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By Electronic Mail

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**Re: Foil Request Of The Public Utility Law Project For Data Provided By
Utilities To DPS Comparing Utility Charges To Residential Customers With
ESCO Gas Or Electric Service With The Charges That Would Have Been
Due The Utility Had The Customers Not Switched To An ESCO**

Dear Ms. Gilberto:

In response to your letter dated February 25, 2014, in the above-captioned matter enclosed please find the *Statement of Necessity Pursuant To Public Officers Law Section 89(5) (B) (2)*

Thank you for your consideration of this matter.

Respectfully submitted,

Retail Energy Supply Association, IDT
Energy, Stream Energy and Just Energy

By: 
Usher Fogel, Counsel

Cc: Service List per February 25, 2014 letter (by electronic mail)

**STATE OF NEW YORK
PUBLIC SERVICE COMMISSION**

**Foil Request Of The Public Utility Law Project For Data Provided By
Utilities To DPS Comparing Utility Charges To Residential Customers With
ESCO Gas Or Electric Service With The Charges That Would Have Been
Due The Utility Had The Customers Not Switched To An ESCO**

***STATEMENT OF NECESSITY
PURSUANT TO PUBLIC OFFICERS LAW SECTION 89(5) (B) (2)***

I. INTRODUCTION

This statement is submitted on behalf of the Retail Energy Supply Association (“RESA”)¹, IDT Energy, Just Energy, and Stream Energy, in response to a request dated January 17, 2014 of the Public Utility Law Project (“PULP”) filed with the Department of Public Service (“Department”) pursuant to the Freedom of Information Law (“FOIL”)², seeking access to and disclosure of certain ESCO customer pricing data in the possession of the utilities and originally submitted to the Department by the utilities with the request for trade secret protection.³

¹ RESA’s members include: AEP Energy, Inc.; Champion Energy Services, LLC; ConEdison *Solutions*; Constellation NewEnergy, Inc.; Direct Energy Services, LLC; GDF SUEZ Energy Resources NA, Inc.; Homefield Energy; IDT Energy, Inc.; Integrys Energy Services, Inc.; Just Energy; Liberty Power; MC Squared Energy Services, LLC; Mint Energy, LLC; NextEra Energy Services; Noble Americas Energy Solutions LLC; NRG Energy, Inc.; PPL EnergyPlus, LLC; Stream Energy; TransCanada Power Marketing Ltd. and TriEagle Energy, L.P. The comments expressed in this filing represent the position of RESA as an organization but may not represent the views of any particular member of RESA.

² Public Officers Law (“POL”), Article 6

³ RESA is a trade association representing the interests of ESCOs operating in the State of New York that are directly impacted by the instant FOIL request as it relates to data and information associated with their operations and interactions with their customers in private commercial transactions. IDT Energy, Stream Energy and Just Energy, are each ESCOs authorized and providing service in New York and are directly affected by the information that may be disclosed in response to the FOIL Request as it seeks disclosure of data associated with their private commercial activities with residential customers.

By letter dated February 25, 2014, from Donna M. Gilberto, Records Access Officer, interested parties were requested to submit a Statement of Necessity that addresses the validity of the FOIL Request and the entitlement of the requested information to trade secret protection.⁴

RESA respectfully urges that the Department except from disclosure the records identified in the FOIL Request in accordance with the provisions of Sections 87(2)(d) and 89(5)(b)(2) of the New York State Public Officers Law, 16 (A) NYCRR Section 6-1.3 of the Commission's Rules and Regulations, and Commission precedent.⁵

As will be demonstrated below, disclosure of this information is inconsistent with (i) the prior determination of the Commission in the UBP Order,⁶ and in the Retail Markets Order⁷; (ii) with the previous FOIL Ruling issued by Secretary Brillong on October 20, 2006,⁸ and the trade secret rulings by Steven Blow, Records Access Officer

⁴ The January 17, 2014 request by PULP and the February 25, 2014 letter from the Records Access Officer are collectively referred to as the FOIL Request.

⁵ To the degree deemed necessary to protect the data from public disclosure, RESA requests that the data sought in the FOIL Request be granted trade secret status pursuant to 16 (A) NYCRR section 6-1.3 on the basis of the positions and information contained in this submittal.

⁶ CASE 98-M-1343 – In the Matter of Retail Access Business Rules; Case 07-M-1514 – Petition of New York State Consumer Protection Board and the New York City Department of Consumer Affairs Regarding the Marketing Practices of Energy Service Companies; Case 08-G-0078 – Ordinary Tariff Filing of National Fuel Gas Distribution Corporation to establish a set of commercially reasonable standards for door-to-door sales of natural gas by ESCOs, *Order Adopting Amendments To The Uniform Business Practices, Granting In Part Petition On Behalf Of Customers And Rejecting National Fuel Gas Distribution Corporation's Tariff Filing* (issued October 27, 2008) (“UBP Order”)

⁷ Case 12-M-0476 - Proceeding on Motion of the Commission to Assess Certain Aspects of the Residential and Small Non-residential Retail Energy Markets in New York State, Case 98-M-1343 – In the Matter of Retail Access Business Rules; Case 06-M-0647 – In the Matter of Energy Service Company Price Reporting Requirements, Case 98-M-0667 - In the Matter of Electronic Data Interchange, *Order Taking Actions to Improve the Residential and Small Nonresidential Retail Access Markets*, issued on February 25, 2014 (“Retail Markets Order”)

⁸ Request for Certain Information in Unredacted Gas-flow Reports for November and December 2005, Trade Secret 06-01, Letter dated October 20, 2006 from Hon. Jaclyn A. Brillong,, Secretary (“2006 FOIL Ruling”).

on May 11, 2009,⁹ and March 16, 2010¹⁰. Moreover, such disclosure will also adversely impact the competitive position of the affected ESCOs.

There appears to be some ambiguity concerning the specific data sought under the FOIL Request. In the February 25, 2014 letter from the Records Access Officer, the data requested is identified as data comparing utility charges to residential customers with ESCO gas or electric service with the charges that would have been due the utility had the customers not switched to an ESCO. However, in an e-mail dated March 6, 2014 from Orange & Rockland Utilities, Inc. to the ESCOs on its system the data is identified as ESCO billing and enrollment data for certain months. In this Statement, both forms of data will be addressed.

II. THE COMMISSION HAS PREVIOUSLY REJECTED INDISCRIMINATE DISCLOSURE OF RAW ESCO DATA AND GRANTED AN EXCEPTION FROM DISCLOSURE FOR SUCH DATA

A. The Commission Has Established a Binding Precedent Concerning Careful Treatment of ESCO Data

The Commission in Case 98-M-1343 previously determined that customer specific information applicable to ESCOs operating in New York should be shielded from disclosure as its public dissemination would cause substantial injury to the competitive position of ESCOs. The Commission specifically ruled:

In response to the Commission's March 19, 2008 Notice, CPB and PULP believe that information on the number and type of customers that an ESCO serves, and the number of complaints filed against an ESCO should be made public. The ESCOs disagree, and in support of their argument

⁹ Trade Secret 09-1 (May 11, 2009), Letter Ruling by Steven Blow, Records Access Officer, Request for Copy of Unredacted ESCO Customer Data, dated May 11, 2009 ("2009 FOIL Ruling").

¹⁰ Trade Secret Letter Ruling by Steven Blow Records Access Officer, dated March 16, 2010, Request for Records Showing 2009 Breakdown of Revenue and Number of Residential Customers for Gas & Electric per ESCO per Utility Company (Cases 93-G-0932 and 94-E-0952) ("2010 FOIL Ruling").

cite an October 20, 2006 letter, in which Secretary Brilling stated that the disclosure of such customer information could cause substantial injury to the competitive positions of ESCOs, especially new market entrants and those with specific geographic marketing campaigns. We see no reason to adopt a different reasoning in this case. Accordingly, we will continue to maintain the confidentiality of the information which describes the numbers of customers served by each ESCO.¹¹

In 2006, Secretary Brilling had reviewed a FOIL Request that sought disclosure involving the volumes and customers served by individual ESCOs. The Secretary carefully examined the historical process governing treatment of this data, the ramifications associated with public disclosure, and the competitive harm that disclosure could engender to the development of the ESCO competitive community. After careful deliberation, Secretary Brilling determined that as disclosure of the information would “likely ... cause substantial injury to the competitive positions of ESCOs”, the “specific information sought in the FOIL request should be exempted from disclosure.”¹²

In assessing the substantial competitive injury, Secretary Brilling underscored that access to the data would clearly define each ESCO’s market position, and would lead to a distortive perception by potential customers concerning individual ESCOs.¹³ As the Secretary explained:

The value to competitors, however, is not the only measure of competitive injury. More important in this context is the distortion of the perception of potential customers that would be occasioned by the disclosure of the number of customers and associated gas volumes on a statewide basis. A public disclosure of such information would not take into the fact that ESCOs can enter and exit a utility market for a number of reasons, which has nothing to do with their reliability or price offerings. For instance, an ESCO that has just entered the State, or one that has chosen to concentrate the marketing of its products and services in the service territories of one or two utilities, would likely be harmed if on a statewide ranking list it were to appear last... Given these considerations,

¹¹ UBP Order, p. 26.

¹² 2006 FOIL Ruling, p. 5

¹³ *Id.*

disclosure... would be likely to cause substantial injury to the competitive positions of ESCOs, particularly new entrants and those that have chosen to concentrate their marketing efforts in specific geographic area in the State.¹⁴

The Commission determination in the UBP Order was reinforced by the 2009 FOIL Ruling issued by Steven Blow, Records Access Officer,¹⁵ in which a request for disclosure of ESCO specific data in the possession of the utilities was denied on the ground that it would engender competitive harm.¹⁶ Similarly the Records Access Officer once again excepted ESCO customer data from disclosure in 2010 and noted that

...[I]t is my opinion that current circumstances are similar to those existing at the time Secretary Brillling made her determination in 2006 such that the rationale set forth therein remains pertinent. Moreover, I am persuaded that disclosure of the highly disaggregated information at issue would be likely to cause substantial competitive injury to ESCOs because of the higher prices energy suppliers would almost certainly demand as a result of the knowledge thereby gained.¹⁷

B. The Retail Markets Order Resolves and Establishes the Process Governing the Disclosure of ESCO Pricing Data

In the most recent Retail Markets Order, the Commission has also comprehensively addressed the issue of public disclosure of ESCO customer pricing data. In this regard it established discrete mechanisms that would provide consumers with such information in a regulated environment subject to Commission oversight.

The Commission directed that all utilities develop and implement a historical bill calculator on their websites that would allow customers to compare their ESCO charges for a historical period with the charges the utility would have applied for the same period.

¹⁴ *Id.*

¹⁵ Trade Secret 09-1, May 5, 2009; See also Trade Secret 08-1 (May 19, 2008), p. 5.

¹⁶ See, also, Trade Secret 08-1 (May 19, 2008), p. 5.

¹⁷ 2010 FOIL Ruling, p. 13.

These historic bill calculators are viewed by the Commission as “powerful tools”¹⁸ for they provide customers with a direct comparison of the amount they were billed, including ESCO charges, in each month for up to 12 months, with what the customer would have paid if commodity service had been obtained from the utility for that same period.

The Commission also correctly determined that release of raw pricing data could be misleading as it would fail to provide a full, complete and accurate picture of the relationship of price to the actual services and products offered by each ESCO. Accordingly, the Commission directed that the web-based Price calculator also include crucial disclosures that would help prevent the provision of incomplete information which also could do harm to the competitive reputation of an ESCO. As the Commission declared:

We also require inclusion of clear disclosure statements to inform customers that: (1) the historic bill calculator is most useful if the customer has been served by an ESCO for at least twelve months; (2) the information presented is historic and is not necessarily indicative of future prices for either utility or ESCO service; (3) the price comparison does not account for any value-added service(s) such as green energy; and (4) the price comparison does not reflect any affinity rewards programs or rebates that may be provided by the customer’s ESCO separately from the customer’s utility bill.¹⁹

The Commission also directed that ESCOs file historical pricing data with the Secretary that would subsequently be publicly disseminated in a manner to be further determined by the Commission.²⁰

ESCOs would file a separate average unit price for products with no energy-related value-added services for each of the following four groups of customers and by

¹⁸ Retail Markets Order, p. 14.

¹⁹ Retail Markets Order, p. 15.

²⁰ Retail Markets Order, pp. 16-17

geographic area: i) residential price fixed for a minimum 12 month period; ii) residential variable price; iii) small non-residential price fixed for a minimum 12 month period; and iv) small non-residential variable price. The averages would be weighted by the amount of commodity sold at each price within each category, and the ESCO also must file the number of customers purchasing products in those categories.

The data filings would be due 30 days after the end of each quarter reflecting data over the previous quarterly period (i.e., April 30th, July 30th, October 30th and January 30th of each year). The initial implementation will be July 30th for data on prices charged in the second quarter of 2014.

Staff intends to publish comparative pricing information for the categories identified above; develop a list of the average price billed for each ESCO, separately for consumers in specific geographic areas of a utility service territory; and sort the list based on average price. The ESCOs will be organized into quartiles, based on the average price charged to customers in the historical period. For the category of variable priced products with no energy related value-added attributes, Staff anticipates that comparable information regarding utility charges will also be presented.

At a Technical Conference to be held within 60 days, Staff will collaborate with all interested parties to further explicate implementation approaches for this new initiative; obtain input from consumers, ESCOs, utilities; develop definitions of the product categories; and design the specific format(s) for reporting of the data.²¹

It is therefore clear that the Commission after conducting a lengthy review and receiving comments from numerous parties, including consumer groups, has adopted a comprehensive regulatory structure that addresses the matter of customer access to ESCO

²¹ *Id.*, p. 18.

pricing data in a manner that from the Commission's perspective reasonably balances the interests of consumers, ESCOs and any other interested party.²²

From what can be gleaned from the Order, it is apparent that the Commission has rejected the random, indiscriminate disclosure of ESCO pricing data, and at a minimum required a system that reviews the data, attempts to present the customer with non-misleading data and recognizes that ESCOs can be unnecessarily competitively harmed if the data is not disseminated in a reasonable and rational manner.

With respect to the web-based Price Calculator, this comparative pricing tool is available to the individual customer directly and not indiscriminately released. In recognition of the potential misleading nature of raw cost comparisons, the Commission has directed that the web site include prominent disclosures that specifically advise the customer that the pricing analysis does not reflect that the ESCO service may include other benefits such as fixed rates, renewable/solar energy, appliance repair or other valuable benefit.

Such a nuanced approach is also evidenced by the Commission's treatment of the reporting of historical pricing. As noted in the Order, the Commission intends to report pricing for commodity only service (with no value-added services) that is averaged over a quarterly period by pricing type (fixed, variable). Moreover, additional details and concerns regarding this measure will be further examined in a Technical Conference.

²² The Commission provided additional access to ESCO product offerings through modifications to the Commission Power To Choose web site (Retail Markets Order, p. 18-20).

C. Summary

In view of the foregoing, it is well established that the precedent established by the Commission under the FOIL process is to except from disclosure ESCO specific operating data that is not made publicly available. Moreover, in connection with specific ESCO customer pricing data, the Commission in the Retail Markets Order has already ruled upon and established the process that would govern release and dissemination of such ESCO data.

HI. THE INDISCRMINATE DISCLOSURE OF THE DATA SOUGHT IN THE FOIL REQUEST HAS THE LIKELIHOOD OF CAUSING SUBSTANTIAL MATERIAL HARM

The release of the data sought herein is shielded by the exemption set forth in Section 87(2) (d) of the Public Officers Law.

Specifically, Section 87(2) (d) provides that an agency may deny access to records that are derived from information obtained from a commercial enterprise and which if disclosed “would cause substantial injury to the competitive position of the subject enterprise.”²³ Substantial harm is a function of the commercial value of the requested information to competitors or potential competitors as well as the cost of acquiring the information through other means. This exception from disclosure does not require the showing of actual harm, but only the presence of actual competition in the marketplace and the likelihood of substantial competitive injury.²⁴

²³ See, Public Officers Law Section 87(2) (d).

²⁴ See, *Verizon New York Inc. v. Christopher Bradbury, as Records Access Officer*, 10 M 3d 785 (Sup Ct. Westchester Cty, 2005); *Encore College Bookstores, inc. v. Auxiliary Services Corporation*, 87 NY 2d 410 (1995); *Matter of Capital Newspapers Div. of Hearst Corp. v. Burns*, 67 N. Y. 2d 562.

This standard is also incorporated in the Commission's regulations which provide that disclosure of Commission records can be withheld where disclosure of such information "would cause substantial injury to the competitive position" of the party seeking the exemption. In assessing the extent of substantial economic injury, the Commission will consider the extent to which disclosure would cause unfair economic or competitive damage, whether the information is known by others and the worth of the information to competitors in the industry.²⁵

The FOIL Request seeks unrestricted and indiscriminate disclosure of pricing comparison that incorporates individual ESCO pricing data. Disclosure of this data would be likely to cause material injury to the competitive position and reputation of ESCOs, and potentially harm consumers.

This data can provide a competitor or prospective competitor with detailed information concerning the specific pricing patterns and behavior by existing ESCOs for a prior period. This type of information can be extremely useful in determining how to price a product, how to compete against existing competitors, how to enter a market and potential margins that can be achieved in this market. Therefore, disclosing this information can result in an unfair competitive advantage.²⁶

The release of the raw comparative ESCO pricing data in the manner requested in the FOIL request also has the serious potential to inappropriately damage the competitive posture and reputation of ESCOs serving the New York market. As requested the data sought would provide a comparison of the price charged by an ESCO to residential customers for a historical period with the price that would have been charged by the

²⁵ 16(A) NYCRR Section 6-1.3 (b) (2) (i) and (ii).

²⁶ See also, to the same effect, Trade Secret 09-1, May 5, 2009; Trade Secret 08-1 (May 19, 2008), p. 5.

utility. However, absent additional crucial information such a comparison could be materially false and misleading as it ignores many other crucial factors that the Commission has already determined are necessary in order to provide an accurate perspective on the ESCOs competitive position as well as the manner in which customers are served.

The release of such data is especially inappropriate and anti-competitive where the ESCO is providing fixed, value-added or green/clean power. An ESCO's fixed price offering, (where the price remains the same and invariant for the entire contract period) reflects the market conditions in effect at the onset of the contract term. Moreover, the fixed priced product reflects the market estimate of future costs whereas the utility rate ostensibly reflects past costs and historical cost allocations. Consequently, this type of ESCO provided commodity product is materially different than a utility's monthly cost allocation methodology which varies monthly and which is difficult to predict on a going forward basis. Therefore, merely comparing the costs associated with these two very different product structures fails to inform the consumer that two entirely dissimilar products are being used in the comparison, and can create an unfair competitive perception of the ESCO..

Further, such data overlooks the underlying purchasing motivations of the consumer. Where a customer has voluntarily chosen a fixed priced product it is usually the case that the consumer is primarily interested in price stability and continuity over the contract term, and the desire to thereby achieve price protection for a defined period of time. This type of stability is especially important to households on fixed incomes and businesses that need to manage cash flows. The customer recognizes that once set the

price will not fluctuate monthly and that market prices may vary over time. These values and motivations are not in any fashion incorporated in the pricing analysis. Rather than comparing “apples-to-apples”, the data will be comparing “apples to oranges”, with the added deficiency that the comparison will suggest an air of relevance and similarity when, in fact, the products being compared are dissimilar.

Similarly, the release of raw pricing data competitively harms any ESCO offering value added product or service. These types of products are designed to provide value in forms other than a direct cost impact (such as appliance repair service) and therefore are not accurately reflected in a limited pricing model.

For example, customers purchasing a green product are seeking to ensure that their energy usage is more environmentally compatible and consistent with the overall state and federal policy goals favoring the use of renewable and green power sources.²⁷ These types of products and power sources are marketed for their positive environmental impact rather than on a cost basis. In fact, it is most likely that these commodity products will be more costly than the traditional commodity sources that are primarily based on fossil fuels.²⁸ Nonetheless, the pricing data will focus only on price overlooking that price is not the motivating factor behind the purchase of this type of product.²⁹ The same logic holds true regardless of the service so long as it adds value to the basic energy product.

²⁷ See Case 03-E-0188 – Proceeding on Motion of the Commission Regarding a Retail Renewable Portfolio Standard, *Order Regarding Retail Renewable Portfolio Standard* (“RPS”) (issued September 24, 2004)

²⁸ In fact, to ensure that the State is able to achieve the mandated RPS targets, the Commission authorized the establishment of a program under which NYSERDA will reimburse renewable generators to the extent the cost of such power exceeds the projected electric market costs. (*Id.*)

²⁹ The ESCO incurs additional costs and risk when offering renewable/green products due to the need to purchase higher cost power sources to meet their commitment to the consumer. As in the case with fixed products, the prudence of taking on such additional financial risk becomes more tenuous if the customer begins to focus primarily on cost.

The validity of these competitive concerns with the use of ESCO pricing data has been repeatedly recognized by the Commission.

In 2013, National Grid, under auspices of the Commission, introduced a web-based Price Calculator that purportedly enables customers to compare their ESCO charges with the Company commodity charges for a comparable historical period.³⁰

A critical aspect of this mechanism was the inclusion of specific and detailed disclosures and disclaimers to the consumer advising of the need to be advised of important factors before judging the competitive standing of the customer's chosen ESCO. Specifically, the following type disclaimers are included on the web-site:

- A comparison of a bill that includes marketer charges with a utility bill in any single period may be affected by the utility's monthly adjustments for prior periods, one-time charges or very short-term changes in energy and natural gas prices. It is therefore recommended that comparisons be made over a longer period of time and, if possible, over an entire year.
- If the supply service purchased from an ESCO includes a value-added feature such as a price that is fixed for a period of time, green energy, an energy equipment repair package or airline miles, the costs of this value-added feature may be reflected in the charges from your ESCO. The supply service provided by National Grid, however, does not include such value added services. Keep this in mind when interpreting the results of this bill comparison.
- National Grid's energy and natural gas prices vary from month to month in response to market forces. Some ESCOs offer a supply service at a fixed price per unit (kilowatt hour of electricity or therm of gas) for the duration of a contract. A fixed price contract may be an attractive choice for consumers who want to lock in a certain price. Fixed price contracts, however, do not and cannot guarantee that the customer will save money, in any given month or over a longer comparison period. In some months, the contract's fixed price could be lower than the variable price offered for supply service by National Grid. In other months, the contract's fixed price may be higher than the National Grid price. Please keep that in mind when interpreting the results of this bill comparison.
- Some ESCOs guarantee savings. Generally, the savings are guaranteed over a twelve-month period. If you have an agreement that guarantees savings, but the

³⁰ See, Cases 12-E-0201 and 12-G-0202 – Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of Niagara Mohawk Power Corporation d/b/a National Grid for Electric and Gas Service, *Report of ESCO Pricing Tools and Consumer Communications Collaborative*, dated June 13, 2013.

results of the bill comparison do not reflect a savings over what you would have paid National Grid, you may wish to contact your ESCO to discuss.

- Please be aware that New York State sales tax may be treated differently for utilities and ESCOs, which can cause variations in bill comparison results.
- Customers should be aware that past performance is not necessarily indicative of future results.³¹

The Commission has basically adopted an identical approach in the Retail

Markets Order.

In connection with the Price Calculator, as previously noted³² the Commission has directed that the web sites include various disclosures indicating that the historic bill calculator is most useful if the customer has been served by an ESCO for at least twelve months; the information presented is historic and is not necessarily indicative of future prices for either utility or ESCO service; the price comparison does not account for any value-added service(s) such as green energy; and the price comparison does not reflect any affinity rewards programs or rebates that may be provided by the customer's ESCO separately from the customer's utility bill.³³

Similarly with respect to the reporting of ESCO historical pricing, the data provided to the consumer reflects commodity only service (with no value-added services) that is averaged over a quarterly period by product type (fixed, variable).³⁴

³¹ *Id.*

³² *Supra*, p. 6

³³ Retail Markets Order, p. 15.

³⁴ It is anticipated that reference may be made to Case 12-E-0201 - Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of Niagara Mohawk Power Corporation d/b/a National Grid for Electric Service, etc., *Ruling Denying, In Full, The Motion Of The Retail Energy Supply Association*, issued on September 7, 2012. However, that Ruling does not bear on this matter as it was not made in the context of a FOIL review under POL Section, Article 6 and it predates the issuance of the Retail Markets Order.

In connection with other data related to ESCO market activities, the Commission has previously concluded that release of such data would engender competitive harm and should not be disclosed, and would not even be disclosed under the Freedom of Information Law (FOIL).³⁵

Thus, the Commission has determined that disclosure of data concerning the market base of each individual ESCO, including the specific and type of customers served and associated revenues, "...would be likely to cause substantial injury to the competitive positions of ESCOs, particularly new entrants and those that have chosen to concentrate their marketing efforts in specific geographic area in the State."³⁶

The broad dissemination of ESCO-specific customer information will create the potential for competitors to interfere with established supply arrangements and to identify and target lucrative customers based on the information disclosed. It could therefore be used by competitors seeking to enter the marketplace and provide similar services and could be extremely useful in targeting strategic geographic market segments. The release of this information would have substantial commercial value to competitors, or potential competitors, of those ESCOs currently in serving the marketplace.³⁷

Further, since the very essence of competition is determined by the costs and opportunities encountered by members within the same industry, there exists a potential unfair advantage to emerging or potential competitors who acquire valuable marketing

³⁵ Request for Certain Information in Unredacted Gas-flow Reports for November and December 2005, Trade Secret 06-01, Letter dated October 20, 2006 from Hon. Jaclyn A. Brillling, Secretary ("2006 FOIL Ruling"); Trade Secret 09-1, May 5, 2009; Trade Secret 08-1 (May 19, 2008), p. 5; Case 98-M-1343 – In the Matter of Retail Access Business Rules; Order Adopting Amendments To The Uniform Business Practices, Granting In Part Petition On Behalf Of Customers And Rejecting National Fuel Gas Distribution Corporation's Tariff Filing (issued October 27, 2008) at p. 26.

³⁶ 2006 FOIL Ruling, p. 5; see also UBP Order, p. 26.

³⁷ See, *Encore, supra*, and *Matter of Troy Sand and Gravel Company, Inc. v. NYS Department of Transportation*, 277 A. D. 2d 782 (3rd Dept, 2000).

information made available under a FOIL Request in lieu of the cost of having to undertake extensive market research. Effective marketing to retail customers is an incremental and costly process that ESCOs have developed over time. Many ESCOs have invested significant human and capital resources in the analysis and development of proprietary company marketing plans and strategies. This has involved targeting of certain market segments with product and service offerings and, just as valuable, determining which segments warrant greater or lesser attention. The disclosure of the individualized ESCO marketing data for the nominal cost of a FOIL Request fee is antithetical with advancing the development of the retail energy market and attracting ESCOs to the State and may produce a chilling effect on current and potential industry participants if such commercially sensitive information is left unprotected.

Each utility in New York actually reflects a unique market that incorporates differing customer bases, supply arrangements, customer preferences, operational requirements and tariff obligations. Concomitantly, the business operations of ESCOs are also unique and dynamic as they will respond to market and overall business conditions as well as developing business opportunities. Consequently, the relative competitive market position of individual ESCOs is changing constantly as service offerings are modified and ESCOs enter and exit individual markets.

The constantly changing economic dynamic underscores the potential economic harm that disclosure may engender. For example, if an ESCO has recently entered a new utility service territory, its position is susceptible to harm if the number of customers and volumes it serves by customer class are publicly disclosed. Customers as well as potential customers might incorrectly perceive an ESCO marketer who has fewer

customers or serves only a limited area as not being commercially viable or otherwise operationally capable of providing service when in fact, the ESCO may, as in this case, just have entered a new market or started serving a new class of customers in a specific market possibly due to a change in applicable regulations or the ESCO's marketing plan.

Further, disclosure of the ESCO specific data such as customers and revenue information has the potential to affect the ESCO's ability to procure energy supplies on favorable terms because disclosure would provide potential suppliers with knowledge of the ESCO's peculiar supply needs where it provides service, and potentially give suppliers an unfair competitive advantage by enabling them to seek higher prices from ESCOs based on this type of data.³⁸

Under the standard codified in *Encore, supra* and *Troy Sand and Gravel Company supra*, information concerning the individualized operations of each ESCO has substantial commercial value to existing competitors as well as potential competitors who may desire to enter the retail energy market. The relevant case law makes clear that an exception from disclosure will be granted where there is a showing of the likelihood of substantial competitive injury.³⁹ That burden has been met by the ESCOs and sustained under long-standing Commission precedent.

³⁸ 2010 FOIL Ruling, p. 13.

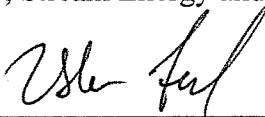
³⁹ See, *Verizon, supra*; *Capital Newspapers, supra*.

IV. CONCLUSION

In view of the arguments and analysis presented herein, and the previous determinations of the Commission, RESA respectfully requests that the data sought in the FOIL Request be excepted from disclosure.

Respectfully submitted,

Retail Energy Supply Association, IDT
Energy, Stream Energy and Just Energy

By: 

Usher Fogel, Counsel

Dated: March 11, 2014
Cedarhurst, New York