorgan's request was the Campaign for Ratepayers' Rights (CRR), who argues that it cannot meaningfully participate in the docket if it is denied access to Bidder Confidential Information. CRR contends that it intends to explore whether the bid submitted by the winning bidder is in fact the most advantageous to New Hampshire ratepayers.

CRR asserts that without the option to compare the winning bid with the others, it is denied the opportunity to reasonably participate in a public proceeding and cannot

adequately make judgment on the propriety of the winning bid. CRR further claims that JPMorgan's commitment to bidder confidentiality does not supercede other parties' opportunity to participate in the docket, especially where CRR stands ready to accept the same obligations to maintain confidentiality as the OCA.

#### **IV. COMMISSION ANALYSIS**

The New Hampshire Right-to-Know Law provides each citizen with the right to inspect all public records in the possession of the Commission. See RSA 91-A:4, I. The statute contains an exception, invoked here by JPMorgan, for "confidential, commercial or financial information." RSA 91-A:5, IV. The case law interpreting whether information is considered confidential requires an objective test; it is not based on the subjective expectations of the party generating the information. See *Union Leader Corp. v. New Hampshire Housing Finance Authority*, 142 NH 540 (1997). In order to show that the information is sufficiently "confidential to justify nondisclosure the party resisting disclosure must prove that the disclosure is likely to (1) impair the state's ability to obtain necessary information in the future; or (2) cause substantial harm to the competitive position of the person from whom the information was obtained." *Id.*

We have reviewed the request for confidential treatment and protective order and find that JPMorgan has provided credible arguments as to the commercial sensitivity of the information for which protection is sought. Disclosure could result in competitive damage to bidders, and also impair the ability of the state to obtain such information in the future. Not only do we believe the information is commercially sensitive, we also believe that public disclosure of bids, bid analyses, financial assessments, and data related to the auction would chill future auction transactions, thereby limiting the results that might otherwise have been achieved.

We are also required to apply a balancing test to determine whether the asserted private confidential, commercial, or financial interest outweighs the public's interest in disclosure. *Id.* at 553 (citations omitted); *see also North Atlantic Energy Service Corporation*, 85 NH PUC 394 (2000). We find that JPMorgan has made a *prima facie* showing that the public's interest in disclosure is outweighed by the interests of the selling owners, bidders and even the state. Accordingly, we find the information that JPMorgan seeks to keep confidential meets the standard exempting it from public disclosure.

As to the recommended treatment of the Confidential Information and the request for protective order, we agree with and adopt JPMorgan's proposal, with the exception of the proposal to limit the Bidder Confidential Information strictly to the Commission and the OCA. We concur with CRR's position that in order for that organization to meaningfully participate in the docket it should have access to the same information as does the Commission. In fact, in *Society for Protection of NH Forests v. Water Supply & Pollution Control Commission*, 115 NH 192 (1975), the court found that intervenors to a docket are entitled to examine all the evidence relied upon by the commission in making its final determination. If we follow that holding to its logical conclusion, we believe that whatever information we might reasonably rely upon in making a decision should be accessible to all Parties who have full intervenor rights and who have sought such information to present their case on the issues they have raised, as CRR has by its position at the prehearing conference and opposition to the protective order requested here.

At this time, CRR wishes to review the Bidder Confidential Information only to determine if there is a basis to contest the award to the winning bidder on the grounds that it is not advantageous to New Hampshire consumers relative to the other bids. For this limited purpose, then, the attorney for and

Chairperson of the Board of CRR shall be given access to the Bidder Confidential Information at Cleveland, Waters & Bass, after execution of the Acknowledgement of Agreement by such individuals, to be bound by the terms of the protective order. Should CRR thereafter wish to expand the number of persons with access to the Bidder Confidential Information, it would then file a further motion to that effect.

Lastly, the terms of the protective order are consistent with our normal practice for handling confidential material during discovery and at hearing. As such, the terms are not onerous and should be followed carefully by all Staff and Parties to this docket.

As we have consistently held on motions for confidential treatment, this ruling is provisional in the sense that we retain the ongoing authority to revisit all confidentiality determinations we make under RSA 91-A should circumstances warrant.

**Based upon the foregoing, it is hereby**

**ORDERED**, that the JPMorgan motion for confidentiality and protective order is GRANTED as filed, but for the request to limit Bidder Confidential Information; and it is

**FURTHER ORDERED**, that CRR shall have access to the Bidder Confidential Information as discussed herein.

By order of the Public Utilities Commission of New Hampshire this fifth day of June, 2002.

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Thomas B. Getz  
Chairman

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Susan S. Geiger  
Commissioner

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Nancy Brockway  
Commissioner

Attested by:

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Debra A. Howland  
Executive Director & Secretary