

THE STATE OF NEW HAMPSHIRE

SITE EVALUATION COMMITTEE

SEC DOCKET NO. 2015-04

APPLICATION FOR A CERTIFICATE OF SITE AND FACILITY BY PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE D/B/A EVERSROUCE ENERGY FOR A NEW 115 KV TRANSMISSION LINE FROM MADBURY SUBSTATION TO PORTSMOUTH SUBSTATION

**APPLICANT'S MOTION FOR PROTECTIVE ORDER
AND CONFIDENTIAL TREATMENT**

NOW COMES Public Service Company of New Hampshire d/b/a Eversource Energy ("PSNH") by and through its attorneys, McLane Middleton, Professional Association, and respectfully request that the Site Evaluation Committee ("SEC" or "Committee") issue a protective order, to preserve the confidentiality of information relating to archaeological resources data, Critical Energy Infrastructure Information ("CEII") and other confidential infrastructure information,¹ and the status, location and distribution of rare, threatened and endangered native plants and natural communities.² In support of their Motion, PSNH states as follows:

1. 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

¹ Confidential infrastructure information includes, but is not limited to, CEII information, critical infrastructure information as defined by the Department of Homeland Security ("DHS"), including any Protected Critical Infrastructure Information ("PCII"), to the extent certified as such by the DHS, pursuant to the Critical Information Act of 2002 (See Final Rule at 6 C.F.R. Part 29, Sept. 1, 2006); Confidential information regarding critical assets and critical cyber assets, which are subject to the North American Electric Reliability Council ("NERC") Critical Infrastructure Protection ("CIP") standards (CIP-002 through CIP-009) pertaining to the reliability and availability of the Bulk Electric System in North America ("Confidential CIP"); any other infrastructure information designated by the Company as proprietary and confidential, whether furnished before or after the date hereof, whether oral, written or recorded/electronic, and regardless of the manner in which it is furnished; and all reports, summaries, compilations, analyses, notes or other information which contain the foregoing information.

² This information includes but is not limited to, information relating to all plant and animal species and natural communities on or adjacent to the Project site. A natural community is defined as "a recurring assemblage of plants and animals found in a particular physical environment." RSA 217-A:3. XI.

(a.k.a. the Right-to-Know Law). *See* RSA 91-A:4; *see also* N.H. Admin Rule Site 104.01. 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. As part of their Application for a Certificate of Site and Facility, PSNH respectfully requests that the Committee issue a protective order and that the Committee treat certain information that is included as part of the application as confidential, pursuant to RSA 91-A:5. *See also* Site 104.01(b) (presiding officer or chairman may protect documents that are exempt from disclosure pursuant to RSA 91-A:5). Specifically, PSNH requests that (1) sensitive archeological information, (2) CEII material and other confidential infrastructure information, and (3) information relating to the status, location and distribution of rare, threatened and endangered native plants and natural communities be treated as confidential subject to a protective order.

2. First, PSNH seeks a protective order and confidential treatment of sensitive archaeological resources data. RSA 162-H:16, IV(c) requires that an application for a Certificate of Site and Facility, must *inter alia*, demonstrate that the project will not have an unreasonable adverse effect on historic sites. Similarly, N.H. Admin. Rule Site 301.03(c)(5) requires an applicant to identify “natural, historic, cultural, and other resources at or within the site.” *See also* Site 301.06 (requiring additional information on historic sites including the identification of areas of potential archaeological sensitivity located within the area of potential effects).

3. Pursuant to the foregoing requirements, and in connection with its Application for a Certificate of Site and Facility, PSNH has included the required information regarding archaeological resources data and archaeological sites within or adjacent to the Project area.

However, pursuant to New Hampshire's Historic Preservation Act, all information that may identify the location of archaeological sites must remain confidential and the disclosure of such information is exempt from RSA 91-A.

4. New Hampshire's Historic Preservation Act specifically provides that:

Information which may identify the location of any archaeological site on state land, or under state waters, shall be treated with confidentiality so as to protect the resource from unauthorized field investigations and vandalism. Toward this end, state agencies, departments, commissions, institutions and political subdivisions, permittees and private landowners with preservation and conservation agreements shall consult with the commissioner before any disclosure of information to insure that the disclosure would not create a risk to the historic resource or that it is done in a manner to minimize the risk. Such information is exempt from all laws providing rights to public access. Disclosure for the public record for tax assessment, transfer, sale or other consideration of the property shall receive careful consideration to minimize the risk to the resource.

RSA 227-C:11.

5. In conjunction with RSA 91-A:5, IV, which specifically provides that records pertaining to confidential information are exempt from the public disclosure requirements of the Right-to-Know Law, RSA 227-C:11 mandates that information that identifies the location of archaeological sites remain confidential. Therefore, such information should not be disclosed to the general public during the SEC proceedings.³

6. Confidential treatment of archaeological sites discovered within or adjacent to the Project Area is warranted to protect the sensitive nature of those sites and is in the public interest. In this case, granting access to the location of an archaeological site will not further any public purpose, but instead, will result in a risk of harm to the archaeological resource. Such a request is reasonable given the nature of the sites and the potential for damage to them. PSNH, therefore,

³ Federal law has a substantially similar provision under the federal Freedom of Information Act ("FOIA") that protects archaeological sites. Under FOIA, "information concerning the nature and location of any archaeological resource for which the excavation or removal requires a permit or other permission under this Act or under any other provision of Federal law may not be made available to the public under [FOIA]." 16 U.S.C. § 470hh(a).

requests that the information regarding archaeological resources contained in Appendices 8 and 9, and certain communications regarding archaeological resources contained in Appendix 33, be maintained confidentially.

7. Second, PSNH seeks a protective order and confidential treatment of materials that are deemed CEII or are otherwise confidential infrastructure information. The Committee's rules require that an Applicant include information that is routinely deemed CEII. *See* Site 301.03(g)(11) (requiring a copy of a proposed plan application or other system study request documentation required to be submitted to ISO New England, Inc. in connection with construction and operation of the proposed facility); Site 301.03(g)(12) (requiring a copy of a system study impact report for the proposed electric transmission facility as prepared by or on behalf of ISO New England, Inc. or the interconnecting utility).

8. Pursuant to Site 301.03(g)(11)–(12), PSNH's Application includes certain required materials that are deemed CEII or contain other confidential infrastructure information.

9. Pursuant to federal regulations, CEII means:

specific engineering, vulnerability, or detailed design information about proposed or existing critical infrastructure that:

- (i) Relates details about the production, generation, transportation, transmission, or distribution of energy;
- (ii) Could be useful to a person in planning an attack on critical infrastructure;
- (iii) Is exempt from mandatory disclosure under the Freedom of Information Act, 5 U.S.C. 552; and
- (iv) Does not simply give the general location of the critical infrastructure.

18 C.F.R. § 388.113.

10. RSA 91-A:5, VI provides that “confidential, commercial or financial information” is exempt from disclosure. To determine whether information is exempt from disclosure because it is confidential, 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).

11. CEII materials and other confidential infrastructure information are routinely considered confidential, commercially sensitive and proprietary, and are not disclosed publicly. Extreme care must be used when protecting sensitive materials that are considered CEII or contain other confidential infrastructure information.

12. The specific documents and information for which PSNH is requesting confidential treatment include the following documents:

- a. Proposed Plan Application submitted to ISO New England, Appendix 21; and
- b. New Hampshire 10 Year Reliability Project Proposed Plan Application report, Appendix 22.

These documents contain information that should be protected from public disclosure because they provide specific details about PSNH’s energy infrastructure, including, the precise location of key facilities within its transmission and distribution systems.

13. PSNH typically maintains this information in such a manner so as to protect the material from unauthorized access or accidental disclosure. Keeping certain CEII materials and other confidential infrastructure information from public disclosure is critical to the safe and reliable operation of the electric system in PSNH’s service territory and is necessary to keep the general public safe.

14. Producing such information to the general public could negatively impact the energy infrastructure in the region, which substantially outweighs any public benefit. Disclosure of CEII material or other confidential infrastructure information to the general public could have a materially adverse effect on the overall operation of the region's electrical grid and could be useful to a person seeking to damage critical infrastructure. The benefits of non-disclosure to the general public largely outweigh any public interest in obtaining these documents. In addition, PSNH will not object to sharing this information with Parties⁴ to this SEC proceeding, subject to the parties being bound by the terms of the Order issued that grants this Motion.

15. Moreover, RSA 91-A:5, IV provides that records and other files whose disclosure 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),⁵ the above-mentioned information is exempt from public disclosure under RSA 91-A, IV. First, PSNH has identified a privacy interest in the information as demonstrated above. Second, there is no prevailing public interest in disclosure of this information. Although parties to this proceeding may have an interest in this data, as discussed above, PSNH will not object to sharing this information subject to the parties being bound by the terms of the Protective Order issued granting this Motion. Moreover, disclosure will not inform the public of

⁴ A "Party" or "Parties" to the SEC Proceeding include members of the Committee, Counsel for the Public, and any individual or organization, and their attorney, who have been granted intervener status in the SEC Proceeding by the presiding officer or chairman, pursuant to Site 202.11.

⁵ The same three-pronged analysis has been used by the New Hampshire Public Utilities 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 that contain information similar to or identical to that deemed by the Federal Energy Regulatory Commission to be critical energy infrastructure information (CEII) that is exempt from mandatory disclosure under the Freedom of Information Act).

the conduct or activities of its government; CEII materials and other confidential infrastructure information are maintained confidentially to ensure public safety. Third, even assuming, *arguendo*, that there is a public interest in disclosure of this information, that interest is greatly outweighed by PSNH's privacy interests in non-disclosure to ensure the safe operation and reliability of the region's electrical system. Moreover, subject to a protective order, the public's interest in ensuring access to public records will be preserved.

16. PSNH, therefore, requests that the CEII materials and other confidential infrastructure information contained in Appendices 21 and 22, be maintained confidentially; a protective order of limited scope is appropriate to balance the interests of PSNH and the public's need to access public records.

17. PSNH also seeks a protective order and confidential treatment of materials relating to New Hampshire's rare, threatened, and endangered native plants and natural communities. RSA 162-H:16, IV(c) requires that an application for a Certificate of Site and Facility, must *inter alia*, demonstrate that the project will not have an unreasonable adverse effect on the natural environment. Similarly, N.H. Admin. Rule Site 301.03(c) requires an applicant to identify "natural and other resources at or within or adjacent to the site," which typically includes the identification of native plants and natural communities.

18. Pursuant to the foregoing requirements, PSNH has included information regarding natural resources data and natural resource sites within or adjacent to the Project area in their application. This information includes, maps, survey results, and other material relating to the location and type of rare, threatened, and endangered native plant species and natural communities. *See* Appendix 37. Based on the importance of protecting and preserving New

Hampshire's rare, threatened, and endangered native plant species and natural communities, PSNH asserts that this information should be exempt from RSA 91-A.

19. First, PSNH asserts that producing information about the type and location of sensitive native plant species could negatively affect those resources. In addition, producing such information stands in stark contrast to the legislative intent of the New Hampshire Native Plant Protection Act of 1987:

Because there are no laws protecting any of our native plants, every year hundreds of our native plants are dug up and removed without permission from public and private property. Many of these are taken out-of-state and sold for profit. Therefore, the legislature finds and declares that ... For human needs and enjoyment, the interests of science, and the economy of the state, native plants and natural communities throughout this state should be protected and conserved; and that native plant numbers should be maintained and enhanced to insure their perpetuation as viable components of their ecosystems for the benefit of the people of New Hampshire. Native species of plants within this state and the nation that are endangered, threatened, or otherwise reduced in number or may become so because of loss, modification, or severe curtailment of their habitats, or because of exploitation for commercial, scientific, educational, or private use, should be accorded protection as necessary to maintain and enhance their numbers.

RSA 217-A:2.

20. Disclosure of such information could result in the intentional disturbance, taking, removal or abuse of rare, threatened, or endangered native plants or natural communities. The benefits of non-disclosure to the general public largely outweigh any public interest in obtaining these documents. Therefore, in furtherance of the legislative intent expressed in RSA 217-A, RSA 212-A and RSA 212-B, PSNH requests that information relating to rare, threatened or endangered plants and natural communities contained in Appendix 37 be treated as confidential.

21. The above-described information contained in Appendices 8, 9, 21, 22, 33 and 37 are submitted herewith has been marked confidential. PSNH may make this information available to the parties subject to a Protective Order. In light of the foregoing, PSNH

respectfully requests that the Committee order that the above-mentioned information contained in Appendices 8, 9, 21, 22, 33 and 37 be maintained confidentially by the parties, and that a protective order be issued requiring this information to remain confidential.

22. PSNH respectfully requests the Committee issue a protective order containing provisions similar to the following:

Accordingly, a protective order is appropriate for the un-redacted versions of Appendices 8, 9, 21, 22, 33 and 37 of the Application. This information shall therefore be marked confidential. One copy shall be filed with the Committee 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 Exhibit A, and forward true copies of the agreement to PSNH and the Committee. Only Parties authorized by the Committee, 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 PSNH. Within sixty days thereafter each Party shall certify to PSNH 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 Committee, will be handled with the same procedures detailed above.

23. In addition to any provisions included in the order by the Committee, in order to minimize the risk of inappropriate disclosure of PSNH's protected confidential information, PSNH respectfully requests that the Committee's Protective Order: (1) specify that PSNH is not required to provide confidential information via electronic mail to the Parties, other than to Counsel for the Public; and (2) specify that if Parties, other than Counsel for the Public, are to

be afforded access to the protected information, such access shall occur by viewing the confidential information at the Committee's offices.

24. Pursuant to N.H. Admin. Rule Site 202.14(d), PSNH must seek concurrence. At the time of the filing of this Motion, there are no opposing Parties from whom PSNH could seek assent.

25. To the extent PSNH is required to submit additional confidential materials or documents relating to archaeology, CEII and any other confidential infrastructure information, and rare, threatened or endangered plant species, PSNH respectfully requests that the Committee afford similar treatment to such information.

26. Finally, to the extent PSNH offers any confidential evidence at any hearing before the Committee, PSNH respectfully requests the SEC to afford similar protection to such documents that are deemed confidential. *See* Site 202.24(d).

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WHEREFORE, PSNH respectfully requests that this Committee:

- A. Grant PSNH's request that the materials contained in Appendices 8, 9, 21, 22, 33 and 37 remain confidential;
- B. Issue a protective order as requested herein that preserves the confidentiality of the documents contained in Appendices 8, 9, 21, 22, 33 and 37; and
- C. Grant such further relief as it deems appropriate.

Respectfully Submitted,

Public Service Company of New Hampshire d/b/a
Eversource Energy

By its attorneys,

McLANE MIDDLETON
PROFESSIONAL ASSOCIATION

Dated: April 12, 2016

By: 

Barry Needleman, Esq. Bar No. 9446
Adam Dumville, Esq. Bar No. 20715
11 South Main Street, Suite 500
Concord, NH 03301
(603) 226-0400
barry.needleman@mclane.com
adam.dumville@mclane.com

Certificate of Service

I hereby certify that on 12th of April, 2016, an original and one copy of the foregoing Motion was hand-delivered to the New Hampshire Site Evaluation Committee.

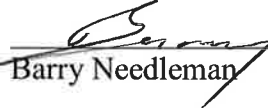

Barry Needleman

EXHIBIT A

THE STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE

SEC Docket No. 2015-04

CONFIDENTIALITY AGREEMENT

_____, hereby certify that I am Party¹ to the above-captioned proceeding and in connection with my interests therein, I request to be given access to the following Confidential Information maintained by the Site Evaluation Committee:

_____. I further certify that I have read the Site Evaluation Committee's protective order issued in the above-captioned matter, understand it and agree to be bound by it. I understand that this Exhibit A does not authorize my access to the above Confidential Information until I have signed and delivered it to counsel for Public Service Company of New Hampshire, and until it has been provided to the Site Evaluation Committee by said counsel.

Dated: _____

Signature of Party to Docket No. 2015-04

¹ A "Party" or "Parties" to the SEC Proceeding include members of the Site Evaluation Committee, Counsel for the Public, and any individual or organization, and their attorney, who have been granted intervener status in the SEC Proceeding by the presiding officer or chairman, pursuant to Site 202.11.