



Institute for Energy and the Environment

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July 25, 2011

Ms. Susan Hudson
Clerk
Vermont Public Service Board
112 State Street
Montpelier, Vermont 05620-2701

Re: Confidentiality Considerations Related to Power Purchase Agreements

Dear Ms. Hudson:

I write in response to your memorandum of June 22, 2011, inviting participants in the recent workshop on the above-referenced topic to comment on certain issues that arose during the discussions. I am grateful to the Board for convening what was a highly informative and insight-producing discussion, and I likewise welcome this opportunity to comment further on pending issues.

The relevant policy considerations aside, I remain convinced that the Board's current practices with respect to confidential treatment of Power Purchase Agreements (PPAs) place the Board at too significant a risk of a determination by the Vermont Supreme Court that the Board is in violation of the procedural requirements of the Access to Public Records Act (APRA). I have articulated my basis for holding this view in previous filings. There is no question that the Board is subject to the APRA, which contemplates a straightforward procedure for submitting document access requests. The Legislature has explicitly decreed that the APRA should be liberally construed in a manner that promotes and favors disclosure. 1 V.S.A. § 315.

As your June 22 memorandum notes, the Board has historically relied on 30 V.S.A. § 9, vesting the Board with "the powers of a court of record in the determination and adjudication of all matters over which it is given jurisdiction," to substitute for the procedures in the APRA the more formal motion practice that is reflected in the Vermont Rules of Civil Procedure as they have been adopted and applied by the Board. This is certainly a rational approach and one that reflects a colorable view of applicable law on a question the Vermont Supreme Court has not had the opportunity consider. However, in my view the Court's existing body of APRA caselaw makes clear that APRA disputes are highly likely to be resolved in favor of maximizing disclosure and

streamlining the process of obtaining it.¹ See, e.g., *Schlansky v. City of Burlington*, 13 A.2d 1075, 1081 (2010) (“We do not overstate the case in saying that open access to governmental records is a fundamental precept of our society. The 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.”) (citation and internal quotation marks omitted).²

Also vulnerable to rejection by the Vermont Supreme Court is the notion that the Board can use its quasi-judicial authority to designate records as confidential for purposes of formal administrative proceedings and then rely on 1 V.S.A. § 317(c)(1) (exempting from disclosure “records which by law are designated confidential”) and then invoke the relevant protective order as the source of the “law” that justifies non-disclosure. The recent decision in *Price v. Town of Fairlee*, 2011 VT 48, undermines such a theory. As the Court stressed in *Price*, the disclosure exception in question “is no exception to the general rule of strict construction favoring disclosure.” *Id.* at ¶ 14 (making clear that when applying this disclosure exception the Court will not just construe section 317 narrowly and in a manner that favors disclosure but will apply the same rule of construction to the referenced “law”). To reiterate a point I have previously made, the Board’s approach to this issue, while reflecting a laudable commitment to the beneficent purposes of the agency itself, would, if deemed consistent with Vermont law, permit a regrettable kind of bootstrapping in which an agency could make a binding determination of confidentiality simply by formally determining that confidentiality advances the agency’s mission. The APRA is intended to allow the public to discern “what the government is up to,” even when what the government is up to is virtuous and consistent with the public good.

Moreover, assuming *arguendo* that the Board’s statutory authority under 30 V.S.A. § 9 would take the Board out of the APRA regime altogether, this might have the effect of making PPA confidentiality determinations more rather than less challenging for the

¹ A precedent that might tend to support a contrary view is *Judicial Watch, Inc. v. State*, 179 Vt. 214 (2005), in which the Court determined that the broad disclosure principles of the APRA were partially superseded by a separate statute governing the storage by the State Archivist of a retiring governor’s official correspondence. However, *Judicial Watch* dealt with substantive disclosure principles; the dispute was resolved procedurally in full accordance with the APRA. See *id.* at 216.

² *Schlansky* provided the Court with an opportunity to construe the so-called “litigation exception” to APRA disclosure, 1.V.S.A. § 317(c)(14) (governing “records which are relevant to litigation to which the public agency is a party of record, provided all such matters shall be available to the public after ruled discoverable by the court before which the litigation is pending, but in any event upon final termination of the litigation.”). This exception, by its terms, does not apply to the Board because the Board is not “a party of record” in its own proceedings even assuming that such proceedings could be “litigation” as that term is used in the exception. Moreover, even if the Court were to apply the litigation exception to the Board itself, it would clearly be inapplicable after the relevant Board proceedings had been reduced to final judgment.

Board to make. The Board's June 22 memorandum referenced *In re Sealed Documents*, 172 Vt. 152 (2001), and invited comments on its import. Suffice it to say that the *Sealed Documents* case reflects the Judicial Branch's commitment to exercising its independent authority in a manner that is even more meticulously disclosure-favorable than that which the Legislature has decreed for executive branch agencies. See, e.g., *id.* at 162-63 (describing applicable balancing test, noting that "the requisite showing of harm must be demonstrated with specificity as to each document," and requiring "fact-specific findings with regard to why the presumption of access has been overcome") (citations and internal quotation marks omitted). Although the *Sealed Documents* case deals with an underlying criminal proceeding, thus making it arguable that a less disclosure-favorable rule might apply in the non-criminal context, the fact remains that those who are concerned about the public policy implications of exposing unredacted PPAs to full public scrutiny are not necessarily well-served by whatever standard the Judicial Branch would impose upon itself.

For these reasons, in my view the Board should consider legislative action as a key element in whatever action plan emerges from the current workshop process. A well-crafted legislative proposal would not provide a blanket exemption from the APRA but would, rather, set forth a disclosure exemption for PPAs in the files of the Board when disclosure-related harm to *the public* outweighs the value of such disclosure with respect to keeping the public informed about the Board's activities. It could authorize the Board to promulgate substantive and procedural rules which would, in turn, allow the Board both to embrace some of the approaches discussed at the April workshop and to approach confidentiality issues procedurally in a manner similar to current practice (i.e., by entering protective orders subject to subsequent reexamination, but without requiring full-blown motion practice for members of the public to seek revision of protective orders after the conclusion of underlying administrative proceedings). Further, well-crafted legislation could and should address the conundrum referenced at page 3 of your June 22 memorandum (i.e., the possibility that each public agency participating as a party in board proceedings might have to make its own, independent APRA determinations if the Board cannot make confidentiality determinations that are binding pursuant to section 317(c)(1)).

The June 22 memorandum sought comment on the question of whether all confidential commercial information that might be worthy of protective treatment would qualify as "trade secrets" under 1 V.S.A. § 317(c)(9) and thus subject to potential non-disclosure on that basis. In my judgment, the answer to that question is likely "no," further illustrating the need for a legislative solution to the issues under discussion. As the Board is aware, the Vermont Supreme Court has only construed the "trade secrets" exception only once, in *Springfield Terminal Railway Co. v. AOT*, 174 Vt. 341 (2002). There, the Court made clear that "trade secrets" constitute not just intellectual property but also business information of a more generic nature as long as it is not otherwise made available to the public. However, by its terms the "trade secrets" exception applies only to information that gives its owner or user "the opportunity to obtain business advantage over competitors who do not know it or use it." (Emphasis added).

Much of the concern about disclosure, as discussed in the workshop, concerned the possible acquisition of business advantage by contractual counterparties or would-be counterparties. The plain language of section 317(c)(9) makes clear that the exception does not address such an interest, however legitimate. I concede that, to some extent, the "trade secrets" exception can be applicable insofar as the issue is competitive advantage as between rival wholesale sellers. But, no wholesale sellers have come forward to explain the extent to which such a competitive advantage exists, thus leaving the Board and the workshop participants with only the hearsay assertions about this issue made by the state's utilities.

As the Board suggested in its June 22 memorandum, the liberal, pro-disclosure rule of construction that applies to APRA matters is likely to undermine efforts to interpret the trade secrets exception in a manner that would protect PPAs as adequately as the parties to those agreements would like. This issue further underscores the value of pursuing a legislative solution to the pending problem.

Finally, although notions of fairness suggest I should not undertake any analysis of responses to the June 22 memorandum that antedate mine, I do think it would be helpful if I made one brief observation about the submission of the Department of Public Service. On the first page of its July 22 comments, DPS endorses the suggestion of utilities that the Board adopt a *pro forma* protective agreement that would provide for a three-year confidentiality period, subject to a rebuttable presumption "such that parties who believe that a shorter duration is appropriate can make such a request of the Board." This approach, though arguably sensible within the confines of any particular Board proceeding, has a fatal flaw. It is almost impossible to imagine a set of circumstances in which a party to a Board proceeding would have any incentive or reason to devote resources to arguing for a shorter confidentiality period, given that the *pro forma* protective order would presumably give the parties themselves full access to unredacted PPAs.

In light of the foregoing, I recommend that the Board convene an additional workshop session with an eye toward developing a measured and sensible initiative that would likely involve some combination of legislative reform and Board action. The workshop proceedings to date have been highly informative and have illustrated even to disclosure proponents like myself why an absolutist approach to PPAs is probably not the best public policy. Nevertheless, I believe the Board and the Legislature should ultimately adopt a disclosure regime that is calculated to keep the public as informed as possible about the costs and risks of purchased power given the central role purchased power plays in electric utility rates and service in Vermont. This accountability, like all regulation, probably imposes some small cost that is ultimately borne by ratepayers. In my view, the cost is worth it because it buys a crucial element of public confidence.

I hope to continue to have the opportunity to assist the Board in its consideration of these issues and would be pleased to collaborate with other stakeholders in this useful process. Thank you for considering my views.

Sincerely,

A handwritten signature in black ink, appearing to read "Donald M. Kreis". The signature is fluid and cursive, with a large initial "D" and "M".

Donald M. Kreis

Associate Director and Assistant Professor of Law