



STATE OF DELAWARE  
**PUBLIC SERVICE COMMISSION**

861 SILVER LAKE BOULEVARD  
CANNON BUILDING, SUITE 100  
DOVER, DELAWARE 19904

TELEPHONE: (302) 739 - 4247  
FAX: (302) 739 - 4849

**MEMORANDUM**

To: Chair and Commissioners  
Delaware Public Service Commission

From: Janis Dillard  
James McC. Geddes, Esq.

Subject: *Criteria for Determining (under State Freedom of Information Act ("FOIA")) Whether "Trade Secrets" and "Confidential Commercial and Financial Information" May be Exempted from Required Public Disclosure*

Date: 13 March 2007

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This memorandum responds to the Commission Staff's request for the "granular" review described at the meeting of the State agencies held in Legislative Hall on February 27, 2007. In connection with this request, we reviewed every redaction made by the three bidders in the bid materials submitted to the Commission and the other State agencies. Table A attached hereto lists the documents that we believe should be released based upon our review. We believe that the remainder of the documents set forth in Table B should be protected under the provisions of the State FOIA Act. 29 *Del. C.* § 10002(g).

In performing this review, we analyzed a memorandum from Gary A. Myers, Esq. to William F. O'Brien, Esq. and Janis Dillard, dated February 12, 2007, and the letters from counsel for the three bidders. We also performed our own independent research of the pertinent case law and applicable standards by which to judge the redacted materials.<sup>1</sup> (See Exhibit "A" attached hereto for relevant authority). The following principles guided our review of the individual documents:

1. Materials that were within the definition of "trade secrets" as stated in the 1977 Attorney General's Opinion (77-209) attached to the Myers memorandum are not being disclosed.<sup>2</sup>
2. If the material might compromise the competitive bid process, or might cause substantial harm to the competitive position of a bidder from whom the information was obtained, it is not being disclosed, if the party established:
  - (a) actual competition as it relates to the confidential information;
  - (b) likelihood of substantial competitive injury;
  - (c) an articulated path that demonstrates how disclosure of the materials will likely harm the position of the bidder.

In establishing the roadmap for how competitive harm could result, we withheld disclosure if there was "actual competition" and a *likelihood* of substantial competitive injury.

After our initial review of the materials and development of the attached Tables with recommendations for disclosure and non-disclosure, we repeated our

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<sup>1</sup> Inskip correspondence dated February 16, 2007; Houghton correspondence dated February 16 and 26, 2007; and McGonigle and Ranji response on behalf of Bluewater Wind

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analysis for each and every document that is being withheld or recommended for disclosure. Thus, we have reviewed these materials twice to determine the appropriate application of the statute.

We believe that our independent review, memorialized in the attached Tables, satisfies the burden of a state agency to make an independent determination of the appropriateness of these redactions and meets the requirements under the State FOIA statute. *See* § 10002(g)(2); 2000 WL 1920192 (Del. A.G.). However, we recognize two issues of substantial public interest regarding disclosure of bidder information in this proceeding -- pricing information and information related to the potential environmental impacts of the various projects being considered.

Pricing information: We conclude that the elements of the pricing as specified in the bids needs to be protected because there is actual competition by and between the bidders, and there exists a likelihood of substantial competitive injury if such information is disclosed. *See Nat'l Parks and Conservationists Assn. v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). As the bidders have pointed out, pricing information included in their respective bids is used in other jurisdictions. This pricing information could be used by competitors or prospective energy companies desiring to contract with a bidder to gain a competitive advantage

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dated February 16, 2007.

<sup>2</sup> We did not use the federal FOIA definition, which is more restrictive.

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through their knowledge of previous bid information and the projections of future market prices and costs relied upon by the bidder. This particular information, if released, could cause substantial harm to a bidder's interest. Release of pricing information could also discourage future bidders from engaging in a similar bid process in Delaware in the future. Furthermore, as discussed in the memorandum to the Commission dated February 23, 2007, the evaluation reports that have been released to the public provide aggregate, comparative pricing information that provide a basis on which to express meaningful comment.

In addition, Delaware case law recognizes the need under FOIA to protect a company from release of information that competitors might use to underbid it. *See American Totalisator Co., Inc. v. Autotote Limited*, 1983 WL 21374 at \*3 (Del. Ch. DATE) (recognizing the need to protect information on prices and costs); *Delmarva Drilling Co., Inc. v. American Water Well Systems, Inc.*, 1988 WL 7396 at \*6 (Del. Ch. DATE) (price bids and bidding procedures require protection from competitors). For these reasons, we recommend that the redacted pricing information contained in the bids not be released at this time.

Release of Environmental Information: At the last meeting of the four agencies held in Legislative Hall on February 27, 2007, environmental information - specifically disclosures on Form H, "Environmental Impact -- Air Emissions" -- engendered a lengthy discussion between NRG and the agencies. As the transcript

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recites, Conectiv and Bluewater substantially complied with the request to supply emission specifics for primary and secondary fuels; NRG did not. NRG discussed the commercial reasons why it was not similarly situated to the other bidders, given that it was bidding a coal gasification facility using technology that was not mature in the marketplace. (*See* Tr. 904-20). Having carefully reviewed the transcript, and having listened to the public's concern regarding current and potential future emissions from the Indian River facilities, we believe that notwithstanding that a bidder could reasonably argue that the information should be kept confidential (i.e., the supposition that a future vendor may be able to use this information in some negative way), the public interest in obtaining specific emission data outweighs NRG's attempt to protect it. *See* Attorney General Opinion 87-1031, 1987 WL 245361 (Del. A.G.). Although we recognize that reasonable people may disagree on the application of such a balancing test, we recommend disclosure of such information and further recommend giving NRG sufficient opportunity to make such application as it believes is necessary in another forum to protect this type of information from public disclosure.

In summary, we believe that the PSC has done all that is required of it under the State FOIA statute. A specific and detailed review has been made of each document where information has been withheld from the public's purview. We recognize that others performing a similar review may reach different and

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contradictory conclusions; however, we believe that there is a sound factual and legal basis for our recommendations and that each determination on disclosure is in keeping with an attempt to properly balance the public's right to know with the bidders' need to compete in this and other jurisdictions. Hopefully, we have given the Commission enough information to make an informed and reasoned decision on the release of this additional information.

We understand that this issue will be on the agenda at the Commission's March 20, 2007 meeting. In that regard, we believe that any follow-up discussion should be limited to questions by the Commission and/or other State agencies relating to the process described above. Such discussion should not, in our opinion, include bidders who have had several opportunities to present their justifications for redacting the documents. In addition, although the public is a beneficiary of the work performed by the Commission Staff in its attempt to release as much information as possible, the public is not a stakeholder in the Commission's, and other agencies', determination as to whether such work should be adopted.

We are available for further questions on the process of this review and our conclusions.

## EXHIBIT "A"

### Standard for Trade Secret and Confidential Commercial Information Exception to FOIA, 29 Del. C. § 10002(g)(2)

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The right to inspect "public records" is defined in Delaware's FOIA, 29 *Del. C.* § 10002(g). Section 10002(g) provides several exceptions to disclosure of information contained in public records. Section 10002(g)(2), excepting trade secrets and confidential commercial or financial information, applies to the bids submitted by Conectiv, NRG, and Blue Water. The following is an outline of the standards used to determine whether the applicants' bids contain a "trade secret" or "confidential commercial or financial information."

#### I. Trade Secrets

- Construed broadly in DE (as opposed to narrow definition under the federal FOIA) to encompass virtually any information that provides a competitive advantage. *Del. Op. Atty. Gen.* 00-IB15 (Oct. 4, 2000), 2000 WL 1920102; *Del. Op. Atty. Gen.* 77-029 (Sept. 27, 1977) (quoting *Restatement of Torts* § 757(b)), 1977 WL 24783.
  - (1) Any formula, pattern, device, or compilation of information
  - (2) Used in one's business
  - (3) Creating an opportunity to obtain an advantage over competitors who do not know or use it. In other words, disclosure will cause "serious competitive disadvantage" if the information "falls into a rival's hands." 2000 WL 1920102 (Del. A.G.).
- Factors employed to determine whether bids contain a trade secret: (2000 WL 1920192 (Del. A.G.) (quoting Opinion 77-029 (citing *Space Aero Products, Inc. v. R.E. Darling Co.*, 208 A.2d 74 (Md. 1955))).
  - (1) extent to which the information is known outside the business
  - (2) extent to which it is known by employees and others involved in the business
  - (3) extent of measures taken to guard the secrecy of the information
  - (4) value of the information to the business and its competitors
  - (5) amount of effort or money expended developing the information
  - (6) ease or difficulty with which the information could be properly acquired or duplicated by others.

## II. Confidential Commercial or Financial Information

- Is the information commercial or financial?
  - (1) Commercial: any matter pertaining to the “transportation of commodities and consist[ing] of dealing in commercial products involving the purchase, sale or exchange of merchandise.” 1977 WL 24783 (Del. A.G.).
  - (2) Financial: “any dealing in money.” *Id.*
- Apply the two-part test articulated in *Nat’l Parks & Conservation Assn. v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974) to determine if the information is “confidential.” *See* 1977 WL 24783 (Del. A.G.). Material falls under exemption (g)(2) if its disclosure would either
  - (1) interfere with the government’s ability to obtain information in the future; or
  - (2) cause substantial harm to the competitive position of the person from whom the information was obtained.
- Prong 1: not at issue here because the RFP proceeding for new generation assets will not likely be repeated. Moreover, PSC’s other bidding processes call for much less information from the bidders. *See* Dillard and O’Brien Mem. at 2 n.1 (Feb. 23, 2007).
- Prong 2: competitive impairment: Submitting party must demonstrate the following: (*CNA Fin. Corp. v. Donovan*, 830 F.2d 1132, 1152 (D.C. Cir. 1987)).
  - (1) Actual competition with respect to the confidential information: occasional re-negotiation of long-term contracts not sufficient. *See Niagara Mohawk Power Corp. v. United States Dep’t of Energy*, 169 F.3d 16, 18 (D.C. Cir. 1999).
  - (2) Likelihood of substantial competitive injury: does not have to be *actual* competitive injury. *See* 2003 WL 22669566 (Del. A.G.) (*quoting Judicial Watch v. Export-Import Bank*, 108 F. Supp.2d 19, 29 (D.D.C. 2000) (confidential commercial or financial information falls within exemption with a showing that disclosure of the information “is likely to cause substantial harm to the competitive position of the person from whom the information was obtained”).
- Applicant’s burden of proof:
  - (1) Agency must make its own independent determination whether the document in fact meets the criteria of § 10002(g)(2), and the agency is not bound by an applicant’s designation of a document as confidential, highly confidential, trade secret, etc. 2000 WL 1920102 (Del. A.G.).
  - (2) Applicant must specifically demonstrate competitive harm on the record; conclusory allegations of harm are not sufficient. *See, e.g., Pub.*



*Citizen Health Research Group v. Food & Drug Admin.*, 185 F.3d 898, 906 (D.C. Cir. 1999) ("[C]onclusory and generalized allegations of substantial competitive harm . . . cannot support an agency's decision to withhold requested documents."); *Nw. Coalition for Alternatives to Pesticides v. Browner*, 941 F. Supp. 197, 202 (D.D.C. 1996) (same); *Lykes Bros. S.S. Co. v. Peña*, No. 92-2780, slip op. at 13 (D.D.C. Sept. 2, 1993) (declaring that submitters are "required to make assertions with some level of detail as to the likelihood and the specific nature of the competitive harm they predict") (reverse FOIA suit); *see also In Def. of Animals v. HHS*, No. 99-3024, slip op. at 21 (D.D.C. Sept. 28, 2001) (rejecting agency's "conclusory and vague statements" which provided "little more than speculation about potential problems in securing future contracts"); *Lee v. FDIC*, 923 F. Supp. 451, 455 (S.D.N.Y. 1996) (rejecting competitive harm when the submitter failed to provide "adequate documentation of the specific, credible, and likely reasons why disclosure of the document would actually cause substantial competitive injury").

- Agency should be able to see on the record, understand, and articulate the path from disclosure to likely substantial harm to the competitive position of the bidder-applicant. *See Myers Mem.* at 5 (Feb. 12, 2007).

**TABLE A –**  
**PAGES 1 THRU 3**  
**CONFIDENTIAL**

Table B, page 1

A	B	C	D	E	
1	TABLE OF DOCUMENTS PROPOSED TO BE HELD CONFIDENTIAL AS OF MARCH 20, 2007				
2					
3					
4	Bid	Bid Volume		Reason for Holding as Confid	
5	Bidder	Volume	Description		
6	Blue Water Wind	Atlantic North	Form D, pg 5	Vestas Performance Guarantee	B
7					
8	Blue Water Wind	Atlantic North	Form D, pg 9	Vestas Wind Turbine Generator Technical Data	B
9					
10	Blue Water Wind	Atlantic North	Form G, pg 6	Calculation of wind resource losses and methodology	B
11					
12	Blue Water Wind	Atlantic North	Form G, pg 8	Capacity factor	B
13					
14	Blue Water Wind	Atlantic North	Form G, Appendix 1	pages 1-22, 34-36 Wind Resource Assessment	B
15					
16	Blue Water Wind	Atlantic North	Form O, pg 4 & 9	Financial Information	B
17					
18	Blue Water Wind	Atlantic North	Form O, Appendix 1	Bluewater Financial Model	B, C
19					
20	Blue Water Wind	Atlantic North	Form Q, pg 1	Vestas and Fluor O&M Plan: Cost and Methodology	B
21					
22	Blue Water Wind	Atlantic North	Form R, pg 1-5	PPA Pricing	A
23					
24	Blue Water Wind	Atlantic North	Form S, pg 1-4	Imputed Debt Offset Analysis	B
25					
26	Blue Water Wind	Atlantic South	Form D, pg 3 & 4	Vestat Performance Guarantee	B
27					
28	Blue Water Wind	Atlantic South	Form D, pg 8	Vestas Wind Turbine Generator Technical Data	B
29					
30	Blue Water Wind	Atlantic South	Form G, Pg 6-8	Calculation of wind resource losses and methodology	B
31					
32	Blue Water Wind	Atlantic South	Form G, pg 9	12 x 24 matrix of Mwh delivered to busbar	B
33					
34	Blue Water Wind	Atlantic South	Form G, Appendix 1	pg 1-21, 31-33 Wind Resource Assessment	B
35					
36	Blue Water Wind	Atlantic South	Form O, pg 4 & 9	Financial Information	B
37					
38	Blue Water Wind	Atlantic South	Form O, Appendix 1	Pages 1-15, Bluewater Financial Model	B
39					
40	Blue Water Wind	Atlantic South	Form Q, page 1	Vestas and Fluor O&M Plan: Cost and Methodology	B
41					
42	Blue Water Wind	Atlantic South	Form R, pg 1-5	PPA Pricing	A
43					
44	Blue Water Wind	Atlantic South	Form S, pg 1-4	Imputed Debt Offset Analysis	B
45					
46	Blue Water Wind	Shared Document 2	All	Vestas Technical Specifications: Electrical, SCADA, etc.	B

Table B, page 2

	A	B	C	D	E
47					
48	Blue Water Wind	Shared Document 4	All	SEAS-NVE and ABB substation and cabling cost/technical an.	B
49					
50	Blue Water Wind	Shared Document 6	pg 12, 15, 16	Wind Park Insurance Pricing	A, B
51					
52	Blue Water Wind	Shared Document 8	Exec Summ, pg 6-7 and pg 14-19	Vestas-Bluewater turbine supply, erection, commissioning O&M proposal	B
53					
54			3.1--pg 3-8; 4.1 pg 3-4; 8.2, pg 3, 5-7		
55					
56					
57	Blue Water Wind	Shared Document 9	pg 6-7, 9-22 and attachments	Ballast-Nedam Foundation, Design Supply Load Analysis and Soil Analysis	B
58					
59					
60	Blue Water Wind	Shared Document 23	1-11	Vestas Availability Guarantee	B
61					
62	Blue Water Wind	Shared Document 28		Bluewater Financial Model	B
63					
64	Blue Water Wind	Shared Document 29	1-6	Bluewater Financial Statements & Development Expenses	B
65					
66	Blue Water Wind	Shared Document 30	pg 3-5	Fluor EPC Scope of work and cost data	B
67					
68	Blue Water Wind	Shared Document 36	1-2	SEAS offshore substation O&M budget	B
69					
70	Conectiv	Proposal	Form C	Bid Summary	A, B
71					
72	Conectiv	Proposal	Form D	Generation Facility Technical Description	B
73					
74	Conectiv	Proposal	Form D, Question 23 pg 1-8	Generator technical specifications	B
75					
76					
77	Conectiv	Proposal	Form G, Item 10	Specific fuel procurement information	B
78					
79	Conectiv	Proposal	Form G, Item 12	Fuel pricing	A
80					
81	Conectiv	Proposal	Form G, Items 12, 16 23, 24, Q, 20, p 2	Fuel Specifications	A, B
82					
83					
84	Conectiv	Proposal	Form H, notes	Technical specifications, including capacity factor	A, B
85					
86	Conectiv	Proposal	Form I, Items 1, 3, 6	Environmental impacts/permits	A
87					
88	Conectiv	Proposal	Form L	Site development	B, C
89					
90	Conectiv	Proposal	Form N, q 6&8	Site development/interconnection	A
91					
92	Conectiv	Proposal	Form O, q 4, 15, 17, 19	Financial information	A, B

Table B, page 3

	A	B	C	D	E
93					
94	Conectiv	Proposal	Form O, Att III	Liquidity/credit line	A
95					
96	Conectiv	Proposal	Form O, Att IV	Fin 46 R	A
97					
98	Conectiv	Proposal	Form P, q. 6	Generation Specifications	A
99					
100	Conectiv	Proposal	Form Q, q 1&3	O&M Plans	A
101					
102	Conectiv	Proposal	Form R	PPA Pricing	A
103					
104	Conectiv	Proposal Q & A	Cover Letter	January 4, 2007 letter to Finrock from Agra--capacity factor	A
105					
106	Conectiv	Proposal Q & A	Question 1	Five-year option for extension	A
107					
108	Conectiv	Proposal Q & A	Question 2	Dependable rating, UCAP	A, B
109					
110	Conectiv	Proposal Q & A	Question 3	Equivalent Availability Factor	A
111					
112	Conectiv	Proposal Q & A	Question 4	Heat rate	A
113					
114	Conectiv	Proposal Q & A	Question 5	Efficiency performance adjustment	A
115					
116	Conectiv	Proposal Q & A	Question 6	Dispatchable capacity and contract extension option	A
117					
118	Conectiv	Proposal Q & A	Question 7	Fuel transportation arrangements	A
119					
120	Conectiv	Proposal Q & A	Question 8	Pipeline transportation costs	A
121					
122	Conectiv	Proposal Q & A	Question 9	Source of gas supply--partially released	A
123					
124	Conectiv	Proposal Q & A	Question 12	Guaranteed minimum pressere	A, B
125					
126	Conectiv	Proposal Q & A	Question 13	Dispatch factor	A, B
127					
128	Conectiv	Proposal Q & A	Question 16	Cooling tower	A, B
129					
130	Conectiv	Proposal Q & A	Question 27 & 28	Capacity and energy payments	A
131					
132	Conectiv	Proposal Q & A	Question 31	Energy adjustments	A, B
133					
134	Conectiv	Proposal Q & A	Question 32	Price index, ancillary services, EAF, price formula	A
135					
136	Conectiv	Proposal Q & A	Question 33	Capacity and energy, UCAP, delivery	A
137					
138	Conectiv	Proposal Q & A	Question 7, att 2	Service agreement for rate schedule FT-1	A

Table B, page 4

	A	B	C	D	E
139					
140	Conectiv	Proposal Q & A	Question 7, att 3	Firm storage agreement	A
141					
142	Conectiv	Proposal Q & A	Question 7, att 4	CESI NAESB contract	A
143					
144	Conectiv	Proposal Q & A	Question 14, att V	Permit Schedule	B
145					
146	Conectiv	Proposal Q & A	Question 21, att VII	Site Maps	C
147					
148	Conectiv	Proposal Q & A	Question 23, att VIII	Pro Formas	A
149					
150	Conectiv	Proposal Q & A	Question 34, Att IX	Project valuation	A
151					
152	Conectiv	Proposal Q & A	Question 36, att XI	Redline PPA; redact capacity factor in Section XII	A
153					
154	NRG	Volume 1--Proposal	Cover letter	December 17, 2006 letter from Crane to Finfrock-redact price	A
155					
156	NRG	Volume 1--Proposal	List of Tables	CO2 storage	A
157					
158	NRG	Volume 1--Proposal	Overview 1.2	Heat rate and carbon capture cost and availability	A
159					
160	NRG	Volume 1--Proposal	Page 11-12	Reference to price and price risk	A
161					
162	NRG	Volume 1--Proposal	Page 14	Pricing Information	A
163					
164	NRG	Volume 1--Proposal	Pages 16-20	Pricing and availability factors	A
165					
166	NRG	Volume 1--Proposal	Page 31	All released but price information	A
167					
168	NRG	Volume 1--Proposal	Page 35	Fuel supply	A
169					
170	NRG	Volume 1--Proposal	Page 38	Pricing	A
171					
172	NRG	Volume 1--Proposal	Pages 40-46	Pricing and technical specifications	A, B
173					
174	NRG	Volume 1--Proposal	Page 50	Technical specification	B
175					
176	NRG	Volume 1--Proposal	Pages 52-53	Technical specifications	B
177					
178	NRG	Volume 1--Proposal	Pg 55, 57-59	Fuel Plan	A, B
179					
180	NRG	Volume 1--Proposal	Pg 64-67, 73-75, 77-80	Environmental Impacts and Benefits	A, B
181					
182					
183	NRG	Volume 1--Proposal	Pg 99-100, 103-119, 123, 125-127	Carbon Sequestration	B
184					

Table B, page 5

	A	B	C	D	E
185					
186	NRG	Volume 1--Proposal	Pg 128	Site Development	A, B, C
187					
188	NRG	Volume 1--Proposal	Pg 145, 151, 156	Financing	A
189					
190	NRG	Volume 1--Proposal	Pg 157	Project Management	B
191					
192	NRG	Volume 1--Proposal	Pg 186	Operations and Maintenance	A
193					
194	NRG	Volume 1--Forms	Form B	Certification--Payment 295 details--financial ID numbers	B
195					
196	NRG	Volume 1--Forms	Form D q. 4	Generating Facility Technical Specifications--Forced Outage Rate	A
197					
198	NRG	Volume 1--Forms	Form D q. 8-9	Generating Facility Technical Specifications--Heat rates, AGC	A, B
199					
200	NRG	Volume 1--Forms	Form D q. 25	Generating Facility Technical Specifications--Technical data	B
201					
202	NRG	Volume 1--Forms	Form G q. 3	Fuel Plan--Fuel Specifications	B
203					
204	NRG	Volume 1--Forms	Form G q. 16	Fuel Plan--Fuel Inventory and management	B
205					
206	NRG	Volume 1--Forms	Form G q. 22	Fuel Plan--Secondary fuel storage	B
207					
208	NRG	Volume 1--Forms	Form O q. 4,5,15	Financial Information	A
209					
210	NRG	Volume 2--Forms	Form S	Imputed Debt Offset Information	A
211					
212	NRG	Appendices--Vol. 1	Appendix 2	Variable Interest Entity Analysis	A
213					
214	NRG	Appendices--Vol. 1	Appendix 3	Design and Engineering	B, C
215					
216	NRG	Appendices--Vol. 1	Appendix 4	Carbon Sequestration	B
217					
218					
219					
220					
221					

KEY FOR REASONS FOR NOT RELEASING DOCUMENTS

- A = Price Data--Competitive Harm
- B = Trade Secret/Confidential/Financial
- C = Security