

**STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE**

Docket No. 2021-03

Joint Petition for Approval of the Transfer of Membership Interests
in BAIF Granite Holdings, LLC and Granite Reliable Power, LLC to
Tusk Wind Holdings III, LLC

**ORDER GRANTING, IN PART, AND DENYING, IN PART, JOINT
PETITIONERS' MOTION FOR PROTECTIVE ORDER AND CONFIDENTIAL
TREATMENT**

I. Background

On May 3, 2021, Tusk Wind Holdings III, LLC (Tusk), BAIF Granite Holdings, LLC and Granite Reliable Power, LLC (collectively Brookfield) and Freshet Wind Energy LLC (Freshet) filed a Petition to Transfer Membership Interests in BAIF Granite Holdings LLC and Granite Reliable Power LLC to Tusk Wind Holdings III, LLC (Petition). The Petition pertains to the Certificate of Site and Facility awarded to Granite Reliable Power, LLC on July 15, 2009, in Docket 2008-04.

Along with the Petition, the Joint Petitioners filed a Motion for Protective Order and Confidential Treatment (Motion). The Motion seeks confidential treatment of the Purchase and Sale Agreement (PSA) (Exhibit E)¹ and the Pro Forma Financial Statement (Pro Forma) (Exhibit G)² filed under seal with the

¹ The PSA was filed as an attachment to the Petition as Exhibit E. It will be offered as Exhibit 7 at the adjudicative hearing.

² The Pro Forma was filed as an attachment to the Petition as Exhibit G. It will be offered as Exhibit 5 at the adjudicative hearing.

Petition.

The Attorney General appointed Senior Assistant Attorney General K. Allen Brooks as Counsel for the Public on June 23, 2021. To date there are no motions to intervene in this docket.

A prehearing conference was held on June 24, 2021. At the prehearing conference Counsel for the Public stated that he would take no position on the Motion and would not be filing a written objection.

On July 9, 2021, the Joint Petitioners filed a Supplemental Motion For Protective Order And Confidential Treatment (Supplement). In the Supplement the Joint Petitioners seek a protective order and confidential treatment for two additional documents. These documents are the proposed form of agreement for the Operation and Maintenance Agreement ("O&M Agreement")³ between GRP and NextEra Energy Partners, LP ("NEP") and the proposed Administrative Services Agreement ("ASA")⁴ between GRP and NextEra Energy Resources.

There are no objections to the relief requested in the Motion or the Supplement.

II. Standard of Review

The records of all Committee actions and proceedings, including submittals of information and reports by members of the public, are open to the public inspection and copying as provided for under the State's Right-to-

³ The O&M Agreement will be offered as Exhibit 10 at the adjudicative hearing.

⁴ The ASA will be offered as Exhibit 11 at the adjudicative hearing.

Know law, RSA Chapter 91-A. See RSA 162-H:13. In a Committee proceeding, transcripts of testimony, documents, and other materials admitted into evidence are public records, unless the presiding officer determines that all or part of a transcript or document is exempt from disclosure under RSA 91-A:5. See N.H. Admin. R. Site 104.01(b) and N.H. Admin. R. Site 202.24(d). Accordingly, the majority of documents filed with the Site Evaluation Committee are governmental records subject to public inspection.

Occasionally a party in a Committee proceeding will request a protective order to limit public disclosure of filed documents.⁵ Even when no party objects to the request the presiding officer must make an independent judgment whether the request should be granted. When considering such requests, the presiding officer must review whether the records in question are exempt from public disclosure under RSA 91-A:5. For those records described in RSA 91-A:5, IV, the presiding officer must undertake a three-step analysis to determine whether information should be exempt from public disclosure. See *Lambert v. Belknap County*, 157 N.H. 375, 382-383 (2008); *Lamy v. Pub. Utils. Comm'n*, 152 N.H. 106, 109 (2005). The first step of the analysis is to determine whether there is a privacy interest at stake that would be invaded by the disclosure. *Lambert*, 157 N.H. at 382. While the petitioner seeking a protective order should identify the perceived privacy interest at issue, whether a record is exempt from disclosure is judged by an objective standard, not subjective

⁵ At this time, no filings have been entered into evidence. Accordingly, this Order will refer to the filings in question as proposed exhibits.

expectations. *See id.* at 382-383. The second step requires assessment of the public's interest in disclosure. *Id.* at 383. Disclosure should inform the public of the activities and conduct of government. *Id.* If disclosure does not serve that purpose, then disclosure is not required. *Id.* Finally, when there is a public interest in disclosure, that interest is balanced against any privacy interests in non-disclosure. *Id.*

III. Analysis

The Joint Petitioners assert that the unredacted PSA, the Pro Forma, the ASA and the O&M Agreement contain confidential, financial, and commercially sensitive information exempt from disclosure under RSA 91-A: 5, IV. As a threshold matter, I find that the information in the PSA, the Pro Forma, the ASA and the O&M Agreement meets the definition of confidential, financial, and commercial information. The information is not publicly available and is clearly financial or commercial in nature. But, to determine whether this information should be exempt from public disclosure, I must engage in the three-step analysis and balance the interests for and against disclosure.

The Joint Petitioners assert that there are significant privacy interests that would be invaded by disclosure of the information at issue. The Petitioners argue that the information is commercially sensitive and not disclosed publicly. The information concerns the financial details of a private entity and the commercial terms governing the sale and operation of an energy facility. Release of the information would damage or destroy the Joint Petitioners' ability to maintain privacy of this information and impair their negotiation

positions for future commercial transactions. Competitors could use such information to their benefit and to the detriment of the Joint Petitioners. Further, the Joint Petitioners correctly assert that the Committee has previously held privacy interests in financial documents like the PSA and the Pro Forma warrant exemption from public disclosure. See Order on Motion for Protective Order and Confidential Treatment, Docket No. 2018-03 (Nov. 30, 2018). Accordingly, I find the privacy interests that would be invaded by disclosure are well established.

As for the second step, the Joint Petitioners argue that neither the PSA, the Pro Forma, the ASA or the O&M Agreement substantially inform the public about the operations, activities, or conduct of the Site Evaluation Committee or the general state government. The question then becomes whether the public interest in disclosure of the information in the documents outweighs the privacy interests of the Joint Petitioners.

The information concerns the financial and operational details of a private entity and the commercial terms governing the sale and operation of an energy facility. As noted above, the privacy interests in keeping this information from disclosure is substantial. Disclosure of the financial and commercially sensitive information would objectively harm the Joint Petitioners' competitive interests and negotiating positions with competitors, vendors, and suppliers. In contrast, the public interest in disclosure of the confidential, financial information contained in the proposed exhibits is slight. The information in the

exhibits does little to inform the public about the operations, activities, or conduct of the Committee or government in general.

In addition, the Attorney General has appointed Counsel for the Public. Counsel for the Public will have access to the unredacted proposed exhibits under the terms of this order. The public interest in disclosure is less compelling when Counsel for the Public has been appointed to protect the interests of the public and will have access to the information withheld from public disclosure.

For these reasons, I find the privacy interest of the Joint Petitioners in non-disclosure outweighs any interest the public may have in disclosure of the unredacted *Pro Forma* Financial Statement and the Purchase and Sale Agreement.

IV. Order

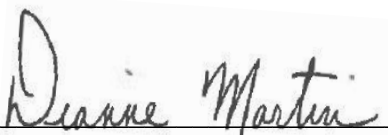
The Applicant's Motion for Protective Order and Confidential Treatment is granted subject to the following:

- A. The unredacted Purchase and Sale Agreement (Exhibit E), the unredacted *Pro Forma* Financial Statement (Exhibit G), The Operations and Maintenance Manual (Proposed Exhibit 10), and the Administrative Services Agreement (Proposed Exhibit 11) will be considered confidential, commercial, or financial information that is exempt from the provisions of RSA Chapter 91-A. Accordingly, these proposed exhibits shall not be disclosed to the public; and,

- B. Counsel for the Public and any expert or consultant he retains for purposes of this docket shall be entitled to copies of the Exhibits. Counsel for the Public, his experts, and consultants shall treat the proposed exhibits confidentially, and shall not use the information therein for any purpose other than for the preparation for, and participation in, the proceedings in this docket; and,
- C. In accordance with N.H. Admin. R. Site 202.11 (d), if any intervenors are permitted to participate in this proceeding, such participation may be conditioned at the time intervention is granted. The Joint Petitioners request to order the imposition of a confidentiality agreement in the absence of an intervenor or pending intervention request is premature. As a result, the Joint Petitioners' request for such order is denied.

The Applicant's Supplemental Motion for Protective Order and Confidential Treatment is granted in part and denied in part.

So ordered this twenty-sixth day of July, 2021.



Dianne Martin, Presiding Officer
Chairwoman, Site Evaluation Committee