



**Public Service
of New Hampshire**

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780 N. Commercial Street, Manchester, NH 03101

Public Service Company of New Hampshire
P. O. Box 330
Manchester, NH 03105-0330
(603) 634-2700
Fax (603) 634-2438
landilt@psnh.com

The Northeast Utilities System

Linda T. Landis
Senior Counsel

December 8, 2010

BY OVERNIGHT MAIL

Mr. Stephen Perkins
Office of Ecosystem Protection
U.S. Environmental Protection Agency
5 Post Office Square
Boston, MA 02109-3912

**Re: Public Service Company of New Hampshire
Merrimack Station, Bow, New Hampshire, NPDES Permit No. NH000465
Response to Information Request, CONFIDENTIAL BUSINESS INFORMATION**

Dear Mr. Perkins:

Public Service Company of New Hampshire ("PSNH"), in response to the United States Environmental Protection Agency's ("EPA") Supplemental Section 308 Request for Information, is providing certain information (see attached Responses 5 and 9) that requires treatment as Confidential Business Information ("CBI"). The CBI herewith provided to EPA is exempt from disclosure under Exemption 4 of the Freedom of Information Act ("FOIA") (5 U.S.C. 552(b)(4)). In addition, PSNH is required by contract to seek confidential treatment for the vendor-proprietary information that comprises Responses 5 and 9. As a result, PSNH is submitting these documents under separate cover and appropriately labeled as required by EPA regulations (40 C.F.R. §§2.201-2.301) and other federal law.

FOIA Exemption 4 covers two broad categories of information: (1) trade secrets; and (2) information that is (a) commercial or financial, and (b) obtained from a person, and (c) privileged and confidential. 5 U.S.C. §552(b)(4). The information at issue, Responses 5 and 9, falls within the second category of Exemption 4 pertaining to confidential commercial and technical information.

FOIA Exemption 4 is specifically designed for situations like this where entities that are required to furnish commercial¹ or financial information to the government are protected against the

¹ As described further herein, courts have routinely interpreted "commercial" information to include technical information.

competitive disadvantages that could result from disclosure.² As a general matter, courts interpret “commercial or financial” information broadly and find that information falls in this category if it relates to business or trade.³ Proprietary technical designs and specifications, including engineering plans (such as Response 5), are commercial information within the meaning of FOIA Exemption 4.⁴ Proprietary technical data (such as Response 9) or designs are also exempt from disclosure where the release of such information could “seriously undermine a company’s competitive advantage by allowing competitors to have access to ideas and design details that they would not have had or would have had to spend considerable funds to develop on their own.”⁵ In relevant FOIA decisions adjudicated by the Department of Energy, the agency has held that technical information is exempt from mandatory FOIA disclosure.⁶ FOIA Exemption 4 has been applied where the requested documents contained “technical information” regarding a project.⁷ Such information is contained in both Responses 5 and 9 (a detailed process diagram in Response 5 and vendor-proprietary information in Response 9).

² *National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765, 768 (D.C. Cir. 1974); *see also*, Attorney General’s Memorandum to All Federal Departments and Agencies Regarding the Freedom of Information Act (Oct. 12, 2001) (recognizing fundamental societal value of protecting sensitive business information). The exemption encourages submitters to furnish useful commercial or financial information to the government and provides the government with an assurance that required submissions will be reliable. *Critical Mass Energy Project v. NRC*, 975 F.2d 871, 878 (D.C. Cir. 1992).

³ *Dow Jones Co. v. FERC*, 219 F.R.D 167, 176 (C.D. Cal. 2002) (finding commercial or financial information relating to “business decisions and practices regarding the sale of power, and the operation and maintenance” of generators); *Merit Energy Co. v. U.S. Dep’t of Interior*, 180 F. Supp. 2d 1184, 1188 (D. Colo. 2001) (finding commercial or financial information relating to “information regarding oil and gas leases, prices, quantities and reserves”); *RMS Indus. v. DOD*, No. C-92-1545, slip op. at 3, 6 (N.D. Cal. 1992) (finding commercial or financial information relating to “interim pricing, type and quality of machines owned and names and background of key employees and suppliers”); *Pub. Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1290 (D.C. Cir. 1983) (“[R]ecords are commercial so long as the submitter has a ‘commercial interest’ in them”).

⁴ *Landfair*, 645 F.Supp. at 327 (D.D.C. 1986) (citing *Washington Post Co. v. HHS*, 690 F.2d 252, 266 (D.C.Cir.1982)). In *Landfair*, the plaintiff sought documents which contained technical information regarding the design and performance of a hydraulic turbine in use at the Chief Joseph Dam in Washington State. *Id.* at 326-27. The court found that the information included “business sales statistics, research data, technical designs, overhead and operating costs, and information on financial condition” and held that the documents containing this information are exempt from disclosure under FOIA. *Id.*

⁵ *SMS Data Products Group, Inc. v. U.S. Dept. of Air Force*, 1989 WL 201031, 3 (D.D.C., 1989).

⁶ *See* DOE, TFA-0205, pg 5 (2007); DOE, TFA-0120, pg 4-5 (2006); DOE, TFA-0077, pg 2 (2005).

⁷ *See* DOE, TFA-0205, pg 5 (2007); *see also* DOE, TFA-0120, pg 4-5 (2006); DOE, TFA-0077, pg 2 (2005). In TFA-0205, the DOE held that the documents in question satisfied the elements of Exemption 4, including the competitive harm prong, because “[t]he technical information is of a confidential nature,” and is “unique to the submitter.” *Id.*

As a general matter we note that one significant factor in assessing whether information is considered confidential is whether its release would result in substantial competitive injury.⁸ To meet this test, a competitive injury need not be “certain” to result from disclosure, rather it is sufficient if such harm is “likely.”⁹ A “competitive injury” is one “flowing from the affirmative use of proprietary information by competitors.”¹⁰ If technical designs and schematics unique to PSNH’s proposed wastewater treatment facility were publicly available, competitor energy suppliers or vendors would be able to access such information without expending any money on research and development and equipment testing.

The scope of Exemption 4 is also sufficiently broad to encompass financial and commercial information concerning a third party and protection is therefore available regardless of whether information pertains directly to the commercial interests of the party that provided it, as is typically the case, or pertains to the commercial interests of another.¹¹

The term “confidential” protects governmental and private interests in accordance with the following two-part test:

To summarize, commercial or financial matter is “confidential” for purposes of the exemption if disclosure of the information is likely to have either of the following effects: (1) to impair the Government’s ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.¹²

Release of the information at issue here would both chill government efforts to secure such information in the future and would certainly cause substantial harm to PSNH’s competitive position, and the positions of our vendors, as well as negatively impact PSNH customer costs.

Additionally, PSNH is contractually bound to ensure the confidentiality of certain vendor-specific information as in Responses 5 and 9. If that information were released, it would likely cause significant harm to PSNH and adversely impact customer costs. The release of the data could potentially result in breach of contract claims which PSNH would have to defend and for which PSNH would face damages. In addition, it would be extremely difficult going forward to attract quality vendors to bid on necessary maintenance and construction activities if such information were to become public and available to competitors.

⁸ *Customs & Intern. Trade Newsletter v. U.S. Customs and Border Protection*, 588 F.Supp.2d 51, 55 (D.D.C. 2008) (citing *CNA Fin. Corp. v. Donovan*, 830 F.2d 1132, 1152 (D.C.Cir. 1987); *Lion Raisins v. U.S. Dept. of Agriculture*, 354 F.3d 1072, 1079 (9th Cir. 2004).

⁹ *Boeing Co. v. U.S. Dept. of Air Force*, 616 F.Supp.2d 40, 45 (D.D.C. 2009).

¹⁰ *Customs*, 588 F.Supp.2d at 55.

¹¹ *Bd. of Trade v. Commodity Futures Trading Comm’n*, 627 F.2d 392, 405 (D.C. Cir. 1980) (holding that the “plain language” of Exemption 4 does not in any way suggest that the requested information must relate to the affairs of the provider).

¹² *National Parks*, 498 F.2d at 770.

PSNH has not disclosed the information we claim as confidential to any other party. As a company, we have taken every conceivable measure to protect the information at issue. In accordance with company policy, confidential business information is segregated, distribution and access is limited, and the information may not be copied. PSNH has and will continue to maintain the information in Responses 5 and 9 as confidential. In the event that any of this information is disclosed to the public, PSNH and/or parties with whom PSNH has contractual and other relationships will suffer substantial harm, including harm to their competitive positions.

We appreciate EPA's consideration of our request to treat the enclosed information as confidential. Please call me if you would like to discuss further or require additional substantiation of our confidentiality claim.

Yours truly,

Linda T. Landis

Linda T. Landis
Senior Counsel

cc: David Webster, EPA
Mark Stein, Esq., EPA
William H. Smagula, PSNH
Elizabeth Tillotson, PSNH
Allan Palmer, PSNH
Elizabeth F. Mason, Esq.