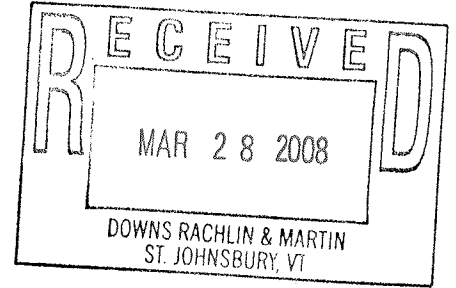


STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7373

Joint Petition of Vermont Electric Power)
Company, Inc., Vermont Transco, LLC, and)
Central Vermont Public Service Corporation for)
a certificate of public good, pursuant to 30)
V.S.A. Section 248, authorizing the construction)
of the Southern Loop Transmission Upgrade)
Project)



Order entered: 3/27/2008

PROCEDURAL ORDER RE: PROTECTIVE AGREEMENT

On March 11, 2008, Vermont Electric Power Company, Inc. and Vermont Transco, LLC (collectively, "VELCO") and Central Vermont Public Service Corporation ("CVPS," and with VELCO, "Petitioners") filed a motion requesting that the Public Service Board ("Board") issue a protective order in this proceeding. The filing explains that Petitioners, and Petitioners' consultant La Capra Associates, Inc. ("La Capra"), have information that they allege is of a confidential and proprietary nature, that it has been, or may be, asked to provide to the Board, the Vermont Department of Public Service ("DPS"), and certain other parties, the names of which are set forth on the signature pages and approved schedules to the Protective Agreement, as defined below (VELCO, CVPS, La Capra, the DPS and each other party will be sometimes referenced herein, where the context requires, as a "Party" and collectively as the "Parties").

To preserve the confidentiality of that information while facilitating disclosure of information in this proceeding, the Parties have entered into a Protective Agreement dated as of February 29, 2008, attached hereto (the "Protective Agreement"). Schedule I of the Protective Agreement, as may be amended in accordance with the terms of the Protective Agreement, describes information that Petitioners (on behalf of La Capra) allege may result in financial or competitive harm to La Capra if disclosed on the public record (which information included in

Schedule I, as amended from time to time, and is herein referred to as the "Allegedly Confidential Information").

Pursuant to that Protective Agreement and to preserve the confidentiality of Allegedly Confidential Information, VELCO, CVPS, La Capra, the DPS and such other parties that have executed the Protective Agreement request that the Board issue a Protective Order implementing the terms and procedures of the Protective Agreement.

On March 17, 2008, the Town of Brookline ("Brookline") filed an objection to the issuance of the requested protective order. Brookline contends that Petitioners have not provided sufficient information to determine whether the La Capra information merits confidential treatment. Brookline further asserts that the La Capra information appears to be directly related to the issues of need for and alternatives to the proposed Southern Loop Project (which is the subject of the current Docket). According to Brookline, the Board's decision and process must remain transparent, and therefore the La Capra information must either be publicly available or not allowed to be used before the Board.

On March 19, 2008, the Petitioners filed a response to Brookline's objection. The Petitioners assert that their request for a protective order is consistent with regular practice at the Board, and allows for sharing of proprietary information in discovery without the delay and expense associated with discovery disputes. The Petitioners contend that, in accordance with the terms of the Protective Agreement, they will be providing the basis for confidential treatment of any Allegedly Confidential Information, and Brookline and other parties will have access to the Allegedly Confidential Information.

On March 24, 2008, Brookline filed a reply to the Petitioners's response. Brookline asserts that the Petitioners have filed "an extremely broad generic request for a protective order, which will have the effect of keeping information relative to the Southern Loop Project away from public scrutiny." Brookline contends that the Petitioners should be required to make a convincing showing that they will be adversely affected by disclosure of the information.

We have carefully considered the arguments of the parties. While we agree with Brookline that the Board's decision in this Docket should, to the greatest extent possible, be based on publicly available information, the question currently before us relates to the

confidentiality of information exchanged among the parties in discovery, *not* the confidentiality of the evidentiary basis for the Board's decision. Previously, in the course of reviewing the proposed sale of the Vermont Yankee nuclear power station in Docket No. 6545, the Board thoroughly reviewed the process that should govern the provision of allegedly confidential material in discovery.¹ In that prior decision, we developed the procedures that the Petitioners seek to follow in the current proceeding. Those procedures included the requirement that the Petitioners:

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 appropriately places the burden of justifying confidential treatment on the party seeking such treatment. It also ensures that counsel for the party seeking confidentiality has actually reviewed and considered the relevant confidentiality factors, as they relate to the specific document or information at issue. The information to be included in the averment is set out in detail in our Order below.²

Our prior decision noted that:

The procedure that we adopt in this Order also provides benefits to the non-petitioning parties compared to the alternative of having no protective order. In the absence of the procedures that we order today, there would be no procedures in place whereby the Petitioners could readily provide Allegedly Confidential Information in response to discovery requests. In the absence of these or similar procedures, the Petitioners would likely seek a protective order, or raise an objection, without providing the information (assuming that the parties could not resolve their disagreement through good-faith discussion, as required by V.R.C.P. 26(h)). In contrast, the procedure that we adopt today allows the non-petitioning parties to obtain the immediate use of information that the Petitioners designate as Allegedly Confidential Information, without having to wait for a Board or Hearing Officer ruling.

Furthermore, the Protective Agreement represents a voluntary agreement among the parties as to procedures for the exchange of information, and our Order today is limited to information that is exchanged pursuant to that agreement. Thus, it is up to the Petitioners to determine which, if any, information they are willing to provide in discovery pursuant to the procedures that we adopt today. Likewise, if

1. Docket No. 6545, *Investigation into proposed sale of Vermont Yankee Nuclear Power Station to Entergy Nuclear Vermont Yankee, LLC*, Order of 11/9/01.

2. *Id.* at 5–6 (footnote omitted).

the non-petitioning parties choose not to accept these procedures, they may instead avail themselves of the usual discovery tools, including motions to compel where appropriate.³

Thus, the procedures that we established in Docket No. 6545, and which the Petitioners propose to follow in the current proceeding, provide a framework whereby the Petitioners must file supporting averments for every document that they wish to keep confidential in the discovery process. This framework allows Brookline and the other parties to obtain access to the allegedly confidential information as part of the discovery process, to know the Petitioners' bases for claiming confidentiality, and to challenge the Petitioners' claims of confidentiality. Furthermore, under this framework there would be no Board determination that the information does in fact merit confidential treatment, unless a dispute is brought to the Board for resolution.

For these reasons, we find good cause to order implementation of the Protective Agreement and that such Agreement is appropriate, useful and reasonable, but with the following clarification. Today's Protective Order shall govern only the protection of documents and information provided in discovery. If a Party wishes to keep confidential any material that is proffered for inclusion in the evidentiary record, that Party must present a properly supported motion for protection of that material.

Therefore, IT IS HEREBY ORDERED that Allegedly Confidential Information provided by VELCO and/or CVPS (on behalf of La Capra) pursuant to the Protective Agreement shall be treated in this proceeding as follows:

1. The Protective Agreement, filed with the Board on March 11, 2008, attached hereto, is approved and adopted as part of this Order.

2. For each document or information response that VELCO and/or CVPS wishes to treat as Allegedly Confidential Information, VELCO and/or CVPS must submit a detailed, document-specific (or information-specific) averment of the basis for such treatment, which addresses the following, to the extent that VELCO and/or CVPS relies upon that factor as the basis for an assertion of confidentiality:

- a. Identification of the specific document or information for which confidential treatment is sought;

3. *Id.* at 6-7, 8 (footnote omitted).

- b. Explanation of the degree to which the document or information contains a trade secret or other commercially sensitive information, or is privileged;
- c. For documents and information alleged to contain trade secrets or other commercially sensitive information,
 - i. the extent the information is known outside VELCO, CVPS and/or La Capra,
 - ii. the extent the information is known by employees and independent contractors,
 - iii. measures taken to guard secrecy,
 - iv. the value of the information to VELCO, CVPS and/or La Capra and competitors,
 - v. the amount of effort or money used to develop the information,
 - vi. the ease or difficulty of others in acquiring or duplicating the information, and
 - vii. an explanation of how disclosure of the information could result in cognizable harm sufficient to warrant a protective order;
- d. Justification of the period during which VELCO and/or CVPS asserts that material should not be available for public disclosure;
- e. Explanation of whether partial disclosure, or disclosure of redacted versions, can adequately protect the allegedly confidential information;
and
- f. Any other information that the party seeking confidential treatment believes may be useful in assessing whether the document or information should remain confidential.

3. If a party wishes to prefile any testimony or exhibits that include or otherwise disclose Allegedly Confidential Information, that party must give five business days' advance notice to counsel for the party that designated the information as Allegedly Confidential. Any party may move the Board for an order that the testimony or exhibits be filed under seal or under other conditions to prevent unnecessary disclosure.

- a. If such motion is filed within the five business days' advance notice period, the proponent of the testimony and exhibits shall place them in a sealed record by filing such documents in sealed envelopes or other appropriate sealed containers on which shall be endorsed the caption and docket number of the proceeding, the nature of the

contents (exhibit, report, etc.) and a statement that it shall not be opened or released from custody of the Clerk of the Board except by order of the Board or Hearing Officer. Notwithstanding such a statement, the members of the Board, and any employee or consultant specifically authorized by the Board to assist the Board in this proceeding and any Hearing Officer appointed to this Docket, may have access to such sealed Allegedly Confidential Information, but shall not disclose the contents of any such sealed information to any person who has not agreed to be bound by the Protective Agreement. The Board will then determine whether the proffered evidence should continue to be treated as confidential information and, if so, what protection, if any, may be afforded to such information.

- b. If no such motion is filed by the end of the five business days' advance notice period, the testimony and exhibits may be filed as a document available for public access.

4. At any hearing or conference in this proceeding, no witness may be questioned with respect to any Allegedly Confidential Information unless examining counsel has provided advance notice to counsel for any party or other person that designated the information as allegedly confidential. To the extent possible, such notice shall be given prior to the commencement of the hearing or conference. Any party may move the Board for an order that the testimony be received *in camera* or under other conditions to prevent unnecessary disclosure. If such motion is made, the Board will then determine whether the testimony should be received *in camera* or subject to other protection.

5. Upon receipt of an executed Protective Agreement signature form, that is, either Schedule IIa or IIb to the Protective Agreement, counsel for VELCO and/or CVPS shall forward one copy of the form to the Clerk of the Board.

6. All documents filed with the Board that are subject to the Protective Agreement as Allegedly Confidential Information and any documents that discuss or reveal Allegedly Confidential Information shall be placed in a sealed record by filing such information in sealed envelopes or other appropriate sealed containers on which shall be endorsed the caption and docket number of the proceeding, the nature of the contents (discovery response, report, etc.) and a statement that it shall not be opened or released from custody of the Clerk of the Board except by order of the Board. Notwithstanding such a statement, the members of the Board, and any

employee or consultant specifically authorized by the Board to assist the Board in this proceeding and any Hearing Officer appointed to this Docket, may have access to such sealed Allegedly Confidential Information, but shall not disclose the contents of any such sealed information to any person who has not agreed to be bound by the Protective Agreement.

7. The Board will retain jurisdiction to make such amendments, modifications and additions to this Order as it may, from time to time, deem appropriate, including any such amendments, modifications or additions resulting from a motion made pursuant to the Protective Agreement. Any party or other person may apply to the Board for an amendment, modification or addition to this Order.

8. The Board cautions the parties that there must be a good-faith basis for all claims of confidentiality. Claims without such a basis may result in sanctions against the party making the unfounded claim. A party's public disclosure of information that it has designated as Allegedly Confidential may indicate that the party lacked a good-faith basis for that designation.

Dated at Montpelier, Vermont, this 27th day of March, 2008.

s/ James Volz)

) PUBLIC SERVICE

s/ David C. Coen)

) BOARD

s/ John d. Burke)

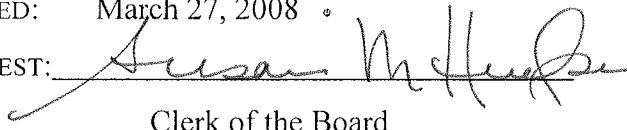
) OF VERMONT

A true copy:

OFFICE OF THE CLERK

FILED: March 27, 2008 •

ATTEST:


Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us)