

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7628

Joint Petition of Green Mountain Power Corporation,)
Vermont Electric Cooperative, Inc., and Vermont Electric)
Power Company, Inc. for a certificate of public good,)
pursuant to 30 V.S.A. Section 248, to construct up to a)
63 MW wind electric generation facility and associated)
facilities on Lowell Mountain in Lowell, Vermont, and)
the installation or upgrade of approximately 16.9 miles of)
transmission line and associated substations in Lowell,)
Westfield and Jay, Vermont)

Order entered: 12/22/2010

SECOND PROTECTIVE ORDER REGARDING PREFILED TESTIMONY

I. INTRODUCTION

On May 21, 2010, Green Mountain Power Corporation ("GMP") filed a Motion for Confidential Treatment of Prefiled Evidence concerning certain prefiled testimony and related exhibits of GMP witness Douglas Smith. The Public Service Board ("Board") granted GMP's motion by Order dated August 5, 2010. On November 22, 2010, GMP filed a Motion to Amend¹ the Board's Protective Order Regarding Prefiled Testimony. Specifically, GMP's motion to amend seeks confidential treatment for six exhibits to the prefiled rebuttal testimony of GMP witness Douglas Smith, and states that the exhibits contain confidential information that is competitively sensitive and should be maintained as confidential. GMP submitted an averment to support its request for confidentiality.

1. While GMP styled its request as a motion to amend the August 5, 2010, Protective Order, we are issuing a second, separate Protective Order addressing only the six exhibits described in GMP's current motion. Three of these six exhibits are revised versions of exhibits that were granted confidential treatment by the August 5, 2010, Protective Order. If we were to simply amend the August 5, 2010, Protective Order utilizing the amended draft Attachment to Protective Order submitted by GMP, the revised exhibits covered by this Order would be afforded confidential treatment, while their original versions would lose the protection afforded them by the August 5, 2010, Order. GMP should file, within one week of this Order, a statement as to whether it intended the original versions of its exhibits Pet.-DCS-5, 6 and 10 to become public documents, and if not an explanation for why they should continue to receive confidential treatment pursuant to the August 5, 2010, Order.

No other party opposed GMP's motion or filed comments.

II. DISCUSSION

We have reviewed the motion and supporting materials, and we conclude that, with the exception of Exh. Pet.-DCS-4 (Revised) as explained below, GMP has made a *prima facie* showing that confidential treatment is warranted for the information at issue. Therefore, we hereby grant in part GMP's motion for a protective order.

To promote full public understanding of the basis for its decisions, this Board has actively taken steps to limit the amount of information subject to protective orders. We have encouraged parties to remove material from that protection to the extent possible. Since 2001, we have required petitioners seeking a protective order to submit a document-specific (or information-specific) averment of the basis for keeping confidential any document (or information) that they wish to be kept under seal. This arrangement appropriately places a heavy burden on the party seeking confidentiality to justify that decision. It also ensures that counsel for the party seeking confidentiality has actually reviewed and considered the relevant confidentiality factors, as they relate to the specific document or information at issue.² Generally, we only resolve disputes about information when there is a genuine disagreement about its confidential nature.³ However, even when the motion is uncontested the Board will review the motion and supporting averment or averments to ensure that the moving party has presented a *prima facie* case for keeping the document or information under seal.

In determining whether to protect confidential information, we consider three issues:

- (1) Is the matter sought to be protected a trade secret or other confidential research, development, or commercial information which should be protected?
- (2) Would disclosure of such information cause a cognizable harm sufficient to warrant a protective order?

2. *Investigation into General Order No. 45 Notice filed by Vermont Yankee Nuclear Power Corporation re: proposed sale of Vermont Yankee Nuclear Power Station to Entergy Nuclear Vermont Yankee, LLC*, Docket No. 6545 ("Entergy Docket"), Order of 11/9/01 at 5-6.

3. *Id.* at 6.

- (3) Has the party seeking protection shown "good cause" for invoking the Board's protection?⁴

GMP asserts that the six rebuttal exhibits should be kept confidential for the following reasons:

- The exhibits contain information on GMP's market view, forecasts and other competitively sensitive information;
- Release of the information would harm GMP's ability to negotiate agreements for the purchase of power, to participate in the markets for energy, capacity, renewable energy credits and other power products, and manage its risks related to the same;
- In certain instances, GMP is contractually required to keep the information confidential.

We have reviewed the motion and supporting materials, and we have applied the existing standard. With the exception of Exh. Pet.-DCS-4 (Revised), we conclude that GMP has made a *prima facie* showing that the redacted information is commercially sensitive information that should be protected, that disclosure would cause a cognizable harm sufficient to warrant a protective order, and that there is good cause for protecting that information. Therefore, GMP has made a *prima facie* showing that confidential treatment is warranted for the rebuttal exhibits at issue except for Exh. Pet.-DCS-4 (Revised), and we grant in part GMP's motion for a protective order.

With respect to Exh. Pet.-DCS-4 (Revised), we conclude that GMP has not yet provided a sufficient basis for us to grant confidential treatment for this exhibit. GMP's averment, like the averment submitted with its May 21, 2010, Motion for Confidential Treatment of Evidence, applies to a number of separate documents, and in conjunction with its motion, advances the three bases described above in support of its request. However, with respect to Exh. Pet.-DCS-4 (Revised), the averment specifically states, "Because Confidential Exh. Pet. DCS-4 contains forward market price indications developed by a third party broker and provide[d] under condition of confidentiality, GMP now seeks confidential treatment of Confidential Exh. Pet.-DCS-4 (Revised)."

4. See e.g., *Entergy Docket*, Order of 3/29/02 at 2.

Vermont law creates a strong presumption that public records, such as the testimony and exhibits filed in this proceeding, are to be available for public inspection.⁵ GMP's averment asserts generally that the information in the six rebuttal exhibits is competitively sensitive and that its release would hinder its ability to negotiate purchase power agreements, and to participate in the markets for energy, capacity, renewable energy credits and other power products, and to manage its risks related to these activities. However, based on GMP's averment, it appears that with respect to Exh. Pet.-DCS-4 (Revised) GMP is primarily relying on the fact that it agreed with the third-party broker from which it obtained the information to not disclose the information publicly. No such exception exists to Vermont's public records law and we therefore decline to grant the requested confidential treatment on that basis. Not only is there no such statutory basis, granting confidential treatment to an otherwise public document simply because the filing party agreed with another entity that it would seek to keep it under seal would be bad public policy. Parties would then believe they were free to enter into such agreements, for example, to avoid public disclosure of embarrassing information that may cause a regulated utility some measure of discomfort if it were not kept secret. We decline to establish such a precedent.⁶

While we have determined that GMP has not met its burden with respect to Exh. Pet.-DCS-4 (Revised), we are granting GMP leave to file a supplemental averment with additional supporting detail explaining why the information in the exhibit should not be made public. GMP must file the supplemental averment within seven calendar days of the date of this Order and the Board will maintain the status quo with respect to Exh. Pet.-DCS-4 (Revised) until after it has received and reviewed the supplemental averment. We are granting this leave because of the possibility that the information in this exhibit might be competitively sensitive, even though we conclude today that GMP has not yet properly demonstrated that fact.

In addition, we have consistently reminded parties who seek confidential treatment for materials that they have a continuing obligation to reexamine protected information and to release material that would not cause competitive harm, or that has otherwise been made public (even during the course of this proceeding), particularly testimony and exhibits. We expect GMP to do the same here. At this time, we are not explicitly ruling that any specific information

5. 1 V.S.A. § 315.

6. This is consistent with a recent Order issued in our review of a petition by twenty Vermont utilities and the Vermont Public Power Supply Authority for authorization to purchase energy from H.Q. Energy Service (U.S.) Inc. *See* Docket 7670, Order of 12/14/10 at 3-4.

should remain confidential indefinitely. Parties and other persons retain the ability to challenge whether information encompassed by this ruling should be removed from the special protections we adopt in this Order or removed completely from protection as confidential information.

III. ORDER

Therefore, IT IS HEREBY ORDERED that the Confidential Information provided by GMP (as set out in an attachment to this Order) shall be treated in this proceeding as follows:

1. All testimony, affidavits, transcripts, exhibits, and other documents that are subject to this Order as confidential information, and any documents that discuss or reveal documents that constitute confidential material, shall be placed in a sealed record by filing such information in sealed envelopes or other appropriate sealed containers on which shall be endorsed the caption and docket number of the proceeding, the nature of the content (*e.g.*, exhibit, report, etc.), and a statement that it shall not be opened or released from the custody of the Clerk of the Board except by Order of the Board. Notwithstanding such a statement, the members of the Board, any employee or consultant specifically authorized by the Board to assist the Board in this proceeding, and any Hearing Officer appointed to this Docket may have access to such sealed confidential information, but shall not disclose such information to any person.

2. At any hearing or conference in this proceeding, no persons, other than those who have signed or agreed to be bound by this Order and any Protective Agreement approved in this Docket, and those whom the Board has expressly authorized to have access to this confidential information, shall be permitted to give, hear or review testimony given or held with respect to this confidential information.

3. Each Board stenographer or reporter in this proceeding shall acknowledge and be bound by this Order. Each such Board stenographer or reporter shall be instructed to and shall start a separate transcription for testimony or discussion on the record of confidential information. Such transcription shall be marked "Confidential" and shall be sealed and filed with the Clerk of the Board, and copies of the same shall be made available only to those persons authorized to view such information. Such transcription shall, in all other respects, be treated as confidential information pursuant to this Order.

4. The Board retains jurisdiction to make such amendment, modifications and additions to this Order as it may, from time to time, deem appropriate, including any such amendments,

modifications or additions resulting from a motion made pursuant to the Protective Agreement. Any party or other person may apply to the Board for an amendment, modification or addition of this Order.

Dated at Montpelier, Vermont, this 22nd day of December, 2010.

<u>s/ James Volz</u>	)	
	)	PUBLIC SERVICE
	)	
<u>s/ David C. Coen</u>	)	BOARD
	)	
	)	OF VERMONT
<u>s/ John D. Burke</u>	)	

OFFICE OF THE CLERK

FILED: December 22, 2010

ATTEST: s/ Susan M. Hudson
Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us)

Docket 7628
Attachment to
Protective Order
dated 12/22/2010

Witness	Page, Line No. or Exhibit No.	Subject/Description	Averment
Douglas Smith	Exh. Pet.-DCS-5-CONFIDENTIAL (Revised)	Market Price Outlook (2010\$\$)	No. 1 (Revised)
Douglas Smith	Exh. Pet.-DCS-6-CONFIDENTIAL (Revised)	Market Price Outlook (nominal \$\$)	No. 1 (Revised)
Douglas Smith	Exh. Pet.-DCS-10-CONFIDENTIAL (Revised)	KCW Cost v. GMP Market Outlook	No. 1 (Revised)
Douglas Smith	Exh. Pet.-DCS-11-CONFIDENTIAL	Henry Hub Gas Price Outlooks	No. 1 (Revised)
Douglas Smith	Exh. Pet.-DCS-12-CONFIDENTIAL	Premium REC Price Outlook	No. 1 (Revised)