

THE STATE OF NEW HAMPSHIRE
BEFORE THE
DEPARTMENT OF ENERGY

Update to License Application Information of Viridian Energy, LLC

Motion for Confidential Treatment

NOW COMES Viridian Energy, LLC (“Viridian”), by and through its attorneys, and respectfully moves the Commission, pursuant to RSA 91-A:5 IV and N.H. Admin. Rule Puc 203.08(a) to grant confidential treatment of the executed Agency Agreement (the “Agreement”) between Viridian and Dynegy Marketing and Trade, LLC (“DMT”), enclosed with the submission of the Update to the License Application Information of Viridian which was filed with the New Hampshire Public Utilities Commission (the “Commission”) on this date. In support of this motion, Viridian represents as follows:

1. Pursuant to N.H. Admin. Rules Puc 203.08(a), upon a finding that the document is entitled to confidential treatment pursuant to RSA 91-A:5, the Commission shall issue a protective order providing for the confidential treatment of the document. Pursuant to N.H. Admin. Rule Puc 203.08(b), the motion for confidential treatment shall contain (1) the documents for which confidentiality is sought; (2) specific reference to the statutory or common law support for confidentiality; and (3) a detailed statement of the harm that would result from disclosure and any other facts relevant to the request for confidential treatment.

2. Enclosed with the Update to License Application Information of Viridian is the Agreement between Viridian and DMT, the document for which Viridian is presently requesting confidential treatment.

3. Pursuant to RSA 91-A:5 IV, the information contained within the Agreement is protected from disclosure as containing “confidential, commercial, or financial information.”

Finding that a document is confidential pursuant to a RSA 91-A:5 exemption requires narrowly construing the exemption, and balancing the application of the exemption against the public's interest in disclosure.¹

4. The Commission typically applies a two-step analysis to determine whether to grant a motion for confidential treatment. First, the Commission will determine whether the document qualifies as exempt under RSA 91-A:5 IV, which requires a showing that disclosure “is likely (1) to impair the applicant’s ability to obtain necessary information in the future; or (2) cause substantial harm to the competitive position of the person from whom the information was obtained.”²

5. The second step of the analysis requires a balancing test to determine whether the disclosure will result in an invasion of privacy.³ In performing this analysis, the Commission will first determine whether there is a privacy interest at stake. Next, the Commission will determine whether there is a public interest in the disclosure. Finally, the Commission will balance the asserted privacy interest with the public’s interest in disclosure.⁴ The party seeking protection of the information has the burden of showing that a privacy interest exists and that its interest in confidentiality outweighs the public’s interest in disclosure.⁵

¹ *Reid v. N.H. Attorney General*, 169 N.H. 509, 520 (2016).

² *Union Leader Corp. v. N.H. Housing Fin. Auth.*, 142 N.H. 540, 554 (1997); *Fairpoint Communications Inc.*, Order No. 25,494 (April 19, 2013); *Atkinson Woods Water LLC*, Order No. 24,364 (Aug. 26, 2004).

³ *Union Leader Corp. v. Town of Salem*, 173 N.H. 345, 354-57 (2020) (citing *Prof'l Firefighters of N.H. v. Local Gov't Ctr.*, 159 N.H. 699, 707 (2010)).

⁴ *Lambert v. Belknap County Convention*, 157 N.H. 375 (2008); see also *Unitil Energy Sys. Inc.*, Order No. 26, 422 (November 6, 2020); *Public Service Co. of New Hampshire*, Order No. 25, 313 (December 30, 2011).

⁵ *Id.*; see also *Liberty Utilities (EnergyNorth Natural Gas) Corp. d/b/a Liberty*, Order No. 26,505 (2021).

6. Viridian meets the above-stated test. To start with the first step, the Agreement qualifies as exempt from public disclosure pursuant to RSA 91-A:5 IV because disclosure of the information publicly will cause substantial harm to Viridian's competitive position as it would describe the amount and method by which DMT procures power on behalf of Viridian. The information contained within the Agreement is confidential and commercially sensitive information that neither Viridian nor DMT release in the normal course of business. This information is accordingly confidential and entitled to protection under RSA 91-A:5 IV.

7. For the second step, Viridian satisfies the three-part balancing test. First, there is a privacy stake at interest here. Viridian and DMT both have a privacy interest in the commercially-sensitive information contained in the Agreement. The Agreement contains business information that neither company publicly discloses. Despite the public disclosure that DMT will procure wholesale power on behalf of Viridian, there are additional commercially-sensitive details in the Agreement. Both Viridian and DMT are engaged in a competitive industry and disclosure of the commercial information contained in the agreement would be an invasion of privacy for both entities and would be competitively harmful to both Viridian and DMT. Furthermore, DMT has requested that Viridian file the Agreement confidentially. Second, the public interest in disclosure of the Agreement is low. Through materials submitted publicly, the public will be able to learn the general outcome of the Agreement, namely that Viridian will begin relying on its affiliate DMT to procure wholesale power in the market on behalf of Viridian, without needing to know the specific confidential terms of the Agreement, which are not disclosed to the public within the normal course of business. Finally, upon a balancing of the privacy interest and the public's interest in disclosure, the Commission should find that the privacy interest in keeping the

information confidential outweighs the interest of the public. Accordingly, disclosure is not warranted.

8. Viridian requests that the Commission issue an order protecting the Agreement from public disclosure and prohibiting copying, duplication, dissemination or disclosure of it in any form.

WHEREFORE, Viridian respectfully requests that this Commission issue an appropriate order that exempts from public disclosure or otherwise protects the confidentiality of the Agreement.

Respectfully submitted,

Viridian Energy, LLC

By its attorney,

Day Pitney LLP

Date: January 10, 2022

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