

COMMENTS

Submitted by Energize Vermont

CONFIDENTIALITY CONSIDERATIONS RELATED TO PRICING AND OTHER TERMS IN ELECTRIC POWER PURCHASE AGREEMENTS

April 18, 2011

Identity and Interest of Commentators

Energize Vermont is a voluntary, non-profit 501(c)(3) organization, comprised of Vermont citizens and residents whose mission is to educate and advocate for establishing renewable energy solutions that are in harmony with the irreplaceable character of Vermont, and that contribute to the well-being of all her people. Energize Vermont achieves our mission by researching, collecting, and analyzing information from all sources; and disseminating it to the public, media, community leaders, legislators, and regulators for the purpose of ensuring informed decisions for long-term stewardship of our communities.

Introduction

EV believes the Public Service Board ("Board") does not need to change its traditional approach toward protective orders and should, instead, more vigorously pursue that approach. The Board currently "strongly presumes" that secrecy reduces government accountability and undermines the public interest. Therefore it puts a very "heavy burden" on any corporation to factually justify why the Board should keep ratepayers and other members of the public in the dark on any contract or issue, large or small. In fact, this is not just a Board policy or preference but a fundamental constitutional command, one that dates back to Vermont's first, 1777 Constitution, which guaranteed that because all governmental power is "derived from the people" all government agencies and officers are the "trustees and servants" of the people "and at all times . . . accountable to them."

To date, no corporation has introduced any hard evidence showing why secrecy is in the public's interest (as opposed to the corporation's private interests), either in general or in a particular case, and no corporation has been able to meet its constitutionally "heavy burden." Given that the parties to a transaction already know its terms, and given that the Board either already

knows or has the right to discover such terms, the only persons left in the dark by confidentiality orders are Vermont's citizens, who, as ratepayers, need to know the components of the prices they are charged for electricity so they can make a rational decision about the electricity generation choices being made for their benefit, and who, as citizens, have the right to know what regulators are doing in their name, in order to keep regulators accountable and to keep private parties from taking advantage of their government-sanctioned positions and government-approved contracts. This need for transparency is even more important today when private corporations are pressing for approval of controversial renewable energy options without providing a full and open analysis of alternatives that can achieve the same goals for less cost and at less damage to Vermont and its traditional values.

Not only is there no evidence that supports changing the Board's anti-secrecy policies, there is compelling evidence showing why such a change would be harmful and why the Board should even more vigorously enforce its long-standing reluctance to approve secrecy requests. As detailed in these comments, numerous scholarly studies—which were commissioned or published by the American Public Power Association ("APPA"), the Center for the Study of Energy Markets (a program of the University of California Energy Institute), the U.S. Agency for International Development, and the National Association of Regulatory Utility Commissioners—show that ratepayers have much to gain, including lower rates, from the routine and timely public disclosure of the terms, including the prices, of power purchase agreements. As the APPA study explained, anything else reduces electricity markets to "a black box on which those paying the bills are required to place full confidence." In addition, studies show the more information available to the public, the less chance corporations can stymie competition and manipulate markets and the greater the chance markets will remain free, fair, and efficient, government regulators will remain energetic and accountable, and the public will enjoy lower electricity rates.

Comments

As the Board explained in a March 15, 2011 memorandum inviting public comment and participation in the upcoming April 28, 2011 Workshop on Confidentiality regarding electric power purchase agreements, over the last year the Board has received an increasing number of requests from distribution utilities, which have petitioned for protective orders to keep confidential certain terms of power purchase agreements, specifically contracted power prices.

Energize Vermont provides the following point-by-point responses to the Board's questions.

A. Confidential treatment of contract terms in tariff filings. In a recent tariff filing, a distribution utility sought to keep some contracted power prices confidential. As the Board noted, "it is unusual, possibly unprecedented, for a Vermont electric distribution utility to request confidential treatment of materials supporting a request for a tariff change."

1. Is it appropriate for the Board to protect contract pricing information in tariff filings from public disclosure?

Energize Vermont submits the Board's long-standing approach towards petitions for protective orders is sound and needs no revision. The Board's March 15 Memo particularly asked commentators for information regarding how the Federal Energy Regulatory Commission ("FERC") treats such issues.

Such requests are sufficiently commonplace that FERC has published a "Model Protective Order." (Available at <http://www.ferc.gov/legal/admin-lit/model-protective-order.pdf> (last visited April 6, 2011)). Unfortunately, however, FERC's website does not provide any substantive standards, procedures, or guidelines for seeking, opposing, granting, denying, or evaluating protective orders. Conversations with staff members of FERC's Division of Enforcement confirm that official standards or guidelines have not been published. As the FERC staff explains, and as published FERC decisions confirm, FERC grants or denies petitions for protective orders on an *ad hoc*, case-by-case basis. Furthermore, FERC decisions are extremely conclusory, as the FERC Commissioners generally do not justify their rulings, describe their reasoning, or otherwise illuminate why some petitions are granted and others are not.¹

Of equal, if not greater, importance, while the Board's March 15 Memo noted that "it is unusual, possibly unprecedented, for a Vermont electric distribution utility to request confidential treatment [by the Board] of materials supporting a request for a tariff change," it is even more unusual for FERC to receive such requests related to power purchase agreements. This is so notwithstanding the fact that the Federal Power Act provides FERC with broad authority "to regulate the 'sale of electric energy at wholesale in interstate

¹ See, e.g., "In deciding confidentiality issues, [FERC] balances the need for public disclosure against the harm caused by release of the information. In this instance, Natural [*i.e.*, the party seeking confidential treatment] has not adequately justified its request for confidential treatment, and the need for public disclosure of the information submitted on a confidential basis by Natural outweighs any potential harm to Natural." *In re Natural Gas Pipeline Company of America*, 69 F.E.R.C. P61029, P61119 (1994). See also *Constellation Power Source, Inc. v. California Power Exchange Corp.*, 98 F.E.R.C. P61258, P62028-62029 (2002).

commerce." *NRG Power Marketing, LLC v. Maine Public Utility Comm'n*, ___ U.S. ___, 130 S. Ct. 693, 698 (Jan. 13, 2010) (citation omitted).² Consequently, FERC's case-by-case decision-making regarding protective orders, cryptic as it is, is neither relevant nor helpful in guiding the Board's decisions regarding protective orders regarding power purchase agreements and in answering the first and most important question presented by the Board's March 15: "Is it appropriate for the Board to protect contract pricing information in tariff filings from public disclosure?"

In considering that question, both in general and in the context of unique requests for protective orders, Energize Vermont submits the Board's long-standing approach towards petitions for protective orders is sound and needs no revision. As the Board recently explained its well-established approach, "Vermont law creates a strong presumption that public records . . . are to be available for public inspection." Docket No. 7670, Order of 12/14/10 re Protective Order for Prefiled Evidence, at 4 (footnoted citation omitted). Thus:

Since 2001, [the Board has] required petitioners seeking a protective order to submit a document-specific (or information-specific) averment of the basis for keeping confidential any document (or information) that they wish to be kept under seal. This arrangement appropriately places a heavy burden on the party seeking confidentiality to justify that decision. . . . [E]ven when the motion is uncontested the Board will review the motion and supporting averment or averments to ensure that the moving party has presented a prima facie case for keeping the document or information under seal.

Id. at 2. In a subsequent decision in the same Docket, the Board noted that not only must it assess whether the party seeking to conceal public records has met its "heavy burden" and has overcome the "strong presumption" in favor of disclosure, but the Board also "must balance the objective of allowing Vermont ratepayers access to information about the specific terms of a power purchase agreement against the negative effect such public disclosure in a Board

² Although the FPA permits "regulated utilities to set rates unilaterally by tariff" and allows "sellers and buyers [to] agree on rates by contract," regardless how rates are set they "must be 'just and reasonable,'" and such "[r]ates may be examined by [FERC], upon complaint or on its own initiative, when a new or altered tariff or contract is filed or after a rate goes into effect." *NRG Power*, 130 S. Ct. at 698 (citations omitted).

proceeding may have on Vermonters' rates for electricity." Docket No. 7670, Order of 1/14/11 re Reconsideration of Protection for Prefiled Evidence, at 1-2.

We write, however, to emphasize two points.

First, regardless of the historical policy preferences and legal presumptions in other states and jurisdictions or in other regulatory agencies, the presumption in favor of openness and accountability in our State is not merely "strong" but surpassingly so. As our Supreme Court unanimously stressed just last year, it is not an "overstate[ment]" to say, "open access to governmental records is a fundamental precept of our society." *Shlansky v. City of Burlington*, 2010 VT 90, ¶12, 13 A.3d 1075, ___, 2010 Vt. LEXIS 87, *13 (Oct. 1, 2010). Indeed, "[t]he generation that made the nation thought secrecy in government one of the instruments of Old World tyranny and committed itself to the principle that a democracy cannot function unless the people are permitted to know what their government is up to." *Id.* (citation omitted).

Although this perspective informs the provision of the Vermont's Public Records Act that "[o]fficers of government are trustees and servants of the people and it is in the public interest to enable any person to review and criticize their decisions even though such examination may cause inconvenience or embarrassment," 1 V.S.A. § 315, openness in government, at least in the Vermont government, is not a mere policy preference or a simple – nor an easily amended or repealed -- statutory requirement. Instead, it is an indispensable constitutional command.

As University of Vermont Law Professor Peter R. Teachout has reminded, "[a]t bottom, all [modern Vermont] laws and judicial decisions trace their roots back to a fundamental principle of government embodied in the Vermont Constitution: the principle that in a constitutional democracy, officials of government should be accountable to the people." Teachout, *"Trustees and Servants": Government Accountability in Early Vermont*, 31 VT. L. REV. 857, 859 (2007).

Thus, Vermont Const., ch. I, art. 6, specifies: "That all power being originally inherent in and consequently derived from the people, therefore, all officers of government, whether legislative or executive, are their trustees and servants; and at all times, in a legal way, accountable to them." Nor is this constitutional principle a novel one; rather, Vermont's first Constitution, of 1777, contained an indistinguishable formulation. *Compare* Vermont Const. of 1777,

ch. I, § V.³ Importantly, the decision of the Framers of that first Constitution to enshrine accountability reflects a centuries old struggle, in the New World and in Mother England, to ensure that government would be the people's "trustee" and "servant," not their master. *See* Teachout, "*Trustees and Servants*," 31 VT. L. REV. 857 at 866-72.

In this light, parties seeking to overcome this venerable, fundamental, and constitutional command in favor of openness and accountability not only must shoulder a "heavy burden," Docket No. 7670, Order of 12/14/10, *supra*, at 2, but must make a very "compelling" showing that their desires for secrecy trump the public's right to know what their servants are doing in their name. *Judicial Watch, Inc. v. State*, 179 Vt. 214, 222, 892 A.2d 191, 198 (2005). *See Herald Ass'n, Inc. v. Dean*, 174 Vt. 350, 368, 816 A.2d 469, 484 (2002) (Skoglund, J., concurring in part, dissenting in part).

Second, the Board should not only "balance" the abstract and largely inchoate "objective of allowing Vermont ratepayers access to information about the specific terms of a power purchase agreement against the negative effect such public disclosure in a Board proceeding may have on Vermonters' rates for electricity," Docket No. 7670, Order of 1/14/11, *supra*, at 2 (emphasis added), but the Board also should balance the potential "negative" effects against the positive effects of allowing the public to obtain information about the prices paid under a power purchase agreement.

The Board's January 14, 2011 Order in Docket No. 7670 suggests that "public disclosure" of the particular "terms of a power purchase agreement" ("PPA") cannot have anything but "negative effect[s]" on "Vermonters' rates for electricity." *Id.* Energize Vermont submits this perspective is unwarranted. Given that the parties to a transaction already know its terms, and given the regulators either already know or have the right to discover terms of a transaction, the only persons who are left in the dark by such policies are Vermont's citizens, who, as ratepayers, need to know the components of the prices they are charged for electricity, and who, as citizens, have the right to know what regulators are doing in their name, in order to keep regulators accountable and to keep private parties from taking advantage of their government-sanctioned positions and government-approved contracts.

³ That provision states: "[A]ll power being originally inherent in, and consequently, derived from, the people; therefore, all officers of government, whether legislative or executive, are their trustees and servants, and at all times accountable to them."

Furthermore, Energize Vermont is unaware of any evidence in the record of any Docket that supports the notion that public disclosures of wholesale PPA terms actually have increased the prices paid by retail electric customers or that such disclosures inevitably would increase retail prices. It is incumbent upon those who insist on secrecy to convincingly demonstrate when, where, and how this alleged phenomenon has occurred in other States and to convincingly show why public disclosures would yield the same effects in Vermont.

Finally, recent and disinterested academic scholarship, including studies commissioned and/or published by four highly regarded institutions – the American Public Power Association ("APPA"), the Center for the Study of Energy Markets ("CSEM"), a program of the University of California Energy Institute ("UCEI"), the U.S. Agency for International Development ("USAID"), and the National Association of Regulatory Utility Commissioners ("NARUC") – shows that ratepayers have much to gain, including lower rates, from the routine and timely public disclosure of PPA terms, including PPA prices.

One study, published in 2007 by APPA -- *Data Required for Market Oversight: A Concept Paper* for EMRI, by William H. Dunn, Jr. (Dec. 8, 2007; available at <http://appanet.cms-plus.com/files/PDFs/dunn2007.pdf> (last visited April 7, 2011)) -- was specifically commissioned by APPA's Electric Market Reform Initiative ("EMRI"), which had been created in 2006 in response to the growing problems public power utilities had experienced in securing electrical power supplies in those regions of the country where power markets were organized and operated by the nation's seven Regional Transmission Organizations/Independent System Operators (RTOs/ISOs), including the Independent System Operator—New England ("ISO-NE"). APPA, *Welcome to the Electric Market Reform Initiative*. (Available at <http://www.publicpower.org/aboutpublic/emriindex.cfm?ItemNumber=16772> (last visited April 7, 2011)).⁴

Dunn's broad-ranging and well-supported study was designed to assess whether "data associated with the operation of the electricity markets in the United States," data which ordinarily is developed and held confidential by

⁴ EMRI's purpose "has been to investigate the restructured wholesale electricity markets and develop proposals for needed reforms to the markets." Dunn's study, together with EMRI's other investigative studies, provides "strong evidence that the RTO-run centralized wholesale markets have substantial problems, and are not yielding just and reasonable rates, as the Federal Power Act requires. Based on the findings of the studies, APPA developed the Competitive Market Plan, a proposal for reforms for the wholesale electricity markets." APPA, *Welcome to the Electric Market Reform Initiative*, *supra*.

market participants, "should be made publicly available." Dunn, *Data Required for Market Oversight*, at 1. After studying information regarding the extent and timing of release of electricity market data in several domestic and international markets, Dunn found that market participants took "counterintuitive positions" on the "the major issue: whether the rapid release of unmasked electricity market data would facilitate collusion or competition . . ." *Id.*

Thus, "those who support continued confidentiality or delayed and masked release of data seem to primarily be the market participants (*e.g.*, resource owners) who could be expected to benefit from data release if it would truly facilitate collusion." *Id.* By contrast, "those who generally advocate faster and resource specific release of data are the market participants (*e.g.*, load serving entities) who would be harmed by any collusion such data release facilitated." *Id.*

In contrast to the unsupported assumption that public disclosure of "unmasked electricity market data" (such as PPA pricing data) would hurt retail customers by causing their electrical rates to rise, Dunn found it "striking . . . that little attention is paid to the possibility that the timely release of [such data] could foster: "1. Confidence in the actual operation of the markets by RTOs/ISOs; and 2. Additional review of sellers' behavior, possibly leading to more confidence that prices in the markets are competitively determined." *Id.* at 8

As Dunn explained, the ability of Load Serving Entities ("LSEs"), other market participants, regulatory agencies, and the public "to validate the prices in the market is extremely limited." *Id.*

In essence, the operation of the markets is a black box on which those paying the bills are required to place full confidence. . . . [T]here are two important aspects of the electricity market that are embedded in the data and information contained in the black box: [1] the actual operation of the market by RTOs/ISOs⁵ and [2] the behavior of the market participants.⁶

⁵ The first issue "has to do with the inability of market participants to monitor how the RTO or ISO actually operates the market. Does it do so in such a way as to minimize prices for both energy and ancillary services? Does it over-commit capacity and/or reserves? Does it always, within reliability criteria, dispatch resources in merit order? Do the theory-based computer algorithms match the reality of actual generation dispatch and transmission system conditions?" Dunn, *Data Required for Market Oversight*, at 8.

⁶ The second issue concerns "review of market participant bidding behavior. Several recent studies . . . mention the lack of data hindering their ability to study market performance. Granting market participants, and the public in general, timely access to unmasked data, even if they do not analyze the data for every hour of every day, allows them to do spot checks and, to the

Id. (emphasis added).

Dunn further found that "market participants" and ratepayers are required to fly blind. They are forced to "rely on a small priesthood of market monitors to validate the black box market results. No matter how good a job they do, these monitors do not have any money at stake, and the market participants" – and ratepayers – "have no way to validate the market monitors' performance." *Id.* (emphasis added).

Nearly a century ago, U.S. Supreme Court Justice Louis D. Brandeis famously wrote, "[p]ublicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman." Louis D. Brandeis, *OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT*, 92 (Frederick A. Stokes Co. , 1914). Dunn's reasoning echoes Brandeis':

The more eyes looking at the data, the higher the chance that anomalous behavior by RTOs/ISOs and/or market participants will be detected. The indirect benefit of increased and timely release of electricity market data is that if market participants know that everyone else will have access to their offer and bid data, they may be less inclined to behave badly.

Dunn, *Data Required for Market Oversight*, at 9.⁷

Dunn's views are corroborated by the CSEM/UCEI study, which was written by Frank A. Wolak, the Holbrook Working Professor of Commodity Price Studies in the Department of Economics at Stanford University, visiting scholar at University of California Energy Institute, a Research Associate of the National

extent that these reviews validate the prices, may result in more confidence in the market. Besides LSEs, other resource owners could gain the confidence necessary to invest in the market when they see that all market participants are treated equitably (especially in markets with a mix of resource ownership structures)." *Id.*

⁷ Although Dunn's study focuses primarily on daily retail electric prices and the role of the ISO, the reasoning and findings are equally applicable to the PPA where the Board performs the function of the ISO and where the general public is shut out of the process unless they have the resources to fully participate in ratemaking and similar proceedings before the Board. The general public, which would include legislators as well as private citizens and other customers of the distribution companies, cannot have confidence that the rates they are paying for electricity are fair and reasonable and that alternative rates and alternative generation sources are being given due consideration if they are deprived of the fundamental information on pricing and contract terms that underlie a decision by the Board. They also cannot assess whether additional information, that they might have or wish to develop, would justify a different result if they are not fully informed of all relevant data being presented to the Board.

Bureau of Economic Research ("NBER"), and, most important, the Chair of the Market Surveillance Committee of the California ISO. As Professor Wolak notes, there is an acute need for the timely and

public release of all data submitted to and produced by the market and system operators. Having this data readily available to all market participants will enable them to become more sophisticated players in the wholesale market in the sense of being better able to protect themselves against potentially harmful market outcomes. Public availability of this data will also allow other entities besides the market monitor and regulator to perform analyses of market performance.

Frank A. Wolak, *Lessons from International Experience with Electricity Market Monitoring*, University of California Energy Institute: Center for the Study of Energy Markets (CSEM), CSEM WORKING PAPER 110, at 1 (June 2004) (emphasis added; available at <http://www.ucei.berkeley.edu/ucei/PDF/csemwp134.pdf> (last visited April 7, 2010)).

As Professor Wolak elaborates, greater disclosure will likely lead to greater competition and more efficient markets.

Public release of all data submitted to and produced by the system operator will increase the transparency of the wholesale market, particularly for the smaller players. Larger firms are more able to justify the expense of collecting the best available information on market outcomes. Consequently, rather than disadvantage these smaller firms, all data necessary to operate the spot market and the transmission network should be publicly released as soon as possible after the trading day.

Id. at 14-15 (emphases added). Greater disclosure also increases the power and efficiency of regulators.

An additional benefit of public data release is that all market participants are aware that their bids, schedules and output levels are publicly available. The fact that their behavior is directly observable is likely to make detection of market rule violations more straightforward. Any interested party can monitor the behavior of any market participant using this publicly available data.

Id. at 15 (emphases added).

Professor Wolak illustrates the danger of permitting private actors to demand that confidentiality trump the public's right to know by describing the debacle that ensued when Enron's insistence on confidentiality allowed it to "game" the California energy market, which, among other things, caused widespread disruptions of power supply and substantially raised the prices charged to ratepayers.

Perhaps the best example of how public data release could have significantly enhanced the effectiveness of a regulatory process occurred during the California crisis. Because of data confidentiality restrictions it was impossible for the public, including the press, to analyze the bidding behavior of specific market participants. Although confidential reports on bidding behavior and market outcomes were submitted to FERC by the [California ISO's Department of Market Analysis ("DMA")] throughout the crisis period, FERC was effectively able to ignore these analyses of bidding behavior because its data confidentiality requirements prevented these studies from being made available to other interested parties and the public. Had both the DMA and [California ISO's Market Surveillance Committee ("MSC")] studies, and the data they were based on, been released to the public immediately, it is difficult to see how the crisis would have lasted as long as it did. The public could have directly verified the levels of bids being submitted by all market participants and made their own assessment of the extent of the market power problem in the California market.

Id. at 15 (emphases added).

Blind faith in the ability of markets to "self-correct," blind faith in the honesty and integrity of all market participants, and blind faith in the belief that public disclosure is an impediment to free and efficient trade and a burden to be avoided, rather than a right to be honored, perpetuated the California energy debacle even if it did not cause it.

The unwillingness of FERC to permit the release of the bid, schedule and settlement data from the California ISO prevented an open analysis and discussion of the causes of the California crisis. Instead, the crisis was

allowed to continue because FERC did not take action based on the studies prepared by the DMA and MSC and it did not undertake its own analysis of the confidential data until the crisis period was largely over.

Id. at 15..

Dunn agrees, concluding that, on balance, the advantages to the public of full and timely disclosure of all data, including price data, greatly outweigh any potential harm to the public from such disclosure.

The possible benefits to be obtained by the posting of resource and load-specific offer and bid data on the day following the operating day appear to far exceed the risks of additional collusion by those market participants inclined to collude. In fact, such data posting may help expose efforts to manipulate market prices and, as a result, discourage such behavior. Such rapid data posting also has the potential to create confidence in the markets and expose what goes on in the black box, thereby increasing the pressure on: (i) market participants to behave; (ii) RTOs/ISOs to efficiently and economically operate the markets; and (iii) market monitors to detect anomalous behavior on the part of market participants and/or RTOs/ISOs.

Dunn, *Data Required for Market Oversight*, at 14 (emphasis added). *See id.* at 1.

The USAID/NARUC investigation, which was written by Professors Liz Hooper, Paul Twomey, and David Newberry, carefully analyzed the costs and benefits of public disclosure. On the positive side, there are "at least three broad means by which information release is beneficial to the functioning of markets, and in particular to the development of efficient, liquid markets." Hooper, Twomey, & Newberry, (USAID/NARUC), *Transparency And Confidentiality In Competitive Electricity Markets*, at 6 (June 2009) (available at <http://www.naruc.org/Publications/EnergyDataTransparencyRpt0609.pdf> (last visited April 8, 2011)). These three benefits are:

(a) *Reduction of risk and uncertainty.* In order to operate in an economically rational manner, agents need information about, and an understanding of, the determinants of price formation now and in the future. Lack of such information subjects businesses to increased risk and uncertainty. Potential consequences may include mistaken decisions and increased costs....

(b) *Removal of information asymmetries.* Unequal access to relevant information can create a competitive disadvantage, discourage participation in the market, facilitate market manipulation and reduce entry and new investment. Allowing participants access to the same information increases trust in market participation and hence improves liquidity and therefore predictability. . . .

(c) *Facilitation of better market monitoring.* Substantial information availability to both market monitors and third parties assists in the detection of potential or actual exercise of market power and other anti-competitive behavior.

Id. (citations omitted).

To be sure, there are "at least four reasons why greater data transparency can be detrimental to effective competition," including: "(a) Reduction in incentives for innovation (commercial confidentiality argument); "(b) Facilitation of collusion"; "(c) Information infrastructure costs"; and "(d) Incentives to develop market liquidity." *Id.* at 7-8.

Nevertheless, after weighing the costs and benefits, the USAID/NARUC Report concluded that although there may be circumstances in which confidentiality should be safeguarded -- such as "certain types of information that need to remain private to allow a firm the opportunity to reap the benefits from efforts to improve their competitive position . . . [and] protect incentives to invest in innovations (technical, operational, administrative etc.) that cannot be protected by other means (e.g. patents)," *id.*, at 7, *i.e.*, data quite dissimilar from pricing information about power purchase agreements -- as a general rule, maximum disclosure should be encouraged and, indeed, required.

Transparency is fundamental to the delivery of competitive electricity markets. Timely and reliable data help market participants – including generators, suppliers and traders – to understand past events and help predict the likely evolution of supply, demand and transmission conditions as they impact on price formation. The availability of relevant data to regulators and other third parties also allows for more effective monitoring of electricity markets and the detection of market power abuse. A critical aspect of transparency is that it eliminates (or very substantially reduces) differences in available information between

dominant and smaller market participants, thus increasing the trust and confidence needed for both to engage in trade and make decisions. The combined result is more cost-effective investment and operating decisions, reduced risk premi[ums], greater market confidence, increased market liquidity and efficiency, and lower barriers to entry.

Id. at 3-4 (emphasis added).

The USAID/NARUC authors found that "[a]ll these factors should contribute to lower electricity costs to consumers and greater confidence that the markets can be allowed to develop under independent regulation, rather than being subject to unpredictable external intervention." *Id.* (emphasis added). We agree.

The need for full public disclosure of all terms of any proposed power purchase agreement is even more essential in the context of current electric power decision-making in Vermont. The Board has determined that the costs, both environmental and economic, of industrial wind turbine projects, are such that "the general good will not be promoted unless we condition our approval of the Project on the requirement that UPC make further efforts to enter into stably priced contracts with the Vermont utilities." Docket No. 7156, Amended Petition of UPC Vermont Wind, LLC, for a Certificate of Public Good, pursuant to 30 V.S.A. § 248, authorizing the construction and operation of a 40 MW wind electric generation facility, consisting of 16 wind turbines, and associated transmission and interconnection facilities, in Sheffield, Vermont, to be known as the "Sheffield Wind Project", Order of 8/8/2007 at 40. The reasonableness of these proposed power purchase agreements is an issue to be resolved by the Board and thus the terms of the power purchase agreements are an essential part of that record. The public, which is faced with a myriad of potential renewable energy and carbon reducing strategies, must be allowed to know, without having to incur the considerable cost of participating as a party to all Board proceedings, what each of these strategies will cost so that fundamental policy decisions, with full public participation, can be made based on the facts, not on assumptions or self-serving assertions of those whose economic interests will be advanced by one project over another. In addition, the need for increased public confidence, which plays such an important part in all of the above-cited studies, calls for greater transparency and is at least as important when the decision-making involves such controversial projects as industrial wind turbines on Vermont's unique and cherished high ridge lines.

Accordingly, we urge the Board to resist the call for more secrecy and instead to insist on even more and more timely public disclosures by all regulated entities of all the terms and underlying bases of proposed power purchase agreements so the public can fully evaluate whether those terms provide sufficient benefit to warrant approval of industrial wind projects.

2. What, if anything, has changed that would justify keeping confidential any information in tariff filings that has traditionally been public?

Energize Vermont submits there have been no material changes in the scientific, economic, regulatory, or legal landscape of our State, region, or nation that would justify keeping confidential any more information regarding tariff filings than has previously been kept confidential.

3. Assuming it is appropriate to extend confidentiality treatment to protect certain contract price information in tariff filings, what procedures should the Board adopt to provide for the adjudication of confidentiality requests in the context of those tariff filings that do not result or develop into rate investigations?

Because Energize Vermont disputes the assumption that changed circumstances warrant greater confidentiality, Energize Vermont submits it is not necessary for the Board to consider adopting new or different procedures for evaluating novel requests for confidentiality. Nevertheless, although Energize Vermont does not think new procedures are necessary and because Energize Vermont recognizes investigations into such requests have the potential of evolving into time-consuming, burdensome, and costly rate investigations, we recommend requesters be required to pay the Board's costs of undertaking such investigations and conducting such hearings, and requesters face substantial financial sanctions if the Board ultimately determines the requests are frivolous.

B. Duration of confidential treatment.

“The Board's protective orders routinely advise parties that they have a "continuing obligation to reexamine protected information" and to allow for the public release of material that would no longer cause competitive harm. It is not apparent that this reminder actually works in practice, and the Board wishes to explore whether it would be better to set a shorter duration for protective orders (possibly, one to three years) and require the parties to file motions to extend the protective orders, if desired, 30 to 90 days prior to the expiration of such term,

with averments that provide a specific explanation as to why the information should continue to receive confidential treatment.”

Energize Vermont submits that no protective order should last longer than a year, that renewals should not be automatic, and that any entity that has obtained a protective order must publicly file detailed reasons why it should be entitled to no more than a year's extension at least 90 days before the expiration of the existing extension with public notice that is as extensive as the notice given when applying for a permit.

1. Would such protective order renewal requirements be unduly burdensome?

Energize Vermont submits there are no grounds to believe such renewal requirements would be unduly burdensome particularly not if the entity seeking the renewal believed the basis for such renewal was sufficient to meet the heavy burden applicable to perpetuation of confidentiality in the face of the strong public interest in disclosure.

2. How flexible and dependent on circumstances should the Board be in determining the duration of protective orders?

Although Energize Vermont believes the Board can be flexible regarding the duration of protective orders, Energize Vermont also submits that parties seeking new protective orders or extensions of existing ones still must shoulder a heavy burden to justify such orders and their terms, as well as, extensions.

3. Are there any contract terms that should be kept confidential for longer periods, perhaps even for the entire term of the purchase agreement?

Energize Vermont submits that the only contract terms that conceivably should be permitted to enjoy protective orders longer than a year are those that involve patentable trade secrets.

4. Is it appropriate for the Board to keep pricing or other contract terms confidential after the expiration of the power purchase agreement, particularly if the term of agreement is relatively short?

Energize Vermont submits it is neither necessary nor appropriate to keep pricing or other contract terms confidential after the expiration of a power purchase agreement. The protective order should end no later than when the power purchase agreement ends.

C. General standards to be applied by the Board in ruling on motions for protective orders.

“The Board is of the view that its power to grant protective orders is primarily based on 30 V.S.A. § 9, which gives the Board the powers of a court of record with respect to matters within the Board's jurisdiction, and that, in exercising that power, the Board is not necessarily constrained by the specific exceptions set forth in the Vermont access to public records law, specifically 1 V.S.A. § 317(c). Starting from a rebuttable presumption in favor of the non-confidential treatment of information, the critical consideration for the Board has been whether confidential treatment is consistent with the broadly defined underlying interests of ratepayers and the public, including the relative costs and benefits to them of keeping certain information confidential.”

1. The Board welcomes any comments with respect to the Board's views as to its powers or as to standards the Board should apply in ruling on motions for protective orders.

Energize Vermont submits that the Board's existing standards and procedures are sound and that no changes are warranted. Ultimately, the Board is the protector of the public interest and possesses the legal authority to assure that it can fulfill that obligation. Thus, the Board has the power to order the release of any information that an applicant relies upon as the basis for a request for action by the Board and to reject any proposal where the applicant refuses to publicly disclose all relevant information regarding a PPA that is essential to the proposed action before the Board.

2. The Board notes that parties seeking protective orders in Board proceedings often make the argument that the information constitutes a "trade secret," seemingly invoking the public document exception in 1 V.S.A. § 317(c)(9). Is that the appropriate standard for the Board to apply when adjudicating motions for protective orders, especially when it comes to the pricing terms of power purchase agreements, which have historically been publicly available?

Energize Vermont submits that pricing data does not qualify for protective orders under 1 V.S.A. § 317(c)(9). No Vermont case has held that pricing terms or information can constitute a trade secret and federal courts that have recently considered the question have held that prices do not qualify for protection as trade secrets, *See, e.g., IBM Corp. v. Visentin*, 2011 U.S. Dist. LEXIS 15342, *39, 31 I.E.R. Cas. (BNA) 1586 (S.D.N.Y. Feb. 16, 2011) (citing *Marietta Corp. v. Fairhurst*, 301 A.D.2d 734, 754 N.Y.S.2d 62, 67 (N.Y. App. Div. 2003) (concluding

that "pricing data and market strategies . . . would not constitute trade secrets"). *See also Nagler v. Garcia*, ___ F.3d ___, ___, 370 Fed. Appx. 678, 681, 2010 U.S. App. LEXIS 6295, *8 (6th Cir. March 25, 2010) (applying Michigan law); *Financial Equip. Co. v. Silva*, ___ F.Supp.2d ___, 2010 U.S. Dist. LEXIS 126656, *25 (E.D. Wisc. Nov. 17, 2010) (citing *MQS Inspection, Inc. v. Bielecki*, 963 F. Supp. 771, 774 (E.D. Wisc. 1995); *TMX Funding, Inc. v. Impero Techs., Inc.*, ___ F.Supp.2d ___, 2010 U.S. Dist. LEXIS 37064, *15 (N.D. Cal. March 18, 2010). Furthermore, because 1 V.S.A. § 317(c)(13) protects "information pertaining to appraisals or purchase price of real or personal property for public purposes prior to the formal award of contracts thereof," by negative implication, other "information pertaining" to other prices are not exempt from disclosure under 1 V.S.A. § 317(c).

3. Although the Board may decline to provide confidential treatment without a request from any party to deny such treatment, the Board generally resolves issues about confidentiality only when there is a genuine disagreement about the confidential nature of information. When the motion for a protective order is not contested, the Board will review the motion and supporting averments to ensure that a prima facie case has been made for keeping the information under seal. Is the Board's approach to resolving confidentiality issues appropriate or should a higher standard than a prima facie showing be required even when none of the other parties opposes the motion for a protective order?

Energize Vermont submits a higher standard is required. The Board is not a neutral arbiter; it is a regulatory body that serves the public's interest and must independently and vigorously assess whether a petitioner deserves a protective order. Ordinary ratepayers and other citizens may not have the time or resources to contest each petition. Where they do not the Board must stand in their shoes and must, on its own initiative and authority, hold requesters to a standard of proof higher than a minimal *prima facie* test. In effect, the Board must act as the opposing party in such instances or require that the Public Advocate of the Department of Public Service present the best possible case in opposition to the proposed confidentiality request – *i.e.*, that the Public Advocate carry-out its duty to advocate for the public.

4. In recent dockets, the Board has noted a lack of specificity in the averments of the parties seeking protective orders. Is it appropriate for the Board to demand a greater specificity with respect to each item of information for which confidentiality is

sought? Can the Board determine the costs and benefits to ratepayers and the public of keeping specific information confidential (even on a prima facie basis) without more focused and contract-specific averments? How and to what extent should the Board test general averments as to the competitive disadvantage that will result from disclosure?

Energize Vermont submits it is absolutely appropriate for the Board to insist upon a minimal level of specificity regarding each item of information for which confidentiality is sought and that it is impossible for the Board to weigh the comparative costs and benefits of secrecy without concrete and particularized proof of the significant likelihood of substantial harm unless a protective order is granted. The Board cannot simply accept the requester's unsupported and self-serving claims as true, particularly in light of the studies cited earlier in these comments that demonstrate that conventional assumptions about the alleged benefits of secrecy and harms of disclosure are baseless. It is well-established in Vermont and throughout the country that the party seeking a protective order bears the burden of showing specific prejudice or harm that will result if no protective order is granted. As the Vermont Supreme Court has definitively held:

A party seeking a protective order to prevent injury to a business must present allegations of injury with some specificity. *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1114 (3d Cir. 1986). "Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c) test." *Id.* at 1121; *see also Joy v. North*, 692 F.2d 880, 894 (2d Cir. 1982) (refusing to make protective order where proponent's only argument in its favor was the conclusory statement that disclosure of certain information would "injure the bank in the industry and local community").

Schmitt v. Lalancette, 175 Vt. 284, 290-91, 830 A.2d 16, 22 (2003). (footnote omitted). *See also County of Santa Clara v. Astra United States*, 588 F.3d 1237, 1249 (9th Cir. 2009).

D. Particular issues involving confidentiality of power purchase agreement terms.

“Based on the arguments advanced in recent Board proceedings in which a party sought confidential treatment of certain terms in power purchase agreements, it appears that public disclosure of certain information in a power

purchase agreement may negatively affect Vermont distribution utilities, and indirectly ratepayers and the public, in one of two ways.

First, public disclosure of certain contract terms could put a Vermont distribution utility at a competitive disadvantage in negotiating future power purchase agreements as potential suppliers will obtain valuable knowledge about the prices, terms and concessions previously agreed to by the distribution utility. Second, the prospect of public disclosure of certain contract terms may affect the willingness of out-of-state power suppliers either to enter into power contracts with Vermont distribution utilities or to make unusual concessions that, if they became public, could set a precedent for future negotiations with other buyers. On the other hand, these considerations must be weighed against all the benefits of public disclosure and against the fact that, without public disclosure of contract terms, ratepayers and the public will be hindered in their ability to understand, and judge for themselves, the relative costs and benefits of power purchase agreements.”

Energize Vermont submits that these claims are not supported by any record facts and are contradicted by Dunn and Wolak. Although utilities often "contend that they will incur substantial competitive harm if information, such as their bid and offer data, becomes publicly available, . . . relatively small number of generators and their repeated market interactions, it is likely that the more active players already know, or can reasonably estimate, their competitors' information." Dunn, *Data Needed for Market Oversight* at 6. In addition, the truly important question is not whether greater or lesser disclosure is a good for a single competitor or a small group of competitors (whether based in Vermont or elsewhere), but whether maximum disclosure is good for the market and beneficial for the majority of Vermont citizens and ratepayers. On this question, knowledgeable commentators agree that the public interest lies in greater and timelier transparency, including on price, in energy markets. As Dunn notes, although these arguments urging increased secrecy and less public scrutiny are increasingly commonplace, the

bottom line is that more, and more timely, information leads to better markets. Peter C. Carstensen indicates, in his paper *Creating Workably Competitive Wholesale Markets in Energy: Necessary Conditions, Structure and Conduct* [1 ENVTL. & ENERGY L. & POL'Y J. 85, 86 (2005)], that “encouraging accurate and prompt public reporting of prices . . . is usually consistent with maintaining a workably competitive market.” The CRA [International] study [*Analysis of Data Release*

Practices in Centrally-Dispatched Electricity Markets (June 29, 2007)] indicates that the “more transparent the operation of the market, the more likely improvements will be made and the more confidence participants will have in transacting in that market.” Finally, the James D. Reitzes paper, *International Perspectives on Electricity Market Monitoring and Market Power Mitigation*, [6 REV. OF NETWORK ECONOMICS 397, 417 (2007)] notes that the “public release of proprietary electricity market data” can lead to: (i) increased market competitiveness and liquidity; (ii) reduced risk premiums; and (iii) sharper competitive responses, and that such “public attention may deter firms from undertaking activities that are perceived to harm the public.”

Id. at 7-8.

The assumption that underlies the two “reasons” stated for confidentiality actually provides persuasive evidence why confidentiality should not be allowed. It is assumed that if information is kept secret a distribution company or a power supplier may make an agreement based on incomplete information, one that can produce a more favorable outcome for ratepayers. However, the opposite is also true and an inadequately informed buyer or seller may reach an agreement that is less favorable to the ultimate consumer than if the transaction had been negotiated with full disclosure. There is no way to know which outcome will occur and, absent full disclosure of PPA terms, no way to evaluate after the fact whether the consumer was in fact placed at a disadvantage due to the absence of full knowledge at the time of the negotiations. The premise of the free market competitive market that is to be achieved by deregulation is that fully informed buyers and sellers will reach the “fair” resolution in any negotiation. If full information is not available, the regulation of markets by the Board, which was the *status quo ante*, will have been replaced by the discredited doctrine of *caveat emptor*, where the strong (and fully informed) prey upon the ignorance of others.⁸

⁸ It is axiomatic that the modern regulatory state is premised on the notion that *caveat emptor* is not only unfair to individuals but hurtful to societies as a whole. Instead, for example, full and fair disclosure of information by those who are issuers of securities to the investing public is a cornerstone of the federal securities laws. In enacting the mandatory disclosure system of the Securities Exchange Act of 1934, 15 U.S.C. § 78a, *et seq.*, Congress sought to promote disclosure of honest, complete, and correct information in order to facilitate the operation of fair and efficient markets. *See, e.g., SEC v. Zandford*, 535 U.S. 813, 819 (2002); *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 151 (1972).

Given those choices it is difficult to see how the Board and the public would not choose fully informed regulation rather than the helter-skelter lottery of partially blinded buyers and sellers seeking to reach a fair PPA by happenstance.

Finally, the Board oversees each PPA in its role of regulating the distribution companies. Although the Board must decide if a final agreement is fair to consumers, the Board is deprived of the benefit of consumer input in reaching that decision unless the consumers have the resources to fully participate in the Board's decision-making process. Public participation is not only a hallmark of the democratic process but is demonstrably of benefit to the Board. Without the full PPA facts, the public, which lacks the economic incentives and substantial financial resources of the generators or the distribution companies, cannot decide whether to expend its limited resources on a particular proceeding because it does not know, due to a confidentiality order, what is really at stake.

1. The Board welcomes any comments with respect to the particular standards the Board should apply in ruling on motions for protective orders related to specific contract terms in power purchase agreements.

Energize Vermont submits that the existing standards are adequate and, if anything, they should be tightened.

2. From the standpoint of the distribution utilities, are pricing terms often less commercially sensitive than certain other terms in power purchase contracts, such as credit support requirements?

Energize Vermont has no comment on this question.

3. From the standpoint of ratepayers and the public, the price to be paid for power under a long-term contract would appear to be the information as to which there is the greatest interest in public disclosure. Is this correct? How relevant to future potential suppliers of power is the price a distribution utility is willing to pay at a particular time for a particular resource at a particular location?

Although pricing information is extremely important, in order to properly form an opinion regarding the PPA, the public would need to know all the terms of the PPA, just as the Board itself would need to know all of the terms of the PPA to make a rational decision on whether the PPA was fair and reasonable. In addition, although Energize Vermont is not a power supplier, it would appear

that in order to make a judgment about the price to set on wholesale power the seller of that power would want to know as much as possible about the market, including prior sales in the market. As stated several times above, the only way to have an efficient free market is if the participants in the market have full knowledge of the relevant market facts, to the extent they are knowable. Just as the ultimate consumers of the power need to know what price they may have to pay for power in order to determine whether to oppose a proposed PPA and to consider alternatives to the proposed PPA (including other and less expensive options), so too must the seller and the buyer be fully informed.

4. The Board takes the position that the parties to a power purchase agreement cannot solely through their own agreement shield terms of the contract from public view in a Board proceeding. Accordingly, the Board has independently judged the merits of the motion for a protective order without regard to such provisions in the power purchase agreement. Is this appropriate?

Energize Vermont submits the Board's stance is absolutely appropriate. Public disclosure is essential to public confidence and public good. Regulated entities should be no more able to exempt themselves from public disclosure of contract terms in this area than they are in any other. It is unthinkable, for example, that securities dealers and investment banks could shield themselves from public scrutiny merely by reaching an agreement to do so. Governments are predicated on the idea that private parties prefer to act in their own interest, not the public's interest. As the great philosopher and economist Adam Smith noted: "People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices." *THE WEALTH OF NATIONS*, Book I, Chapter X (1776). James Madison, widely regarded as the Father of the federal Constitution, made a similar point in this now famous passage from *Federalist Paper No. 51* (1788): "If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself." *THE FEDERALIST PAPERS* 322 (Clinton Rossiter, ed. 1961). The Board exists to "control the governed," here, the generators and the distributors of electric power; the public must be fully informed in order to be able to check on the Board, to keep tabs on and, if necessary, "to control [the government] itself."

5. Recently, the Board has distinguished between agreements under which a Vermont utility has purchased all or substantially all of the output of a generation facility from those in which a Vermont utility purchases only a portion of the output, suggesting that the argument for confidentiality from the perspective of the seller may be less persuasive in the first instance. Is such a distinction appropriate at least in some cases?

Energize Vermont submits that the premise of this question is that disclosure of the price paid by a prior purchaser will impact the price to be paid by a subsequent purchaser in a negative way. However, there is no direct evidence to support that premise and commonsense suggests it is wrong. For example, the first buyer of some of the electricity from a supplier may get a lower price because the seller is anxious to be assured of a buyer. Later buyers can expect to pay more as the supply dwindles. This well-known supply/demand principle does not deter the early buyer or the later buyer, particularly when the product is something that is as valuable as energy. It is part of the free market system and knowledge that an early buyer got a better deal in a previous sale, may provide an incentive for buyers to seek contracts earlier when the next sale occurs. If the price paid by the first purchaser is unknown, the second purchaser is forced to negotiate blindly and without full market information. Uninformed purchasers are more likely to be taken advantage of by sellers. The Board should not encourage such market anomalies.

The question posed also asks whether knowing what a prior buyer paid may give the subsequent buyer a basis to insist on a similar price, thus denying the seller the chance to make a larger profit on the next sale. Why should the Board enable the seller to obtain more from the second buyer than it was willing to settle for from the first buyer, absent a rational basis for the difference? If a rational basis exists, the seller should be willing to share that with the buyer to justify seeking a higher price. There is no indication that energy generators are being discouraged from the Vermont market because they are not able to make a reasonable profit. In addition, the whole purpose of deregulating the market was to allow a free market to prevail. Without full knowledge, a free market cannot function properly and many of the advantages of deregulation will be lost.

Finally, as the previously discussed studies by Dunn, Wolak, and the NARUC make clear, empirical evidence establishes that fully informed market participants make better decisions, ones that benefit all participants and consumers, than decisions that are made under circumstances where the market

participants are required to negotiate in the dark. If a seller can afford to offer an attractive price to one buyer, thus benefiting consumers to whom the power is distributed, why shouldn't other consumers from other buyers have the same benefits? In carrying out its functions to protect the public interest, the Board should encourage negotiations that produce a fair return to sellers but also the best possible price for consumers. Transparency, not secrecy, furthers that objective.

6. When the Board evaluates power purchases at above-market rates in light of other considerations such as renewable attributes and environmental benefits, does this heighten the need for public disclosure of pricing terms? Don't ratepayers and the public need sufficiently detailed information in order to evaluate whether the Board is making the appropriate trade-offs between price and other considerations in approving a power purchase under Section 248?

Energize Vermont fully agrees that in cases where decisions are reached by the Board on factors other than economic costs to the consumers, there is a heightened need for full disclosure of all PPA terms. The public needs to know just how much ratepayers would be compelled to pay to achieve some other goal or to meet some other value and the public needs full information in order to determine whether there are other and better ways to achieve that value. The mandate of 30 V.S.A. § 248(b)(2) is that no CPG can be issued absent a finding by the Board that a proposed project “is required to meet the need for present and future demand for service which could not otherwise be provided in a more cost effective manner through energy conservation programs and measures and energy-efficiency and load management measures, including but not limited to those developed pursuant to the provisions of sections 209(d), 218c, and 218(b) of this title”. *Id.* (emphasis added). Thus, the full terms of the PPA need to be disclosed and analyzed to ascertain the true cost of the proposal and to compare that cost to “energy conservation programs and measures and energy-efficiency and load management measures” that the distribution company could choose in lieu of a more expensive PPA to obtain the same non-economic value, such as a reduction in carbon emissions. *Id.* Dunn, Wolak, and the NARUC are correct in their findings that maximum transparency ensures fairer markets, lower rates, and greater governmental accountability, even when the only consideration is not the direct economic cost of the proposal.

7. In addition to Vermont public policy preferences in favor of greater public disclosure, the general value of transparency,

the facilitation of informed public input, debate and participation in Board proceedings, and the enhanced opportunity for informed discussion and analysis of Board decisions and of Vermont electric utilities, generally, by the public, the media, consultants and academic researchers, it can be argued that greater public disclosure of contract terms would result in a more informed and efficient market for the purchase and sale of wholesale power.

a. The Board seeks more information about the practices of other states, FERC and ISO-NE as it relates to protecting the confidentiality of contract terms for the purchase of power.

b. To what extent have other states, FERC and ISO-NE considered public interest and market efficiency arguments in assessing the value of greater public disclosure of the terms of wholesale power purchase agreements?

c. To what extent is there agreement or disagreement as to the accuracy of any of the following statements:

(i) Greater transparency about the specific terms of power purchase agreements is desirable both because of the public interest and because competitive markets tend to operate more efficiently when market participants have greater information.

(ii) There is a national trend toward keeping the terms of power purchase agreements confidential.

(iii) In most, if not almost all, jurisdictions, outside of Vermont, price and credit terms relating to wholesale power agreements are regarded as commercially sensitive and are typically not disclosed to the public.

(iv) There is legitimate concern that requiring Vermont distribution utilities to publicly disclose commercially sensitive power purchase terms may put them at a competitive disadvantage in relation to out-of-state sellers and buyers of power that are not subject to similar public disclosure requirements.

(v) Public disclosure of certain terms of power purchase agreements will undermine the bargaining position of Vermont utilities and lead to higher rates for their customers.”

Energize Vermont fully supports the initial statement. As discussed previously Energize Vermont submits that Dunn, Wolak, and the NARUC are correct in their findings that an informed citizenry yields fairer and more efficient markets and more optimal government. As to the specific following questions and sub-questions Energize Vermont offers the following comments:

- a. Energize Vermont has provided this information earlier in these comments.
- b. Energize Vermont has provided this information earlier in these comments.
- c. Energize Vermont submits:
 - (i) Dunn, Wolak, and the NARUC are correct in their findings that maximum transparency ensures fairer markets, lower rates, and greater governmental accountability. We have seen no reputable studies or empirical evidence that contradicts these findings.
 - (ii) Energize Vermont has seen no reliable evidence that this trend exists, let alone that it represents a steady and unmistakable trend. Furthermore, the significance of such a trend, even if it did exist, would be comparatively inconsequential in light of Vermont's unique, powerful, and constitutionally required tradition of public openness. *See Teachout, "Trustees and Servants", 31 VT. L. REV. at 860.*
 - (iii) The previously cited studies by Dunn, Wolak, and the NARUC show that while requests for greater secrecy are peaking, evermore jurisdictions are rejecting such requests.
 - (iv) Because a PPA with an out-of-state seller requires Board approval for the in-state buyer, the Board has the right and should insist that the out-of-state seller disclose relevant information of the same kind and to the same degree as an in-state seller. Any other result would

discriminate against in-state sellers as it would, if the premise of the non-disclosure argument were valid, irrationally advantage out-of-state sellers. In addition, there is no credible or consistent evidence that out-of-state sellers would reject selling in the attractive Vermont market merely because of disclosure requirements and threats from any of them that such a result would occur should be seen for what they are – threats without credibility.

- (v) Energize Vermont submits, for the reasons stated above, that there is no reason to fear that more information will harm Vermont ratepayers. To the contrary, studies published by APPA, CSEM, and NARUC demonstrate that Vermont customers have much to gain, including lower rates, from the routine and timely public disclosure of PPA terms, including PPA prices.

Conclusion

For all the reasons set forth above, Energize Vermont urges the Board to reject demands for greater secrecy and to require greater and timelier public disclosures by all entities subject to the Board's regulation.

Respectfully submitted

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