

THE STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE D/B/A EVERSOURCE ENERGY

Docket No. DE 16-822

MOTION FOR PROTECTIVE ORDER AND CONFIDENTIAL TREATMENT

Public Service Company of New Hampshire d/b/a Eversource Energy (“Eversource”) hereby moves, pursuant to Puc 201.06, 201.07, 203.08 and RSA Chapter 91-A, the New Hampshire Public Utilities Commission (“Commission”) to grant protective treatment to certain confidential information in this docket. Specifically, Eversource seeks confidential treatment of the information contained within the response to Data Request Staff 4-8 (marked as Exhibit 9 at the June 22, 2017 hearing in this docket), as well as the related testimony on pages 30-31 and page 41 of the transcript, as specified in Attachment A to this motion. In support of this motion, Eversource states as follows:

1. In Docket No. DE 10-195, the Commission approved a Power Purchase Agreement (“PPA”) between Eversource and Laidlaw Berlin Biopower, LLC relating to the output of a biomass-fueled electrical generating station in Berlin, New Hampshire (the “Plant”). Among its various provisions the PPA defines the calculation of a “Cumulative Factor” and a “Cumulative Reduction” relating to the difference in the price of the power purchased under the PPA versus the cost of power in the ISO-New England marketplace. Under the application of the Cumulative Factor, if the cost of power Eversource pays under the PPA exceeds the cost of power in the ISO-New England marketplace, a credit is created for the future benefit of Eversource; that credit is termed the Cumulative Reduction. Over time, as a result of the application of the Cumulative Factor, if the Cumulative Reduction grows to more than \$100 million, the amount over \$100

million is applied as an offset in the following year to the cost of the purchases Eversource would otherwise make under the PPA. Thus, by operation of the PPA the Cumulative Reduction is capped at \$100 million. The cost of the power purchases made by Eversource under the PPA is a component of the Energy Service rate that is the subject of the instant docket.

2. In this case, through Staff question 4-8, the Commission Staff requested information about the status of the Cumulative Reduction and about Eversource's projections relative to it. The Staff likewise cross-examined Eversource witnesses at the June 22, 2017 hearing for similar information about the Cumulative Reduction. At the hearing, and pursuant to a request of Eversource, the information pertaining to the Cumulative Reduction was treated as confidential. The Staff and the Office of Consumer Advocate ("OCA"), however, took the position that the information about the Cumulative Reduction is not, and should not be, confidential. During the hearing, rather than rule upon the confidentiality of the material, the Commission stated that:

I think the way out of this for today is that – is that we're going to treat it as confidential for now. I think we're going to ask the Parties to confer following the hearing, and they will either enter into a stipulation regarding how it gets treated, or it may be that you're going to need to file something to keep it confidential going forward. But it will be confidential until we resolve the question, and we'll deal with it as confidential for the remainder of this hearing, and on the transcript, until the issue gets resolved.

Transcript of June 22, 2017 Hearing in Docket No. DE 16-822 at 37-38.

Following the hearing, and consistent with the above direction, Eversource, the Staff and the OCA conferred on whether a stipulation could be reached. A stipulation was not reached. Accordingly, Eversource now submits this motion to maintain the confidential status of the identified information. For clarity, Eversource maintains the position that the information that is the subject of this motion is appropriately protected as confidential material provided in a "routine proceeding" pursuant to Puc 201.06 and 201.07, and that by submitting this motion

Eversource does not intend to waive any protections that may apply to this material under those regulations.

3. Pursuant to RSA 91-A:5, IV, records that constitute confidential, commercial, or financial information are exempt from public disclosure. In determining whether documents are entitled to the exemption, the Commission applies a three-step analysis to determine whether information should be protected from public disclosure. *See Lambert v. Belknap County Convention*, 157 N.H. 375 (2008), *see also Public Service Company of New Hampshire*, Order No. 25,313 (December 30, 2011) at 11-12. The first step is to determine if there is a privacy interest at stake that would be invaded by the disclosure. If such an interest is at stake, the second step is to determine if there is a public interest in disclosure. The Commission has stated that 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. *Electric Distribution Utilities*, Order No. 25,811 (September 9, 2015) at 5. If both of these steps are met, the Commission balances the privacy interest with the public interest to determine if disclosure is appropriate. *Public Service Company of New Hampshire*, Order 25,167 (November 9, 2010) at 3-4.

4. Eversource submits that there is a substantial privacy interest in the information relating to the status of the Cumulative Reduction. Pursuant to Section 26.1 of the underlying PPA, the parties to that agreement have the obligation to treat the information exchanged under the agreement as confidential unless disclosure is required by law (or is otherwise deemed necessary). Even in such a case, however, the disclosing party is to minimize the scope of any disclosure and “have the recipients maintain the confidentiality of any documents or confidential information covered by this provision, including, if appropriate, seeking a protective order or similar mechanism in connection with any disclosure.” Amended and Restated Power Purchase

Agreement dated May 18, 2011 and filed on May 18, 2011 in Docket No. DE 10-195 at 32. Consistent with that obligation, Eversource has treated the information exchanged about the Cumulative Reduction as confidential, and to the extent it has been disclosed to the Commission, its Staff, or the OCA, through discovery or the like, Eversource has consistently sought to minimize any disclosure, including through submission this motion. Accordingly, there is an interest in ensuring that the confidentiality obligations of the PPA are met.

5. Additionally, information about the status of the Cumulative Reduction could, if revealed, disclose information about the finances and operations of the Plant. This information is highly sensitive competitive information that could reveal how the Plant prices its power for sale in the competitive wholesale marketplace. Similar information about the costs relating to power production has been protected for similar reasons in the past. For example, in seeking confidential treatment of certain information in Docket No. DE 08-077, Constellation, a generator competing in the wholesale market, stated that:

As an active participant in the competitive wholesale and retail electric markets, Constellation's costs are highly sensitive commercial and financial information. If such information became known to Constellation's competitors it could cause substantial harm to Constellation because its competitors would be better able to determine how to price their retail products and the prices that they offer suppliers in the wholesale market.

January 23, 2009 Motion of Constellation for Protective Order and Confidential Treatment at 1-2. The Commission granted that motion as part of Order No. 24,695 (May 1, 2009). Likewise, similar information relating to the pricing of energy sold under the PPA would cause competitive harm, and there is a privacy interest to protect.

6. The second criterion of the Commission's analysis is whether there is a public interest in disclosure. Eversource concedes that there is some public interest in the confidential

information. The price that Eversource pays for energy under the PPA is a factor in the setting of Eversource's Energy Service rate, and, to that extent, there is some public interest in the information included in the setting of the rate. While Eversource does not view this interest as substantial, there is, nonetheless, an interest.

7. As to the final requirement of the Commission's analysis, balancing the relevant public and private interests, there is strong potential that this information would be commercially damaging if it were revealed in the public record. The information, if revealed, would be competitively damaging to the Plant for the same reasons identified by Constellation. Moreover, to the extent that there is some concern about the existence or size of the Cumulative Reduction, such concerns were known and addressed at the time the PPA was approved. In Order No. 25,213 (April 18, 2011) the Commission recognized the potential for risk to consumers from above market costs and added the condition that the Cumulative Reduction be capped at \$100 million. Revealing information about the status of the Cumulative Reduction at any given point in time does nothing to further inform the public about the Commission's activities. Following approval of the PPA, the public is aware of the existence of the Cumulative Reduction, and its purpose, and is aware of the basic terms under which it functions. Having additional information about the current status of the Cumulative Reduction, or about Eversource's projections relating to it,¹ changes nothing about the operation of the Cumulative Reduction or about the benefits and burdens associated with the PPA. Thus, revealing the information publicly would harm the competitive position of the Plant, but will not provide any greater insight into the operation of the Cumulative Reduction beyond

¹ In fact, having Eversource's projections revealed may make matters more confused because, as both the OCA and the Commission acknowledged at the hearing, projections are, by their very nature, inaccurate. *See* Transcript of June 22, 2017 Hearing at 15, 42.

what is already publicly available. Accordingly, the privacy interest outweighs the interest in disclosure and the information should be protected.

WHEREFORE, Eversource respectfully requests that the Commission:

- A. Grant this Motion and issue an appropriate protective order; and
- B. Order such further relief as may be just and reasonable.

Respectfully submitted this 27th day of July, 2017.

**PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE D/B/A
EVERSOURCE ENERGY**

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