

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

SEC DOCKET NO. 2021-__

**Joint Petition of BAIF U.S. Renewable Power Holdings LLC, Freshet Wind Energy LLC
and Tusk Wind Holdings III, LLC for Approval of the Transfer of BAIF U.S. Renewable
Power Holdings LLC's Membership Interests in BAIF Granite Holdings LLC
and the Transfer of Freshet Wind Energy LLC's Membership Interests in
Granite Reliable Power, LLC to Tusk Wind Holdings III, LLC**

**JOINT PETITIONERS'
MOTION FOR PROTECTIVE ORDER AND CONFIDENTIAL TREATMENT**

NOW COME BAIF U.S. Renewable Power Holdings LLC ("Brookfield Seller"), Freshet Wind Energy LLC ("Freshet") and Tusk Wind Holdings III, LLC ("Tusk") (collectively, "Joint Petitioners"), by and through their respective undersigned attorneys, and respectfully request that the Site Evaluation Committee ("SEC" or "Committee") issue a protective order to preserve the confidentiality of the information described below which has been submitted with the above-referenced Joint Petition. In support of this Motion, the Joint Petitioners state as follows:

Introduction

1. The Joint Petitioners have entered into a purchase and sale agreement ("PSA") for the purpose of the transferring the membership interests in Granite Reliable Power, LLC ("GRP") to Tusk. GRP is the owner of a 99-megawatt wind powered electric generating facility located in Coos County, New Hampshire ("the Facility") which holds a certificate of site and facility issued by the Committee ("the Certificate"). Committee orders issued in SEC Docket Nos. 2010-03 and 2008-04, require that the Committee provide prior written approval of the transfer of ownership of GRP. *See Order and Certificate of Site*

and Facility, SEC Docket No. 2008-04 (July 15, 2009) pp. 2-3 and *Decision and Order Approving Transfer of Ownership Interest in Granite Reliable Power LLC*, SEC Docket No. 2010-03 (February 8, 2011) p. 15.

2. In accordance with the above-referenced orders, the Joint Petitioners have filed a petition (“the Joint Petition”) seeking the Committee’s approval of the transfer of ownership of GRP to Tusk. With the Joint Petition, the Joint Petitioners have filed confidential, proprietary, competitively sensitive commercial and financial information that should be protected from disclosure and granted confidential treatment under RSA 91-A:5, IV. More specifically, the Joint Petitioners have filed the following information that they seek to protect from public disclosure: the PSA; and a *pro forma* statement of Tusk’s assets and liabilities (collectively, “the Confidential Information”). Unredacted paper copies of the Confidential Information have been marked “Confidential” and submitted to the Committee in an envelope clearly marked “Confidential.” In addition, a thumb drive with the Confidential Information has been submitted to the Committee and has also been clearly marked “Confidential.”

Legal Standard

3. Although governmental records as defined by RSA 91-A:1-a are generally made available for public inspection pursuant to RSA 91-A:4, there are exemptions from such public disclosure for records pertaining to confidential, commercial or financial information, and other files whose disclosure would constitute an invasion of privacy. *See* RSA 91-A:5, IV and N.H. Admin. R. Site 104.01(b)(Committee records are available for public inspection upon a determination by the presiding officer or Chairperson that such requested documents are not exempt from disclosure pursuant to RSA 91-A:5).

4. The SEC applies the three-step analysis articulated by the New Hampshire Supreme Court in *Lambert v. Belknap County*, 157 N.H. 375, 382-383 (2008) when deciding whether information should be exempt from public disclosure under RSA 91-A:5, IV. *See Order on Motion for Protective Order and Confidential Treatment and Supplemental Motion for Protective Order and Confidential Treatment*, SEC Docket No. 2019-02, (May 8, 2020).
5. The first prong of the SEC's analysis is to determine if the petitioner has identified a privacy interest. *Id.* at 3. If a privacy interest is invoked, then the SEC must determine whether there is a public interest in disclosure. *Id.* Disclosure should inform the public of the activities and conduct of the government; if it does not serve that purpose, then disclosure is not required. *Id.* Lastly, even if the SEC determines that there is a public interest in disclosure, that interest must be balanced against any privacy interests in nondisclosure. *Id.*

Analysis/Argument

6. The Confidential Information clearly satisfies the first prong of the above-stated test for nondisclosure. The Confidential Information contains financial and other information that is commercially sensitive and proprietary, and is not disclosed publicly. The electricity generation and related markets are intensely competitive, and market participants like the Joint Petitioners safeguard this type of information to insure that it is not disclosed to the public or to one another for various reasons, many of which relate to preserving their negotiating positions in future commercial transactions. The SEC has expressly recognized that the confidential data contained in a *pro forma* financial statement "has routinely been found to establish a privacy interest and fall within the

exemption to RSA 91-A:5, IV.” *Id.* Accordingly, the Joint Petitioners have identified a legitimate privacy interest with respect to the Confidential Information.

7. There is little, if any, public interest in disclosure of the Confidential Information, as such disclosure will not inform the public of the Committee’s conduct. The Committee’s function in this docket is limited to determining whether Tusk possesses the financial, technical and managerial capability to own and operate the Facility in continuing compliance with the terms and conditions of its Certificate. *See Decision and Order Approving the Transfer of Ownership Interests in Antrim Wind Energy, LLC*, SEC Docket No. 2018-03 (Feb. 15, 2019) at 3. For the reasons discussed below, even if there is a public interest in disclosing the Confidential Information, that interest is outweighed by the harm to the Joint Petitioners that would result from disclosure.

A. **The PSA.** Public disclosure of the PSA, which contains the terms and conditions of the transaction that will accomplish the transfer of the membership interests in GRP, will reveal nothing about the Committee’s determination of Tusk’s financial, managerial and technical capabilities. Thus, there is no public interest in disclosing the PSA. Even if such an interest arguably exists, the PSA should be accorded protective treatment and not be publicly disclosed. The PSA is a highly confidential document that contains commercially sensitive information relating to, among other things, confidential business terms. Disclosure of this information would certainly place the Joint Petitioners at a competitive disadvantage. Thus the harm in disclosing the PSA greatly outweighs what little, if any, public interest in disclosure that may exist.

- B. **The Pro Forma Statement.** Although there may be an arguable public interest in disclosure of the *pro forma* statement of Tusk’s assets and liabilities, that interest is vastly outweighed by the competitive harm that would befall Tusk by disclosure. The *pro forma* statement reflects Tusk’s financial conditions and financial forecasts that would place Tusk at a competitive disadvantage if the information is disclosed. As the SEC has observed, a *pro forma* “is highly confidential and could negatively affect the competitive interests of the Applicant if disclosed in public or to competitors, vendors, or suppliers.” *Order on Outstanding Motions*, SEC Docket No. 2012-01, (August 22, 2012) at 4. In addition, the SEC has determined that “information contained in *pro forma* financial statements is clearly financial information as contemplated by RSA 91-A:5, IV.” *Order on Assented-To Motion for Protective Order and Confidential Treatment*, SEC Docket No. 2010-03 (Jan. 19, 2011) at 2. In view of the foregoing, the *pro forma* statement should be accorded protective treatment and should not be publicly disclosed.
8. The SEC has previously protected from public disclosure and accorded confidential treatment to a *pro forma* financial statement and purchase and sale agreement similar to those comprising the Confidential Information. *See Order on Motion for Protective Order and Confidential Treatment*, SEC Docket No. 2018-03 (Nov. 30, 2018). In so doing, the SEC found that “[t]he private interest in nondisclosure of the Confidential Information outweighs the public interest in its disclosure.” *Id.* at 3. The SEC further ordered that the Confidential Information would be made available for review by Counsel for the Public and its expert without the need to sign a confidentiality agreement, but that

parties to the SEC proceeding seeking access to the Confidential Information must execute a confidentiality agreement consistent with the SEC's order. *Id.* at 3-4.

9. In view of the foregoing, the Joint Petitioners submit that Committee should issue an order that exempts the Confidential Information from public disclosure and that protects its confidentiality in the manner set forth below.
10. The New Hampshire Department of Justice has been contacted regarding this Motion, and takes no position at this time.

Requests for Relief

WHEREFORE, the Joint Petitioners respectfully request that the Committee:

- A. Issue a protective order that protects the confidentiality of the Confidential Information as follows:
 - i. Counsel for the Public and any expert it may retain for purposes of this docket shall treat the Confidential Information with confidentiality, and shall not use it for any purpose other than for the preparation for, and participation in, the proceedings in this docket;
 - ii. Intervenors in this docket may have access to the Confidential Information upon execution of an appropriate confidentiality agreement consistent with the following: Intervenors may review the Confidential Information at the Offices of Orr & Reno in Concord, New Hampshire; Intervenors shall treat the Confidential Information with confidentiality and shall not use the Confidential Information for any purpose other than the proceedings in this docket; Intervenors shall not be permitted to copy, photograph, or otherwise record the Confidential Information; Intervenors shall destroy any notes referencing or relating to the Confidential

Information within thirty (30) days after a final determination of this matter, and shall certify to the Joint Petitioners that they have done so; and Intervenors shall certify in writing that they have read and agree to be bound by the terms of the Committee's protective order.

B. Grant such additional relief as the Committee deems appropriate.

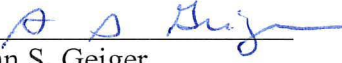
Respectfully submitted,

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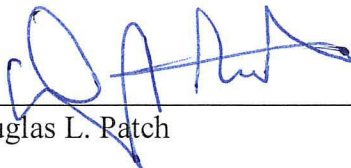
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May 3, 2021

Certificate of Service

I hereby certify that a copy of the foregoing Motion has on this ____ day of _____, 2021 been sent electronically to K. Allen Brooks, Senior Assistant Attorney General, Department of Justice, Concord, N.H.

By: 

Douglas L. Patch

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