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Via Electronic Mail March 27, 2014

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RE: Matter #11-01661 and #12-00172 - FOIL request 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.

**(DETERMINATION – Trade Secret Information 14-01)**

Dear Mr. Norlander, et al.:

This letter constitutes my determination, as Records Access Officer (RAO) for the New York State Department of Public Service (the Department), on a request for access to records pursuant to §89(5) of the Public Officers Law (POL). It discusses whether certain records submitted by Central Hudson Gas & Electric Corporation (CHG&E), National Fuel Gas Distribution Corporation (NFGD), Niagara Mohawk Power Corporation d/b/a National Grid (Niagara Mohawk), Consolidated Edison Company of New York, Inc. (Con Edison), and Orange & Rockland Utilities, Inc. (O&R) (together, the Utilities) are entitled to an exception from disclosure as trade secrets or confidential commercial information within the meaning of POL §87(2)(d).

**FOIL PROCEDURAL BACKGROUND**

On January 17, 2014, Gerald A. Norlander sent a request on behalf of the Public Utility Law Project (PULP) seeking access to data provided by the Utilities to the Department comparing utility charges to residential customers having energy service company (ESCO) gas or electric service with the charges that would have been due the utility had the customers not switched to an ESCO. The PULP request specifically disclaimed any interest in the disclosure of the names of the individual ESCOs.

On February 25, 2014, I sent a two-fold letter to PULP and to the Utilities outlining the procedural process that would be employed to determine access to the requested documents. The individual ESCOs and Usher Fogel, who represents the Retail Energy Supply Association (RESA),[[1]](#footnote-1) IDT Energy, Just Energy, and Stream Energy, were also provided this notification.[[2]](#footnote-2)

Subsequently, the Utilities submitted Statements of Necessity that modified their prior requests for confidential treatment of ESCO-related information. All of the Utilities withdrew their original requests for trade secret protection for ESCO price information and enrollment data. With the exception of Niagara Mohawk,[[3]](#footnote-3) the Utilities now assert trade secret protection only for the ESCO names and identification codes that link specific ESCOs to the their enrollment and pricing information.[[4]](#footnote-4) All continue to assert confidentiality for customer data.

RESA also submitted a Statement of Necessity on behalf of its members. RESA argues that the records identified in the PULP request are entitled to protection from disclosure in accordance with POL §§87(2)(d) and 89(5)(b)(2), 16 NYCRR Section 6-1.3, and Commission precedent.

Neither the release of customer data, including enrollment data and personal identifying details, nor the names and associated key or index codes of ESCOs are at issue; they are not the subject of this Determination. The sole issue for this Determination is RESA’s contention that the ESCOs’ pricing information is entitled to trade secret protection.[[5]](#footnote-5)

**DISCUSSION**

**Arguments of RESA**

RESA argues that disclosure of the “data provided by utilities to DPS comparing utility charges to residential customers having ESCO gas or electric service with the charges that would have been due the utility had the customers not switched to an ESCO” is inconsistent with the UBP Order,[[6]](#footnote-6) the Retail Markets Order,[[7]](#footnote-7) certain Appeals of Trade Secret Determinations issued by the Secretary,[[8]](#footnote-8) and Trade Secret Determinations made by the RAO in other cases.[[9]](#footnote-9) Moreover, RESA asserts that disclosure will adversely impact the competitive position of the affected ESCOs.

RESA refers to several orders and determinations as establishing that information related to ESCOs is confidential. For example, RESA cites the UBP Order as precedent for the confidentiality of information identifying the number of customers served by an ESCO.[[10]](#footnote-10) RESA claims that the UBP Order was reinforced by the RAO’s Trade Secret Determination 09-1 in which a request for disclosure of ESCO-specific data was denied on the ground that it would engender competitive harm.[[11]](#footnote-11) RESA also cites a 2010 RAO decision protecting ESCO customer data from disclosure,[[12]](#footnote-12) and an October 2006 Appeal Determination in which the Secretary found that disclosure of ESCO names, the total number of customers for each, and the quantities of gas each ESCO moved to its customers was not required.[[13]](#footnote-13)

RESA also states that the Commission’s recent Retail Markets Order comprehensively addressed the issue of public disclosure of ESCO customer pricing data and established discrete mechanisms to provide consumers with such information in a regulated environment subject to Commission oversight. I note that the Order directed utilities to develop and implement an historical bill calculator on their websites to allow customers to compare their ESCO charges with the charges the utility would have applied for the same period.[[14]](#footnote-14) RESA argues that, by adopting the comprehensive regulatory structure governing customer access to ESCO pricing data, the Commission has rejected other disclosure mechanisms. RESA declares that Commission precedent under FOIL is to protect ESCO-specific operating data from disclosure, and that the Retail Markets Order established the process for the release and dissemination of ESCO customer pricing data.

Finally, RESA argues that disclosure of the ESCO specific data at issue here could affect an ESCO’s ability to procure energy supplies on favorable terms, because disclosure would provide potential suppliers with knowledge of an ESCO’s particular supply needs where it provides service, and potentially give suppliers an unfair competitive advantage by enabling them to charge higher prices.[[15]](#footnote-15)

**Statement of Applicable Law**

POL §87(2) provides, in pertinent part: “Each agency shall, in accordance with its published rules, make available for public inspection and copying all records, except that such agency may deny access to records or portions thereof that: . . . (d) are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise.”

The Court of Appeals, in Matter of New York Telephone Co. v. Public Service Commission,[[16]](#footnote-16) held that the Commission had not only the power but also the affirmative responsibility to provide for the protection of trade secrets and cited the definition of “trade secret” contained in Restatement of Torts §757, comment (b) (1939).[[17]](#footnote-17) Thereafter, the Commission adopted a virtually identical definition of “trade secret.” The Commission’s definition reads as follows: “A trade secret may consist of any formula, pattern, device or compilation of information which is used in one’s business, and which provides an opportunity to obtain an advantage over competitors who do not know or use it.”[[18]](#footnote-18)

The Court of Appeals, in Encore Coll. Bookstores v Auxiliary Serv. Corp. of State Univ. of N.Y.,[[19]](#footnote-19) stated that the Legislature intended that the “substantial injury to the competitive position” language of POL §87(2)(d) should be similar in scope to the “substantial competitive harm” test announced in National Parks and Conservation Association v. Morton,[[20]](#footnote-20) a case that arose under the federal Freedom of Information Act. The Court of Appeals concluded that the test does not require the information submitting enterprise to establish actual competitive harm. Rather, the party asserting an exemption from disclosure must show “actual competition and the likelihood of substantial competitive injury.”[[21]](#footnote-21)

While “competitive injury” is not defined by the statutes, regulations, or case law, the Court of Appeals has interpreted the phrase in subsequent decisions. In 2008, the Court appears to have “raised the bar” as to what is necessary to sustain the burden of proof required to exempt information from public disclosure in Markowitz v. Serio,[[22]](#footnote-22) a case involving the New York State Insurance Department and the issue of “redlining.” There the Court stated that “to meet its burden, the party seeking exemption must present specific, persuasive evidence that disclosure will cause it to suffer a competitive injury; it cannot merely rest on a speculative conclusion that disclosure might potentially cause harm.”[[23]](#footnote-23)

**Application of Pertinent Law**

First, I find that the orders and rulings cited by RESA are not applicable in this case and do not have any binding effect on the issues presented here. RESA misapplies the various Commission, Secretary and RAO rulings it cites to the facts at hand. Neither the Commission’s UBP Order nor its Retail Markets Order addresses release of specific ESCO pricing information. Similarly, none of the rulings by the Secretary or RAO cited by RESA apply here as they deal with ESCO gas flow-through data for a specific period of time, the variable rate contract of Hess Corporation, and ESCO customer enrollment data. None of the aforementioned precedents addresses release of pricing information alone.

Given RESA’s contention that the pricing information in question is a trade secret or confidential commercial information, the two‐pronged test established by the Court of Appeals in Encore is applicable. In applying the first prong of the Encore test, (in which the Court implicitly assumed the non-public nature of the information in question), the existence of competition must first be established. I find that the existence of competition in the electric and gas industry in New York State has been established.[[24]](#footnote-24)

The second prong of the Encore test turns on whether disclosure would be likely to cause “substantial injury to the competitive position of the enterprise.” The Court in Ashland Management, Inc. stated that one of the considerations in deciding a trade secret claim is the value of the information to the enterprise and to his competitors. [[25]](#footnote-25) In this regard, I first note that almost all information possessed by a business would have some commercial value to its competitors; however, the question is whether the information at issue is sufficiently valuable that its disclosure would be likely to cause substantial competitive injury. In examining this issue, I also note that, because the overall purpose of the statute is to ensure that the public is afforded access to governmental records, FOIL exemptions are interpreted narrowly.[[26]](#footnote-26) The Court of Appeals restated this principle in Matter of Capital Newspapers v. Burns, and held that the party resisting disclosure must demonstrate a particularized and specific justification for denying access. [[27]](#footnote-27)

Here, RESA failed to meet this burden. RESA has not demonstrated that disclosure of the pricing information would be likely to cause substantial injury to the competitive position of a commercial enterprise and therefore has not met the burden of proof it bears pursuant to POL §89(5)(e). In order to meet this burden, the party seeking non-disclosure must provide the necessary causal link between the disclosure of the information and the likelihood that it would cause substantial injury to the competitive position of a commercial enterprise. RESA did not accomplish this. Mere conclusory allegations, without factual support, are insufficient to sustain non-disclosure.[[28]](#footnote-28) The party resisting disclosure must demonstrate a particularized and specific justification for denying access.[[29]](#footnote-29) The arguments suggesting that the ESCOs will suffer a competitive disadvantage from the release of the pricing information are theoretical at best.

In addition to falling short on its burden, RESA’s arguments ignore the fact that the Utilities have continued to protect, and PULP has not requested information that would identify the individual ESCOs who provided the pricing data. Thus, the information could have only minimal value to any competitors. I am aware of one precedent that is on point, and it was cited by several of the Utilities in support of their decision to narrow their requests for exception from disclosure to the names and enrollment information of their ESCO customers.[[30]](#footnote-30)In that case, the administrative law judges (ALJs) denied RESA’s motion for confidentiality for any internal analysis of the commodity prices charged to residential customers of ESCOs in comparison to the charges that would have been billed by Niagara Mohawk for electric or gas commodity for the period 2008-2011 and monthly for 2012 to date. The ruling states that pricing information alone is unlikely to provide competitors with a competitive advantage and is unlikely to cause significant competitive injury to any specific ESCO.[[31]](#footnote-31) At least one utility agreed with this statement. NFGD stated that “[I]f aggregated pricing information is disclosed with no attribution, however, then it cannot result in competitive harm to the ESCO. . . . With ESCO names removed, the other information contained in the document is general in nature, and cannot, on its face, be attributed to any ESCO.”[[32]](#footnote-32)

There is an additional reason to question the competitive value of the ESCO data and thus its entitlement to protection. The information PULP requests is historical pricing information. Specifically, Niagara Mohawk provided monthly ESCO data to Staff that covered the 24-month period from August 2010 to July 2012. Con Edison sampled monthly ESCO customer data from January 2012 to December 2012. O&R provided data for a single month; gas ESCO price information for January 2012 and electric ESCO price points for June 2012. CHG&E provided price comparisons between various ESCOs for February 2011, May 2011, June 2011, and June 2012. Thus, the most recent information is nearly16 months old. At this point, it is unlikely that it has any relevance to current market conditions or would provide any advantage to a competitor.

RESA also asserts that releasing the information about comparative ESCO and utility billing information will cause competitive harm to ESCOs as a class.[[33]](#footnote-33) The Commission itself has addressed the performance of retail energy markets as a whole, for residential and small commercial customers and found that substantial changes to improve the market design are required. The Commission concluded:

“… we have several concerns about retail energy markets for residential and small non-residential customers. We find that as currently structured, the retail energy commodity markets for residential and small non-residential customers cannot be considered to be workably competitive. Although there are a large number of suppliers and buyers, and suppliers can readily enter and exit the market, the general absence of information on market conditions, particularly the price charged by competitors, is an impediment to effective competition. Additionally, Staff's review shows a large variation in the price charged for energy commodity services with no value-added attributes, a result that is inconsistent with a workably competitive market.”[[34]](#footnote-34)

This conclusion is based on the comprehensive review of retail energy markets conducted by Staff and the Commission. The aggregate pricing information at issue here, with ESCO names removed, is simply some of the data reviewed by Staff and the Commission that supports that overall conclusion regarding retail energy markets for small customers.

Even if a slight degree of competitive injury could be shown, such demonstration would not rise to the level of substantial competitive injury. Moreover, any de minimis harm would be outweighed both by the general policy favoring disclosure and the Commission’s specific policy favoring transparency in the retail access market.[[35]](#footnote-35) Most recently, the Commission issued an Order to improve the State’s retail energy markets serving the State’s two largest groups of customers, residential and small nonresidential customers. The Commission found that the markets are not providing sufficient competition or innovation to properly serve consumers. To assist its ongoing review of ESCOs the Commission directed ESCOs to begin reporting historic pricing data for dissemination to the public.[[36]](#footnote-36)

**CONCLUSION**

In light of the forgoing, the pricing information claimed by RESA to be trade secrets or confidential commercial information does not warrant an exception from public disclosure.

Review of my determination may be sought, pursuant to POL §89(5)(c)(1), by filing a written appeal with Kathleen H. Burgess, Secretary at the address given above, within seven business days of receipt of this determination. Unless a contrary showing is made, receipt will be presumed to have occurred on March 27, 2014, so the deadline for the receipt of any such written appeal is April 8, 2014.

Very Truly Yours,

Donna M. Giliberto

Assistant Counsel & Records Access Officer

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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. [↑](#footnote-ref-1)
2. By separate writing dated March 14, 2014, Definite Energy Corporation expressed its support of RESA’s Statement of Necessity. [↑](#footnote-ref-2)
3. In prior submittals, Niagara Mohawk requested confidential protection for the names of ESCOs providing service. In its Statement of Necessity, it asserts, “However, in light of the ALJs’ decision in Cases 12-E-0201 and 12-G-0202 and the RAO Letter asserting the companies did not present a prima facie case for blanket protection of the documents, the Company defers to ESCOs copied on the RAO Letter to make any such showing of necessity in connection with potential disclosure of ESCO names.” [↑](#footnote-ref-3)
4. See Matters 12-00172 and 11-01661. [↑](#footnote-ref-4)
5. RESA states that there appears to be some ambiguity concerning the specific data sought under the FOIL request. Counsel cites an e-mail dated March 6, 2014 from O&R to the ESCOs on its system in which the data is identified as ESCO billing and enrollment data for certain months. Enrollment data is not an issue here and will not be ruled on in this Determination. [↑](#footnote-ref-5)
6. Case 98-M-1343, In the Matter of Retail Access Business Rules; Case 07-M-1514, Petition of NYS Consumer Protection Board and NYC Depart. of Consumer Affairs Regarding 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). [↑](#footnote-ref-6)
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 NYS; Case 98-M-1343; 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 February 25, 2014) (Retail Markets Order). [↑](#footnote-ref-7)
8. Case 94-E-0952, Competitive Opportunities Regarding Electric Service. Request for ESCO Gas Flow-Thru Data Reports for November and December 2005, Appeal of Trade Secret Determination 06-01 (issued October 20, 2006) (2006 FOIL Ruling). [↑](#footnote-ref-8)
9. Case 98-M-1343, Request for ESCO Customer Data. Trade Secret Determination 09-1 (issued May 11, 2009) (2009 FOIL Ruling); Cases 93-G-0932 and 94-E-0952, Request for 2009 Breakdown of Revenue and Number of Residential Customers for Gas & Electric per ESCO per Utility Company, Trade Secret Determination 10-2 (issued March 16, 2010). [↑](#footnote-ref-9)
10. UBP Order, at 26. [↑](#footnote-ref-10)
11. See, also, Case 94-E-0952, Trade Secret Determination 08-1 (issued May 19, 2008), at 5. [↑](#footnote-ref-11)
12. Case 98-M-1343, Request for ESCO Sales Agreements – Variable Energy Price Contracts – Hess,

    Trade Secret Determination 10-4, (issued December 24, 2010) at. 13. [↑](#footnote-ref-12)
13. Case 94-E-0952, 2006 FOIL Ruling, at 5. [↑](#footnote-ref-13)
14. Retail Markets Order, at 16-17. [↑](#footnote-ref-14)
15. Case 98-M-1343, Trade Secret Determination 10-4, at 13. [↑](#footnote-ref-15)
16. 56 N.Y.2d 213, 219 – 220 (1982). [↑](#footnote-ref-16)
17. Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1973) in which the Court discussed what might constitute a “trade secret”, citing Restatement of Torts, §757, comment b (1939). [↑](#footnote-ref-17)
18. 16 NYCRR §6-1.3(a). [↑](#footnote-ref-18)
19. 87 N.Y.2d 410 (1995). [↑](#footnote-ref-19)
20. 498 F.2d 765, 770 (D.C. Cir., 1974). [↑](#footnote-ref-20)
21. Encore at 419-420. [↑](#footnote-ref-21)
22. 11 N.Y.3d 43 (2008). [↑](#footnote-ref-22)
23. Markowitz, supra at 51; Encore, supra. [↑](#footnote-ref-23)
24. See Case 94-E-0952 , In the Matter of Competitive Opportunities Regarding Electric Service, Opinion & Order Regarding Competitive Opportunities for Electric Service, [Op. No. 96-12, confirmed 196 Misc.2d 924 (Albany County 1996), aff'd](https://www.lexis.com/research/buttonTFLink?_m=7b881b9dfbe52ee7c9efabfbce73b0fd&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b169%20Misc.%202d%20924%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=42&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b168%20P.U.R.4th%20515%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=2&_startdoc=1&wchp=dGLzVzB-zSkAl&_md5=5a176e85cfe6d67c5277933f9757d785), 273 A.D.2d 708; Case 93-G-0932, Proceeding on Motion of the Commission to Address Issues Associated with the Restructuring of the Emerging Competitive Natural Gas Market; Case 98-M-1343, In the Matter of Retail Access Business Rules. [↑](#footnote-ref-24)
25. 82 N.Y.2d 395, 407 (1993). [↑](#footnote-ref-25)
26. Washington Post Co. v. New York State Ins. Dept.*,* 61 NY2d 557, 564 (1984). [↑](#footnote-ref-26)
27. 67 N.Y.2d 562, 566, 570 (1986). [↑](#footnote-ref-27)
28. See, Church of Scientology of New York v. State of New York, 46 N.Y.2d 906 (1979). [↑](#footnote-ref-28)
29. Capital Newspapers v. Burns, supra at 566, 570 (1986). [↑](#footnote-ref-29)
30. 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. Ruling Denying, in Full, the Motion of the Retail Energy Supply Association (issued September 7, 2012). [↑](#footnote-ref-30)
31. Id. at 16. [↑](#footnote-ref-31)
32. See Matter 12-00172, Statement of Necessity, National Fuel Gas Distribution Company. [↑](#footnote-ref-32)
33. See RESA Statement of Necessity at 10-11, 15. [↑](#footnote-ref-33)
34. Case 12-M-0476, Retail Markets Order at 10. [↑](#footnote-ref-34)
35. Supra, October 2012 Order. [↑](#footnote-ref-35)
36. Supra, Retail Markets Order at 12. [↑](#footnote-ref-36)