DE 16-693

STATE OF NEW HAMPSHIRE

BEFORE THE

PUBLIC UTILITIES COMMISSION

Public Service Company of New Hampshire

Petition for Approval of Power Purchase Agreement

Docket No. DE 16-693

Opposition of the Office of the Consumer Advocate to Motion for Confidential Treatment

NOW COMES the Office of the Consumer Advocate ("OCA"), a party in this docket, and opposes the Motion for Confidential Treatment appended to the petition submitted by the electric distribution utility Public Service Company of New Hampshire d/b/a Eversource Energy ("PSNH"). In support of this opposition the OCA states as follows:

1. On June 28, 2016, PSNH filed a petition with the Commission seeking approval of a 20-year, 100-megawatt Power Purchase Agreement ("PPA") between PSNH and Hydro Renewable Energy, Inc., an indirect wholly owned subsidiary of the provincially owned electric utility Hydro Quebec.[1] The power at issue would be transmitted from its sources in Quebec to a delivery point in Deerfield, New Hampshire via the controversial Northern Pass transmission project that is being developed by a PSNH affiliate and funded by Hydro Quebec. The petition further seeks authority to recover all costs associated with the PPA through PSNH's Stranded Cost Recovery Charge ("SCRC"), which would have the effect of guaranteeing PSNH its cost recovery notwithstanding the fact that PSNH is a restructured utility that ostensibly sells retail energy into a competitive market. Although

[1] For purposes of clarity and simplicity, this motion will refer to Hydro Renewable Energy, Inc. by the name of its ultimate owner, Hydro Quebec.

the petition touts "expected" (but not guaranteed) "economic benefits to PSNH's customers," PSNH Petition at 4, appended to the petition is a Motion for Confidential Treatment that seeks to treat as non-public information all of the pricing terms of the PPA. If granted, this motion would result in the Commission treating as secret the key information underlying resolution of the central question presented by this docket: whether it is in the best interests of PSNH's captive customers for the Commission to tether them to Northern Pass in such fashion. For the reasons that follow, the PSNH request is contrary to the Right-to-Know Law, RSA 91-A, and thus the OCA requests that the Commission deny the PSNH motion.

2. The OCA agrees with PSNH that RSA 91-A:5 governs the outcome of the confidentiality motion. RSA 91-A:5 exempts certain governmental records from the general rule in RSA 91-A:4 that such records be available for public inspection and copying. Application of the RSA 91-A:5 exemptions is a discretionary matter; the Right-to-Know law is not a privacy statute and the Commission is free to waive application of the section 5 exemptions if it wishes to do so. *See Chrysler Corp. v. Brown*, 441 U.S. 281, 292-93 (1979) (concluding that the federal Freedom of Information Act "by itself protects the submitters' interest in confidentiality only to the extent that this interest is endorsed by the agency collecting the information"); *38 Endicott Street North, LLC v. State Fire Marshal*, 163 N.H. 656, 660 (2012) (noting that "federal interpretations of the federal Freedom of Information Act" provide "guidance" in interpreting analogous provisions of the Right-to-Know Law); *but see Valley Green Natural Gas LLC*, Order No. 25,868 in Docket No. DG 15-155 at 6 (referring to "rights to the protection of . . . confidential information" under RSA 91-A:5). When an agency invokes one of the discretionary

exemptions, it must interpret such exemption "restrictively" in light of the relevant "statutory and constitutional objectives" of "the greatest possible public access to the actions, discussions and records of all public bodies, and their accountability to the people." *New Hampshire Right-to-Life v. Director, N.H. Charitable Trusts Unit*, 2016 N.H. LEXIS 55 at [7] to [9] (quoting RSA 91-A:1; other citations omitted).

3. The OCA further agrees with PSNH that the only RSA 91-A:5 disclosure exemption with possible application here is the provision in RSA 91-A:5, IV governing "confidential, commercial, or financial information." As PSNH notes, application of this exemption involves the use of a three-step balancing test in which the Commission must first evaluate the privacy interest that would be compromised by public disclosure (and make the record or records public if there is no such privacy interest), then assess the public's interest in disclosure (i.e., "the extent to which disclosure of the information . . . would shed light on an agency's performance of its statutory duties or otherwise let citizens know what the government is up to"), and, finally, balance the privacy interest against the public's interest in disclosure. *New Hampshire Right-to-Know, supra*, at [23] - [24] (citations omitted); *see also Professional Firefighters of N.H. v. Local Gov't Center, Inc.*, 159 N.H. 699, 707 (2010) (same).

4. To facilitate application of the balancing test, the Commission requires a motion for confidential treatment to contain "(1) [t]he documents, specific portions of documents, or a detailed description of the types of information for which confidentiality is sought; (2) [s]pecific reference to the statutory or common law support for confidentiality; and (3) [a] detailed statement of the harm that would result from disclosure and any other facts

relevant to the request for confidential treatment." N.H. Code Admin. Rules Puc 203.08(b). PSNH has adequately met the first two of these requirements.

5. However, the PSNH motion must be denied for want of the "detailed statement of harm" required by Puc 203.08(b)(1). In lieu of such a statement, PSNH has simply provided an admittedly well-worn set of conclusory assertions to the effect that (1) it promised confidentiality to its counterparty, and (2) that public disclosure would "detrimentally impact both PSNH's ability to attract negotiating partners in the future, as well as [Hydro Quebec's] competitive position in the marketplace." PSNH Motion at 2, ¶ 6. Although this appears to be a matter of faith among utilities and generators whose wholesale power transactions are subject to Commission scrutiny, to the best of the OCA's knowledge *no seeker of confidential treatment has ever produced any evidence of these ill effects*. Even assuming PSNH earnestly believes such a claim, it subjective views and those of Hydro Quebec (to the extent PSNH has standing to assert them) have no relevance here. *See N.H. Right-to-Life* at [24] ("Whether information is exempt from disclosure because it is private is judged by an objective standard and not by a party's subjective expectations.") (citation omitted). In these circumstances, the command of the New Hampshire Supreme Court is inexorable: No privacy interest means no confidential treatment.

6. In arguing to the contrary, PSNH relies on an order issued by the Commission on May 1, 2009 – Order No. 24,965 – in Docket No. DE 08-077, which concerned a PPA, ultimately approved, between PSNH and Lempster Wind, LLC. However, Order No. 24,965 does not provide any useful guidance or persuasive authority; it simply recites without analysis

that the Commission granted a motion for confidential treatment (over the objection of an intervenor) at the prehearing conference in that docket. Order No. 24,965 at 2.[2]

7. Assuming *arguendo* that PSNH has a cognizable privacy interest (and/or has standing to assert such an interest on behalf of Hydro Quebec, which has not appeared), the Commission must next assess the public's interest in disclosure. PSNH simply ignores this element in its motion. This is understandable because the public's interest in disclosure looms in an extraordinarily large fashion here. To state the obvious, in essence what is happening here is that Eversource – which owns both Northern Pass Transmission and PSNH – is proposing to commit approximately ten percent of the project to its retail customers in New Hampshire in the hope that this will defuse the widespread public opposition to the project, bolster the case for approval of the transmission project by the Site Evaluation Committee, and demonstrate to the satisfaction of the Commission and the public that Northern Pass will yield palpable benefits to electric consumers in the Granite State. The petition itself touts not just the potential economic benefits of the PPA but also the fact that it would lessen dependence on fossil fuel for the production of electricity and increase fuel diversity. The news release issued by PSNH states that the PPA "is expected to deliver additional benefits that, combined with the lowering of market power prices, bring the total estimated energy

[2] The full docket in DE 08-077 is available at http://www.puc.nh.gov/Regulatory/Docketbk/2008/08-077.htm. It reveals that the objection to the PSNH motion for confidential treatment of key provisions of the Lempster Wind PPA did not, as the OCA does here, question the existence of a cognizable privacy interest. Rather, the objecting intervenor was simply seeking its own access and therefore sought an order requiring PSNH "to negotiate appropriate arrangements with all intervenors" – i.e., confidentiality agreements of the sort that are routinely concluded in dockets subject to confidentiality orders. Constellation's Objection to Motion for Protective Order in Docket DE 08-077 (June 20, 2008) at 2.

cost savings for New Hampshire customers to over $1 billion."[3] The Commission will ultimately judge whether these asserted benefits warrant approval of the PPA. The point here is that the public has the most pressing of interests in scrutinizing whether the Commission comes up with the right answer, something the public cannot do meaningfully if the cost of the contract is treated as secret information. This is not a garden variety case in which the Commission must review a PPA pursuant to RSA 374:57; a PPA that might be entitled to confidential treatment in a more routine proceeding should be subject to public disclosure in these unique circumstances.

8. The public's interest in disclosure is even more pressing than what is demonstrated in the preceding paragraph when one considers the remarkable and unprecedented regulatory treatment PSNH is seeking for its proposed PPA. One would expect a distribution utility entering into a PPA to use it to meet default service obligations and to include its costs in default service rates. Instead, PSNH proposes to turn the concept of "stranded costs" on its head by, in effect, pre-stranding the costs of the PPA – i.e., by including the cost of the PPA in PSNH's nonbypassable Stranded Cost Recovery Charge and thus forcing all of its delivery service customers to pay for this contract regardless of whether they use PSNH or a competitive supplier for energy.

9. The Commission can defer to another day the merits and legality of such a proposition. The PUC need not address at present the confounding similarity of such a plan to the proposed regulatory treatment of natural gas capacity by PSNH as proposed in Docket

[3] https://www.eversource.com/content/general/about/news-room/new-hampshire/newspost?Group=new-hampshire&Post=eversource-and-hydro-québec-reach-important-agreement-to-deliver-clean-energy-to-new-hampshire-customers (accessed on June 30, 2016). This press release does what the petition stops short of doing – touting the PPA as a reason for approving the Northern Pass project. Somewhat audaciously, in the press release PSNH cites its own high rates as a basis for both approving the PPA and the petition pending at the Site Evaluation Committee. *See id.* ("'This agreement is great news for New Hampshire electricity customers who have been struggling to pay some of the highest rates in the country,' said Bill Quinlan, President of Eversource New Hampshire Operations.).

No. DE 16-241. And the Commission need not decide now whether the public interest requires the PUC to force PSNH to accept its statutory fate as a truly restructured distribution company (particularly in light of the divestiture agreement pending in Docket No. DE 14-238, which if approved would end PSNH's ownership of generation facilities nearly 20 years after restructuring first became the state's public policy with the adoption of RSA 374-F) and stop trying to impose upon its customers business risk that properly belong with the shareholders of a restructured utility. The Commission must simply consider here that to the extent distribution service customers are to be required to take on the risks of this proposed PPA in light of its asserted benefits, the public's interest in disclosure of the exact terms of the PPA is at its zenith for purposes of the Right-to-Know Law.

10. In these circumstances any reasonable application of the balancing test specified by the New Hampshire Supreme Court leads the Commission to deny the motion for confidential treatment here. Even if the Commission were inclined to recognize a privacy interest sufficient to justify non-disclosure of a more routine PPA, this extraordinary and controversial PPA should be disclosed to the public if the public is to have a meaningful opportunity to understand what the Commission is "up to" in its regulation of an electric distribution utility that is both the state's largest and the one has resisted and continues to resist restructuring the most assiduously.

11. In arguing to the contrary, PSNH takes up a theme that has been occasionally sounded by the Commission in the past to the effect that the public also has an interest in non-disclosure. *See, e.g., Unitil Energy Systems*, Order No. 25,054 (Dec. 18, 2009) in Docket No. DE 09-009, at 10 (concluding that "the interest in public disclosure of . . . financial,

commercially sensitive information is outweighed by the benefit derived from maintaining the confidentiality of such information, given that *confidentiality helps produce lower rates*") (emphasis added); *Granite State Electric Co.*, Order No. 24,787 in Docket No. DE 07-012 (Sept. 21, 2007) at 10 (granting confidential treatment of information relating to default service bidding, concluding that "disclosure in this instance could negatively affect customers"). There are three things wrong with this approach to an RSA 91-A:5, IV determination.

12. First, the balancing test adopted by the New Hampshire Supreme Court does not contemplate that the public's interest will weigh on both sides of the scale – i.e., that the public itself can have an interest in non-disclosure. To suggest that the public's interest in knowing what the PUC is "up to" is somehow attenuated by a competing public interest (such as lower utility rates) is at fundamental variance with the legislative determination that the public's disclosure interest is an absolute one. The only privacy interests potentially protected by RSA 91-A:5, IV are those of individual people and businesses.

13. Second, the Commission should not simply assume that the public's interest in lower rates is superior to its interest in governmental transparency – or, at least, that it is always so. One might plausibly conclude in the context of the restructured electric industry that customers choosing to rely on their distribution utility for default service are willing to pay somewhat higher prices in exchange for the certainty that comes with a transparent process for cost recovery.[4] In other words, to the extent that secrecy truly begets cheaper

[4] Alternatively, one might plausibly conclude that secrecy has no place in the Stranded Cost Recovery Charge – i.e., that if a cost is so crucial as to be guaranteed to a utility for cost recovery, the analysis to support such a conclusion ought to be fully concluded in public.

electricity, New Hampshire has competitive electricity providers to deliver that result, in part by avoiding plenary oversight by the Commission and its attendant transparency.

14. Finally, to quote Justice Souter, "[t]he syllogism is only as sound as its premises." *Appeal of Public Service Co. of N.H.*, 130 N.H. 748, 754 (1988). *No evidence supports the claim that secrecy yields lower rates.* To the contrary, no less an authority than the Antitrust Division of the U.S. Justice Department has advised the Federal Energy Regulatory Commission (in the context of natural gas markets) that "[m]arket transparency can benefit the public by facilitating market monitoring and by promoting efficient production and investment decisions. . . . Transparency can also increase short-run efficiency by providing appropriate signals to suppliers about how much to produce." Comments of U.S. Justice Department (Feb. 1, 2013) in FERC Docket No. RM13-1-000 at 3. The persistent claim that wholesale transactions subject to Commission oversight will be compromised unless the parties' self-serving and mutual commitment to secrecy has, apparently, never been subjected to skeptical scrutiny in Commission proceedings. Such scrutiny is both warranted and overdue.

15. Pursuant to RSA 363:28, VI, PSNH has furnished the OCA with an unredacted version of its filing in this docket and the OCA will both abide by whatever determination the Commission ultimately makes on the confidentiality motion and treat the redacted information in the filing as non-public during the pendency of the motion. The OCA believes, nevertheless that it is in the best interests of residential utility customers for the Commission's evaluation of this controversial proposal from PSNH to take place in the sunshine.

WHEREFORE, the OCA respectfully request that this honorable Commission:

A. Deny the motion of Public Service Company of New Hampshire for confidential treatment, and

B. Grant any other such relief as it deems appropriate.

Respectfully submitted,

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July 1, 2016

Certificate of Service

I hereby certify that a copy of this Objection was provided via electronic mail to the individuals included on the Commission's service list for this docket.

Donald M. Kreis