

**THE STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE**

**In the matter of the
Application for Certification
Pursuant to RSA 162-H of
ANTRIM WIND ENERGY, LLC**

Docket No. 2012-01

**RESPONSE OF COUNSEL FOR THE PUBLIC TO
APPLICANT’S MOTION TO CLARIFY**

Counsel for the Public, by his attorneys, the Office of the Attorney General, hereby submits this response to the Applicant’s Motion to Clarify, dated October 1, 2012. In support hereof, Counsel for the Public respectfully represents as follows:

The Applicant claims as confidential information concerning its business that the Presiding Officer has determined is “important to determine whether or not the project is likely to obtain project financing that would allow it to construct and operate the project within the terms and conditions of any Certificate granted.” Order, dated Aug. 22, 2012, *Application of Antrim Wind*, SEC no. 2012-01, at 7. Applicant has taken the position that the capacity factor information used by Deloitte in its Report dated September 24, 2012, should not be shared with parties other than Counsel for the Public. In the August 22nd Order the Presiding Officer agreed with that approach, but there is no lawful basis for restricting access to this information in this way, and to the extent it is necessary, Counsel for the Public urges the Presiding Officer to reconsider.

“Due process requires notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *In re Bagley*, 128 N.H. 275, 286 (1986). “The right to be heard

includes the right to cross examine adverse witnesses.” *Ross v. Gadwah*, 131 N.H. 391, 395 (1988). As a matter of due process the “opportunity for cross examination is guaranteed” to parties in administrative proceedings. *In re Sprague*, 132 N.H. 250, 258 (1989). While it is appropriate to impose reasonable limits to cross examination in administrative proceedings, it is not within the power of the Presiding Officer to deprive a party of the opportunity altogether. *See id.* A party’s rights of due process “mandate that they have an opportunity to counter evidence that a fact-finder will rely on in reaching a judgment.” *Ross*, 131 N.H. at 395; *see Desclos v. Southern N.H. Med. Ctr.*, 153 N.H. 607, 618-19 (2006) (privileged information must be disclosed in order to provide fair trial to party). The right of public access to information in adjudicatory proceedings is presumptive. That information is confidential is not a proper objection to its production or admission into evidence. *See RSA 541-A:33; N.H. Admin. R., Site 202.24.* If it is relevant and not privileged, it must be produced. In addition, “it is clear that no absolute privilege for trade secrets is recognized.” *Spain v. United States Rubber Co.*, 94 N.H. 400, 401 (1947). There is no evidence or authority presented to support an assertion that any of the information being sought is a “trade secret.” Where the financial resources of the party are at issue in this case, the Applicant’s financial affairs are discoverable by other parties even if not available to the public. *Sawyer v. Bouford*, 113 N.H. 627, 628-29 (1973).

To overcome the presumption that adjudicative proceedings should be open, a party requiring secrecy must be able to show “some overriding consideration or special circumstance, that is, a sufficiently compelling interest.” *In re Keene Sentinel*, 136 N.H. 121, 130 (1992).

Assuming its applicability in these circumstances, under RSA 91-A, the Presiding Officer should interpret “provisions favoring disclosure broadly and exemptions narrowly” in order to “best effectuate the statutory and constitutional objective of facilitating access to all public documents.” *Lamy v. New Hampshire Public Utilities Comm’n*, 152 N.H. 106, 108 (2005).¹

The Applicant and the Presiding Officer in her August 22, 2012 order have chosen not to allow disclosure of the information sought to other parties in the proceeding even if they are willing to sign confidentiality agreements. The Applicant now wishes to extend that ruling to the capacity factor information. None of the other parties are competitors of the Applicant, and the Applicant has not made any allegation that any of the parties is untrustworthy or unable to honor a confidentiality agreement. The Applicant and the Presiding Officer assume, without basis, that if the information is shared with intervenor parties that those parties will violate confidentiality agreements.

“Whether information is exempt from disclosure because it is private is judged by an objective standard and not by a party’s subjective expectations.” *Lamay*, 152 N.H. at 109. Consequently, that the Applicant believes that the capacity factor information is especially sensitive is not relevant. In this case, objectively it would appear that the capacity factor projected for this project is *not* especially sensitive. A narrow range of it is disclosed in the Application itself, suggesting that the information is not carefully restricted. In previous proceedings, capacity factors were shared with non-competitor intervenor parties who agreed

¹ The Presiding Officer has erroneously relied upon the right to know law which applies to governmental records sought by the public. The information in this case is non-governmental records sought by intervenors who have demonstrated standing in the case.

to sign confidentiality agreements. *See* Order, dated Dec. 8, 2008, at 2-3, *Application of Granite Reliable*, SEC no. 2008-04 (capacity factor information available to other parties in case that sign confidentiality agreement); *accord* Order, dated June 9, 2010, *Application of Laidlaw Berlin Biopower*, SEC no. 2009-02 (allowing party access to confidential information on agreement not to disclose). Based on the research done by Deloitte, it also appears that operating capacity factors are generally available. Deloitte was able to find the actual operating capacity factors of over 20 projects in the northeast.

The “public’s” interest in this information is high – the interest of the parties to that information is even higher. This process serves to balance the environmental impacts of a proposed project against the value of the energy it produces. RSA 162-H:1. It is not possible to understand the relative weight of the impacts without knowing how much energy will be produced. With a wind project it is not possible to know how much power is expected to be produced without a full understanding of the P-50 and P-90 capacity factor estimates. The Applicant’s operational assumptions are also necessary for an evaluation of the project’s feasibility. Whether the applicant uses realistic capacity factor information (as well as realistic power purchase agreement price expectations) could be admissible or could lead to the discovery of admissible evidence concerning the Applicant’s financial and managerial capability, including the credibility of the Applicant’s witnesses. Therefore, even in a *Lamay* balancing exercise, the information ought to be made available to other parties subject to safeguards. Under ordinary and clearly applicable court practice, and, as a matter of due process, the information should not be withheld completely and should be shared with the other parties in the case.

Finally, the August 22, 2012 order premised its decision to restrict financial information to disclosure only to Counsel for the Public on confidence that Counsel for the Public will “adequately address this issue.” Order, dated Aug. 22, 2012, at 7, *Application of Antrim Wind*, SEC no. 2012-01. It is not clear what is meant by “adequately address” but the assumption places Counsel for the Public in an awkward position. It is not unforeseeable that Counsel for the Public might choose not to cross examine the Applicant’s witnesses on this issue. This would mean that where other parties have no access to information necessary to conduct a full cross examination, no one would be doing it. What is more, Counsel for the Public represents all of the public, not just those in favor of the project or those opposed to it. Thus, it is inappropriate to suggest that the due process rights of another party with a strongly held position one way or another should be dependent upon Counsel for the Public. It would not, for example, be seen as in keeping with due process to the Applicant if the Presiding Officer decided that the Applicant could not present its testimony on financial capability because the Deloitte Report ‘addressed’ it. Yet, that is essentially what is being suggested here; the other parties, some of which clearly oppose the project, are being restricted from being heard on the possibly erroneous assumption that Counsel for the Public will address, with cross examination, financial capability for them. Consequently, reliance upon the anticipated efforts of Counsel for the Public would not be consistent with due process as a basis for excluding the other parties from access to the capacity factor and other confidential financial information.

The Presiding Officer should allow other parties access to the financial information, including capacity factors, if they agree to keep it confidential. The public perception of the process will be enhanced by allowing other parties, which have already demonstrated

standing, to fully participate in this critical aspect of the hearing. Those parties have a due process right to the information.

Respectfully submitted this 9th day of October, 2012,

PETER C.L. ROTH
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By his attorneys

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Certificate of Service

I, Peter C.L. Roth, do hereby certify that I caused the foregoing to be served upon each of the parties named in the Service List of this Docket.

Dated: October 9, 2012



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Peter C.L. Roth