

THE STATE OF NEW HAMPSHIRE
before the
PUBLIC UTILITIES COMMISSION

Public Service Company of New Hampshire
RSA 366:3 Affiliate Contract Filing

Docket No. DE 11-_____

Motion for Confidential Treatment
Pursuant to RSA Chapter 91-A
and
N.H. Code Admin. Rules Puc § 203.08

Pursuant to RSA 91-A:5,(IV)(Supp.) and N.H. Code Admin. Rules Puc § 203.08, Public Service Company of New Hampshire ("PSNH" or the "Company") hereby requests confidential treatment and the issuance of a protective order for certain confidential, commercial, or financial information contained in the contract ("Contract") entered into by and between PSNH and its affiliate E. S. Boulos Company ("ESB"). The information for which confidential treatment and protection is sought includes ESB pricing information from 2008 to present and tables that have pricing information from non-affiliated entities. All other information provided as part of the accompanying filing would not be deemed confidential.

In support of this Motion for Confidential Treatment, PSNH says the following:

1. RSA 366:3 requires a public utility to file with the Commission a copy of any contract or arrangement, the consideration of which exceeds \$500, entered into between a public utility and an affiliate providing for the furnishing of managerial, supervisory, construction, engineering, accounting, purchasing, financial, or any other services either to or by a public utility or an affiliate.
2. N.H. Code Admin. Rules Puc § 203.08(a) provides 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.

3. Rule Puc § 203.08(b) requires a motion for confidential treatment to include:
 - i.) the documents, specific portions of documents, or a detailed description of the types of information for which confidentiality is sought; ii.) specific reference to the statutory or common law support for confidentiality; and, iii.) a detailed statement of the harm that would result from disclosure and any other facts relevant to the request for confidential treatment.
4. Pursuant to RSA 366:3, PSNH is providing copies of contracts with affiliates. Certain of the contracts being provided were entered into by and between PSNH and E.S. Boulos Company, Inc., a wholly-owned subsidiary company of Northeast Utilities. As noted in the accompanying filing, ESB offers comprehensive design/build services for both high and medium voltage electrical projects. These services are performed in the competitive marketplace. More information regarding ESB may be obtained from their website, at <http://www.esboulos.com/>.
5. PSNH is seeking confidential treatment of the pricing terms ('Pricing Information') for contracts between the Company and E.S.Boulos for the period from 2008 to present.
6. The Pricing Information represents sensitive, confidential financial and commercial information. The disclosure of this information would be harmful to E.S. Boulos, PSNH and its customers.
7. Disclosure of the Pricing Terms would provide competitors with information regarding both E.S. Boulos's pricing and the Company's costs for services; such information would distort the competitive marketplace for both E.S. Boulos and the Company. Disclosure of the Pricing Information would reveal the specific confidential, commercial, or financial terms and conditions and thereby could harm each party's ability to negotiate favorable contracts in the future.

8. RSA Chapter 91-A is commonly referred to as the “Right-to-Know Law.” The Right-to-Know Law provides each citizen with the right to inspect government records in the possession of the Commission. However, under RSA 91-A:5, certain government records are exempted from the disclosure requirements of RSA Chapter 91-A. In particular, RSA 91-A:5, IV exempts from disclosure records pertaining to confidential, commercial, or financial information.
9. The New Hampshire Supreme Court has had the opportunity to discuss the requirements of the Right-to-Know Law on several occasions. Most recently, in *Professional Firefighters of New Hampshire v. Local Government Center, Inc.*, 2010 WL 323119, 6 (N.H.) (N.H., January 29, 2010), the Court noted: “The Right-to-Know Law does not guarantee the public an unfettered right of access to all governmental workings, as evidenced by the statutory exceptions and exemptions.” *See also, Goode v. New Hampshire Office of Legislative Budget Assistant*, 148 N.H. 551, 553 (2002), and *Brent v. Paquette*, 132 N.H. 415, 426, (1989) (“[T]he Right-to-Know Law guarantees every citizen the right to inspect all public records except as otherwise prohibited by statute or RSA 91-A:5.” (quotation omitted)).
10. The Court opined on the confidential, commercial, or financial information exemption of the Right-to-Know Law in *Union Leader Corp. v. New Hampshire Housing Finance Authority*, 142 N.H. 540 (1997), a case cited by the Commission dozens of times. In its decision, the Court noted:

The terms “commercial or financial” encompass information such as business sales statistics, research data, technical designs, overhead and operating costs, and information on financial condition. *Landfair v. United States Dept. of Army*, 645 F.Supp. 325, 327 (D.D.C.1986); *see Comstock Intern. v. Export-Import Bank of U.S.*, 464 F.Supp. 804, 806 (D.D.C.1979) (loan agreements are financial or commercial information). Whether documents are commercial depends on the character of the information sought. Information is commercial if it relates to commerce. *See American Airlines, Inc. v. Nat. Mediation Bd.*, 588 F.2d 863, 870 (2d Cir.1978).

142 N.H. at 553.

The Court also noted:

To best effectuate the purposes of our Right-to-Know Law, whether information is “confidential” must be determined objectively, and not based on the subjective expectations of the party generating it. “To determine whether [records] ... are exempt as confidential, the benefits of disclosure to the public must be weighed against the benefits of non-disclosure to the government.” *Chambers v. Gregg*, 135 N.H. 478, 481 (1992). We find instructive the standard test employed by the federal courts: To show that information is sufficiently “confidential” to justify nondisclosure, the party resisting disclosure must prove that disclosure “is likely: (1) to impair the [State's] ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.” *National Parks and Conservation Ass'n v. Kleppe*, 547 F.2d 673, 677-78, (D.C.Cir.1976) (quotations omitted) (*National Parks II*).

Id. at 553-554 (internal citations omitted).

11. In determining whether commercial or financial information should be deemed confidential and private, the Commission has followed *Union-Leader* as well as the three-step analysis applied by the New Hampshire Supreme Court in *Lambert v. Belknap County Convention*, 157 N.H. 375, 382 (2008). The *Lambert* analysis requires: i) an evaluation of whether there is a privacy interest at stake that would be invaded by the disclosure -- when commercial or financial information is involved, this step includes a determination of whether an interest in the confidentiality of the information is at stake; ii) when a privacy interest is at stake, the public’s interest in disclosure is assessed; and, iii) when there is a public interest in disclosure, that interest is balanced against any privacy interests in nondisclosure. See *Unitil Energy Systems, Inc.*, Order No. 25,054, Docket No. DE 09-009 (December 18, 2009); *Public Service Company of New Hampshire*, Order No. 25,059, Docket No. DE 09-158 (December 31, 2009).

12. The Commission, using the *Union-Leader* and *Lambert* standards discussed above, has regularly granted confidentiality for information similar to the PSNH/ESB Contract. For example:

- a. “If public disclosure of confidential, commercial or financial information would harm the competitive position of the person from whom the information was obtained, the balance would tend to tip in favor of non-disclosure.” *Re National Grid plc*, 92 NHPUC 279, 326 (2007) (granting confidential treatment for information regarding system upgrades and capacity contain information that, if publicly disclosed, would likely harm its competitive interests and the interests of ratepayers who would ultimately bear the burden of increased contract costs resulting from disclosure);
- b. “Inasmuch as disclosure in this instance could negatively affect customers, we do not find the public's interest in review of the financial, commercially sensitive information sufficient to outweigh the interest that National Grid and its bidders have in maintaining confidentiality of such information.” *Re Granite State Electric Company dba National Grid*, 92 NHPUC 215, 219 (2007) (granting a protective order for information received by National Grid as part of a competitive RFP process including “a brief discussion of the selection of the winning bidder, a bidder key that identifies the suppliers who participated in the RFP, the comparative energy and capacity prices received from the bidders (including the estimated total cost according to the evaluation loads provided with the RFP), a ranking of the transactions offered by each bidder in terms of financial security (including consideration of reasonable extension of credit to National Grid and the creditworthiness of the supplier and the credit assurance offered), the information provided by each bidder in the proposal submission forms, and, a redlined version of the negotiated purchase and sale agreement.);
- c. Regarding a series of contracts provided by PSNH: “The information in the documents is financially or commercially sensitive in the sense that its public disclosure would reveal information that could place Ensio Resources at a competitive disadvantage relative to other firms that purchase end products of coal-burning processes and PSNH at a

competitive disadvantage in future negotiations with end-product purchasers.” *Re Public Service Company of New Hampshire*, 84 NHPUC 484, 485 (1999);

- d. Granting confidential treatment for bidder information obtained during the auction sale of the Seabrook Nuclear Generating Station: “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.” *Re North Atlantic Energy Corporation*, 87 NHPUC 396, 399 (2002).

13. The confidential, commercial and financial information that has been removed from the redacted version of the Contract clearly involves a privacy interest that would be invaded by disclosure. Both PSNH and ESB routinely participate in the competitive construction services marketplace. Disclosure of the confidential, commercial and financial information would damage PSNH’s ability to attract competitive bids in the future, negatively affecting retail customers by increasing the cost of goods and services included in rates. Disclosure would also damage ESB’s competitive position when bidding on future contracts. Contracts with suppliers and confidential bidding information have historically been granted confidential treatment by the Commission. *Unitil Energy Systems, Inc.*, 91 NHPUC 145, 150 (2006). In *Re Granite State Telephone*, 81 NH PUC 472 (1996), the Commission found that disclosure of billing and collection services costs that Granite State Telephone acquired from an affiliate “would result in harm because it would provide an unfair advantage to competing toll providers.” As a result, the Commission granted protective treatment of that information.

14. Under the Commission’s interim Chapter 200 Rules, similar information is entitled to routine treatment as being confidential by Rule Puc 201.06, i.e. (23)


REC prices; (24) RGGI allowances; (25) supplier commodity pricing and special contracts; (29) default service information. See also *Re New Hampshire Gas Corporation*, 92 NH PUC 430 (2007) ("the identification of suppliers and costs would make it difficult for NGHC to negotiate with other suppliers in the future.")

WHEREFORE, PSNH respectfully requests that the Commission grant confidential treatment of the confidential, commercial, or financial Pricing Information by issuance of a protective order as requested herein. In accordance with N.H. Code of Administrative Rules Puc 203.08(g) the unredacted information should be labeled "Confidential," held in a secure location within the Commission's offices, and not disclosed to the public or any party other than the Commission staff without PSNH's consent.

Respectfully submitted this 26th day of April, 2011.

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

By: _____


Robert A. Bersak

**Assistant Secretary and Assistant General Counsel
Public Service Company of New Hampshire
780 N. Commercial Street
Manchester, NH 03101-1134**

**603-634-3355
bersara@PSNH.com**