

STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

DOCKET NO. DW 15-476

AQUARION WATER COMPANY OF NEW HAMPSHIRE, INC.

MOTION FOR PROTECTIVE ORDER AND CONFIDENTIAL TREATMENT

Aquarion Water Company of New Hampshire, Inc. (“Aquarion” or the “Company”) by its attorneys, McLane Middleton, Professional Association, respectfully requests that the Public Utilities Commission (the “Commission”) issue a protective order in accordance with Puc 203.08 to preserve the confidentiality of information relating to confidential infrastructure information.¹

In support of its motion, Aquarion states as follows:

1. On November 16, 2015, the Commission issued data request 1-6 to the Company in which it sought the following:

Please provide a copy of the Tata & Howard “capital efficiency study” referenced on p. 6, line 20 of Mr. McMorrans’s testimony.

The Company responded to the request by providing a summary of the requested study to the Commission. In response to the Commission’s second request for the entire study, Aquarion, concurrently with this Motion, submits the Tata & Howard “Capital Efficiency Study” (the “Study”). The Study contains confidential infrastructure information including identification of areas of the distribution system in need of rehabilitation, repair, or replacement. The Study includes information regarding the location and evaluation of the existing water infrastructure,

¹Critical infrastructure information for which confidential treatment is sought has been defined by Congress in the Critical Infrastructure Information Act of 2002 to include “information not customarily in the public domain.” 6 U.S.C §212(3). In this instance, such information includes; information relating to the location, status, and condition of all existing water infrastructure including all water pipes, storage facilities and appurtenances. This information is normally maintained as private, confidential information. Under the Act, such critical infrastructure information is exempt from the Freedom of Information Act. 6 U.S.C. §133(a)(1)(A).

including water transmission and distribution piping and appurtenances as well as water storage facilities.

2. Governmental records, as defined by RSA 91-A:1-a, are generally made available for public inspection pursuant to the Access to Governmental Records and Meetings Statute (a.k.a. the Right-to-Know Law). *See* RSA 91-A:4; *see also* N.H. Admin Rule PUC 201.04. There are certain exemptions, however, from the requirement that public agencies or public bodies produce government records. One such exemption applies to “confidential, commercial, or financial information . . . and other files whose disclosure would constitute invasion of privacy.” RSA 91-A:5.

3. To determine whether information is exempt from disclosure because it is confidential or would constitute an invasion of privacy, the benefits of disclosure to the public must be weighed against the benefits of non-disclosure. *Chambers v. Gregg*, 135 N.H. 478, 481 (1992); *see also Union Leader Corp. v. NH Housing Fin. Auth.* 142 N.H. 540, 553 (1997) (stating that “[t]he terms ‘commercial or financial’ encompass information such as ‘business sales statistics, research data, technical designs, overhead and operating costs, and information on financial condition’) (internal quotations and citations omitted) (emphasis added).

4. Pursuant to federal regulations, Critical Infrastructure means “existing and proposed systems and assets, whether physical or virtual, the incapacity or destruction of which would negatively affect security, economic security, public health or safety, or any combination of those matters.” 18 C.F.R. §388.113(c).

5. Confidential infrastructure information is routinely considered confidential, sensitive and private, and is not disclosed publicly. Extreme care must be used to protect sensitive materials that are considered and/or contain confidential infrastructure information.

Aquarion has provided the Study to the Commission which contains information that should be protected from public disclosure because it provides specific details about Aquarion's confidential infrastructure including; the precise location of key distribution pipes, wells, treatment facilities, and pump stations within Aquarion's service territory. Aquarion typically maintains this information in such a manner so as to protect the material from unauthorized access or accidental disclosure. Keeping certain confidential infrastructure information from public disclosure is critical to the safe and reliable operation of the water distribution system in Aquarion's service territory and is necessary to keep the general public safe.

6. Producing such information to the general public could negatively impact the water infrastructure and distribution system in the region, which substantially outweighs any public benefit. In addition, this type of information could be useful to a person seeking to damage critical infrastructure. The benefits of non-disclosure to the general public are largely outweighed by any public interest in obtaining these documents. In addition, Aquarion will not object to sharing this information with parties to this PUC proceeding that have a reasonable basis for reviewing the information, subject to those parties being bound by the terms of the Order issued granting this Motion.

7. Moreover, RSA 91-A:5, IV provides that records and other files, the disclosure of which would constitute an invasion of privacy, are exempt from the public disclosure requirements of RSA 91-A. Under the three-pronged analysis established in *Lambert v. Belknap County Convention*, 157 N.H. 375 (2008) and *Lamy v. New Hampshire Public Utilities Commission*, 152 N.H. 106 (2005), the Study is exempt from public disclosure under RSA 91-A, IV. The same three-pronged analysis has been used by the Commission to determine whether information should be granted confidential treatment under RSA 91-A:5, IV. *See e.g.*, New

Hampshire Regulated Utilities, New Hampshire Pub. Util. Comm., Order No. 25,457, 2013 WL 865994 (2013) (granting a motion for confidential treatment of certain electrical system diagrams and system circuit maps). The three prong analysis set out by the New Hampshire Supreme Court and the Commission requires the following considerations:

First, the analysis requires an evaluation of whether there is a privacy interest at stake that would be invaded by the disclosure. If no such interest is at stake, the Right-to-Know Law requires disclosure. Second, when a privacy interest is at stake, the public's interest in disclosure is assessed. 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. Finally, when there is a public interest in disclosure, that interest is balanced against any privacy interests in non-disclosure.

Order No. 25, 457 at *5 and *Lambert v. Belknap County Convention*, 157 N.H. at 382-83.

8. In this case, Aquarion has satisfied the three prong analysis. First, Aquarion has identified a privacy interest in the information contained in the Study in order to protect the safety and welfare of the public and the water infrastructure and distribution system. Second, there is no prevailing public interest in disclosure of this information as it will provide no information about the conduct or activities of the Commission or other parts of New Hampshire state or local government. Further, Aquarion will not object to sharing this information with parties to the proceeding that have a reasonable basis for reviewing the information, subject to a party being bound by the terms of the Protective Order issued granting this Motion. Moreover, disclosure will not inform the public of the conduct or activities of its government; confidential infrastructure information is maintained confidentially to ensure public safety. Third, even assuming that there is a public interest in disclosure of this information, that interest is outweighed by Aquarion's privacy interests in non-disclosure to ensure the safe operation and reliability of the water distribution system. Moreover, subject to a protective order, the public's interest in ensuring access to public records will be preserved.

9. The Company requests that the Commission issue a protective order and that the Commission treat the Tata & Howard Study, which contains confidential infrastructure information, as confidential pursuant to RSA 91-A:5. *See also* PUC 203.08(a) (presiding officer or chairman may protect documents that are exempt from disclosure pursuant to RSA 91-A:5).

10. Aquarion respectfully request the Commission issue a Protective Order containing provisions similar to the following:

Accordingly, a protective order is appropriate for the Tata & Howard Capital Efficiency Study provided in response to data request 1-6. This Study shall therefore be marked confidential. One copy shall be filed with the Commission and maintained in a secure file separate from the public records of the proceedings in this matter.

If a Party desires to view the confidential information, said Party will execute a protective agreement in the form set forth in Appendix A, and forward true copies of the agreement to the Applicants and the Commission. Only Parties authorized by the Commission, after receipt of the executed protective agreement, shall be afforded access to the confidential information. The Parties shall not make any copies of such information or use the information for purposes other than the preparation for, and conduct of, the proceedings in this docket.

Unless otherwise ordered, the Parties shall not reference the confidential information during public proceedings in this docket or at any time in public. Upon completion of this proceeding and any resulting appeals, the Parties shall destroy any notes referencing the confidential information and return all confidential information to Aquarion. Within sixty days thereafter each Party shall certify to Aquarion that said notes have been destroyed and all confidential information returned. The rights of the Parties under this order are not assignable and may not be transferred in any manner.

Unless otherwise ordered, any future requests for a protective order, which are subsequently granted by the Commission, will be handled with the same procedures detailed above.

11. In addition to any provisions included in the order by the Commission, in order to minimize the risk of inappropriate disclosure of Aquarion's protected confidential information, Aquarion respectfully request that the Commission's Protective Order: (1) specify that Aquarion is not required to provide confidential information via electronic mail to the

Parties; and (2) specify that if Parties are to be afforded access to the protected information, such access shall occur by viewing the confidential information at the Commission's offices.

12. Finally, the Protective Order should also be extended to any discovery, testimony, argument or briefing relative to the confidential information. *See* Puc 201.04(a)(6).

WHEREFORE, Aquarion Water Company respectfully request that the Commission:

- A. Grant Aquarion's request that the Tata & Howard Capital Efficiency Study remain confidential;
- B. Issue a Protective Order as requested herein that preserves the confidentiality of the information contained in the Tata & Howard Capital Efficiency Study; and
- C. Grant such further relief as it deems appropriate.


Respectfully Submitted,

AQUARION WATER COMPANY
OF NEW HAMPSHIRE, INC.

By Its Attorneys

McLANE MIDDLETON,
PROFESSIONAL ASSOCIATION

Date: December 8, 2015

By: 
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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Motion for Protective Order and Confidential Treatment has been electronically served and mailed to the service list in this proceeding.

Dated: December 8, 2015

Rebecca S. Walkley
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