

# Public Utility Law Project of New York, Inc.

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August 12, 2014

Kathleen H. Burgess  
Secretary  
New York State Department of Public Service  
3 Empire State Plaza  
Albany, N.Y. 12223

Re: Case 13-01288, Freedom of Information Law (FOIL) Appeal Regarding Information in Annual Electric Company Reports

Dear Secretary Burgess:

The Public Utility Law Project of New York, Inc., submits this comment in support of reversal of the determination of the Records Access Officer (RAO) in the above-numbered case.<sup>1</sup>

In addition, these comments are joined in by AARP, Consumers Union, and New York Public Interest Research Group (NYPIRG). The release of the information requested under the Freedom of Information Law (FOIL) that is the subject of this proceeding is of great importance to New York consumers seeking to understand why they pay some of the nation's highest prices for electricity.

The RAO held that release of virtually all information contained in the annual reports required to be filed by electric companies under Public Service Law § 66(6) is barred from public disclosure by the "trade secret" exemption to the Public Officers Law, §87(2), with respect to companies the Commission considers to be "lightly regulated."

As background, there is no specific statutory authorization or definition of a "lightly regulated" electric company or for keeping any information in their annual reports secret. The Commission has allowed some New York electric companies to sell at wholesale only, without requiring them to sell any portion at retail prices under state jurisdiction, and so their prices are now subject to FERC jurisdiction over wholesale electric sales. The Commission's "light regulation" regime of these electric companies covers "matters such as enforcement, investigation, safety, reliability ... system improvement .... [p]ower in the market ... and any actions that contravene the public interest."<sup>2</sup>

For a time, the Public Service Commission deemed filing of annual reports with FERC to be compliance with the state statute's annual report filing requirement. After FERC gave many sellers "market based

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<sup>1</sup> The RAO initial determination is at <http://bit.ly/1mFYCva>.

<sup>2</sup> [\*Matter of Astoria Gas Turbine Power, LLC v Tax Commn. of City of N.Y.\*, 7 NY3d 451, 455 - 456 \(2006\)](#).

rate” permission,<sup>3</sup> and reduced its filing requirements, the “lightly regulated” electric companies were required to file annual reports with the New York Commission, in order to comply with the state statute.<sup>4</sup> Subsequently, when the companies filed their annual reports, they filed versions redacting virtually all data and information fields on the report forms. As a consequence there is no public information regarding basic matters such as their costs, revenues, and profits. This appeal ensued.

The Public Service Law generally makes all of the records of the Public Service Commission public. Public Service Law (§ 16, subd 1), provides: "All proceedings of the commission and all documents and records in its possession shall be public records." Under the Freedom of Information Law (FOIL), there are exemptions to disclosure of public records, but these are generally disfavored and are to be strictly limited. The Court of Appeals held that:

Exemptions are to be narrowly construed to provide maximum access, and the agency seeking to prevent disclosure carries the burden of demonstrating that the requested material falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access.

*Capital Newspapers v. Burns*, 67 NY 2d 562, 566 (1986). *Accord, Farbman & Sons v. New York City*, 62 NY 2d 75, 80 (1984); and *Fink v. Lefkowitz*, 47 NY 2d 567, 571 (1979).

The RAO relied upon the electric companies’ filed statements in opposition to public release of their statutorily required annual reports, which elicit financial and operating income and expense information. Of the 450 pages reviewed by the RAO, 322 of them consist of the empty or blacked out 14-page forms of 23 electric company submitters. The balance is the arguments and affidavits supporting the redaction, much of them repetitious. The general thrust of the opposition is that the electric companies are in a “competitive” industry and so publicly divulging the information in their annual reports, including their revenue and net income, would be harmful. Much of their argument is based on sheer conjecture that armed with the information in the annual reports -- filed in July for the prior calendar year -- competitors might deduce the marginal operating costs of each other’s generating units and use that cost information to further anticompetitive bidding strategies in the NYISO spot markets.

Largely, the objections to disclosure seek blanket secrecy of the contents of the reports. Reports filed have blacked out nearly every field but the names. According to the RAO, “[O]nly two of the affidavits provide a line-by-line explanation of the redactions – that of Charles McCall, CEO of the Astoria companies (APP and APP II), and C. Kay Mann, CEO of Noble Environmental Power, LLC. Scrutiny of these affidavits does not support the claim that release of the annual reports would cause harm. For example, the Mann affidavit seeks to stifle reporting of basic financial information:

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<sup>3</sup> The Supreme Court has not yet ruled on the legality of FERC’s effort to eliminate statutory rate filing and review requirements for sellers allowed to have unfiled “market based rates.” *Morgan Stanley Capital Grp., Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cnty.*, 554 U.S. 527 128 S.Ct. 2733, 2747 (2008) (“we do not address the lawfulness of FERC’s market-based-rates scheme, which assuredly has its critics”).

<http://www.law.cornell.edu/supct/html/06-1457.ZS.html>

<sup>4</sup> Case 11-M-0294, *In the Matter of the Filing of Annual Reports Pursuant to Public Service Law §66(6) by Electric and Gas Corporations Subject to Lightened Ratemaking Regulation Under the Wallkill Ruling and Order, Order on Annual Report Under Lightened Ratemaking Regulation and Establishing Further Procedures.* (issued March 23, 2012).

Annual Report Page 4, lines 2-6, 40; page 5, line 12, 13, 19, 28 and 35; page 6, lines 7, 8, 9, 12, 13, 19 and 26; page 8, lines “Accumulated Depreciation” and “Depreciation Charged to Reporting Period”:

17. The Confidential Information identified above includes the cost of the plant, and data from which the financing costs of the facility could be derived with reasonable accuracy. *Depending on the bidding strategy employed from time to time*, these data could enable a competitor to “reverse engineer” bids by Noble wind farms. This information is highly sensitive, is not available to the public, and would be made available only through FOIL disclosure. Disclosure of the indicated Confidential Information would cause substantial harm to Respondents.

Mann argues that the “**bidding strategy employed by the owner of a wind farm might be driven by one or more of several goals**, and therefore may change over time.”<sup>5</sup> Presumably Noble’s competitors now know this if they didn’t before, so even if they could figure out tomorrow’s marginal operating cost based on prior year annual reports, why would that matter if Noble is pursuing a “bidding strategy” that is not based on marginal cost but is “driven by one or more or several goals”?

Second, the prevailing spot market doctrines posit that regardless of the costs of other sellers, or one’s capital and financing costs, a seller is driven to submit bids based on its own internal operating costs, and not on external factors like the costs or bids of other market participants. That way a seller’s unit will run only when profitable, when the price set is at or above its bid, and it will not elevate its price lest it lose a profitable sale when the price is set lower than an elevated bid but above its operating costs.

What the Mann affidavit suggests is that Noble may not be bidding in its energy at its marginal operating costs but may be adopting other bidding strategies, and fears that if its prior year annual costs and profits are known, other sellers might figure out that non-marginal cost based bidding strategy, or that they too might base their bids not on their own unit operating costs, but on their estimate of what Noble or other sellers’ costs or bids will be. That may well be the case today anyway, without release of the annual report information, due to gaming by sellers in the repetitive NYISO auctions, in which they reach a Nash equilibrium to elevate their bids without overt collusion, and may not actually be offering all of their output in all hours at their marginal operating costs.<sup>6</sup>

One of the considerations, under the FOIL trade secrecy standard, is the “value” to competitors of the information. The unsubstantiated claim that strategic bidding, or more of it, would happen in the spot markets if prior year annual report information is disclosed is not a valid basis to bar release of the

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<sup>5</sup> Mann Affidavit, § 1. Available at <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={708DEA0F-EE5A-42A0-8D97-812AAF771EB2}>.

<sup>6</sup> See, Aleksandr Rudkevich, Ph.D., Max Duckworth, Richard Rosen, Ph.D., “*Modeling Electricity Pricing in a Deregulated Generation Industry: The Potential Oligopoly Pricing in a Poolco*”, Tellus 1998 available at <http://www.tellus.org/publications/files/e7-ar01.pdf>. “Our principal findings are that generating firms can exercise market power in such markets by adopting mutually profit-maximizing, stable bidding strategies, consistent with the Nash Equilibrium, that lead to average prices considerably higher than those expected from production cost bidding.” *Id.* at 19. Subsequently, in a settlement of a NYISO market gaming case, one of the authors, Duckworth, was banned from any “position which involves physical and financial energy trading at CCG or a successor company in the future.” FERC Case IN12-7, *Constellation Energy Commodities Group*, ORDER APPROVING STIPULATION AND CONSENT AGREEMENT (Issued March 9, 2012), at 6.

information. This “fear of market gaming” argument to defend redaction contains an inherent presumption that the suppressed information has value to certain unidentified but nefarious other power producers who would use the information to game the market and reap unjust financial rewards. But this rests upon the assumption that NYISO and its market monitor are somnolent and would not detect the gaming or would not do their job if a competitor tries to game tomorrow’s NYISO spot market prices after ingeniously, through unexplained methods, using last year’s aggregated data in the annual PSC reports to deduce the other sellers’ costs or bid strategies. The asserted risk of gaming -- or more gaming -- in the NYISO markets rests upon impermissible assumptions of incompetence on the part of the NYISO, the market monitor, and FERC.<sup>7</sup>

Rather, there is a presumption of regularity, that if sellers deviate from bidding prices based on their own operating costs and instead engage in strategic bidding and gaming, by whatever means, then the NYISO monitor must be assumed to be willing to question anomalous bidding behavior and red flag deviant bids that are above the marginal cost of the bidder. Similarly, it should be assumed not that the NYISO and FERC would tolerate such gaming, but that they would swiftly adopt rule changes to address perverse bidding behavior based on factors other than one’s own costs, and stop any gaming behavior, whether based on last year’s financial reports filed with the PSC, mathematical strategies, or other gambits. As a consequence, if we make the normal assumptions of regularity regarding the market monitoring function under NYISO tariffs and FERC’s oversight of the wholesale markets, the purported value of the redacted information about a rival’s last year’s performance and profits as a tool in gaming the NYISO markets would be vitiated. Furthermore, any attempts of unidentified, unscrupulous power sellers to game the market or drive out competitors, as posited by those seeking to keep prior year annual report information secret, would expose anyone who would attempt to game the market to serious negative consequences.<sup>8</sup>

Another factor is whether the information sought to be protected is available or can be deduced from other sources. As discussed, the connection between last year’s reports and tomorrow’s marginal operating costs is not made. But even if marginal costs could be “reverse engineered” or deduced that way, there may be more direct ways to do it. For example, the efficiency of the power plants is known from publicly available manufacturers’ engineering specifications for each model of plant, in many cases from historical records when they were owned by vertically integrated utilities when their costs were reviewed in rate cases, from fuel prices, and their output might be inferred from unit specific emissions data publicly available from EPA. Even without annual reports to the PSC, competitors could estimate what it costs for a particular model power plant to run at a particular hour tomorrow, with fuel cost at tomorrow’s price. Looking at a prior year’s annual report -- which aggregates a year’s worth of income and expense and a year’s worth of fluctuating fuel prices and with no details on any hours when the plant captured the clearing price, has not convincingly been shown to supply information needed to calculate a unit’s marginal cost of operation for tomorrow’s spot market offer or how the output from that unit was bid. Last year’s revenue from spot market sales presumably was based on the winning

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<sup>7</sup> The electric companies cite an irrelevant filing from the NYISO in another case which did not involve the filing of annual electric company reports required by PSL §66(6).

<sup>8</sup> In a settlement of a NYISO market gaming case, Max Duckworth, one of the authors of the article cited in footnote 1, which demonstrated mathematically that markets like those of the NYISO are susceptible to gaming, was banned from any “position which involves physical and financial energy trading at CCG or a successor company in the future.” FERC Case IN12-7, *Constellation Energy Commodities Group*, ORDER APPROVING STIPULATION AND CONSENT AGREEMENT (Issued March 9, 2012), at 6.

seller's bids in each hour, so revenues reported in the annual report cannot reliably be reflective of the actual bids made by the company making the report. Again, the value of the information in the report to competitors is being greatly exaggerated.

Importantly, no detailed example of such "reverse engineering" was provided which showed how one might derive from last year's annual electric company report what a rival seller's marginal costs or bids would be tomorrow. Rather, the "reverse engineering of marginal cost" claim is simply repeated over and over by multiple sellers objecting to their annual reports being made public, but with no evidentiary or demonstrative proof that it could actually be done. Also, information on capital structure, debt, debt service costs and the like does not relate to marginal operating costs and should be independent of what a seller would bid in the energy spot markets. It is patently clear that the industry seeks protection from public revelation of its financial reports. But that desire is not sufficient to justify redaction of public records.

Under NYISO rules, the prices demanded by the electric companies and the winners of hourly electricity supply auctions that set the price for all sellers are kept secret. Under the RAO decision, the annual reports of the electric companies setting out their costs, revenues and profits are being held secret by the Commission. Without release of the information in the annual reports, the public can have no confidence that the Commission is performing its role to assure that the electric companies are acting in the public interest.

As stated by the Court of Appeals:

The Freedom of Information Law expresses this State's strong commitment to open government and public accountability and imposes a broad standard of disclosure upon the State and its agencies (see, *Matter of Farbman & Sons v New York City Health and Hosps. Corp.*, 62 NY 2d 75, 79). The statute, enacted in furtherance of the public's vested and inherent 'right to know', affords all citizens the means to obtain information concerning the day-to-day functioning of State and local government thus providing the electorate with sufficient information 'to make intelligent, informed choices with respect to both the direction and scope of governmental activities' and with an effective tool for exposing waste, negligence and abuse on the part of government officers.<sup>9</sup>

FOIL requires those seeking exclusion from disclosure meet its evidentiary burden by producing "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." *Markowitz v. Serio*, 11 N.Y.3d 43, 51 (2008). Speculative concerns about the potential value of the annual report information to unscrupulous power sellers, or improper market gaming strategies they "could" possibly attempt with it, and harm if not detected and not stopped by market officials, FERC, or law enforcement agencies are not sufficient. An exclusion from disclosure "cannot merely rest on a speculative conclusion that disclosure might potentially cause harm." *Id.* The electric companies were legally obligated to provide to the Commission specific and persuasive evidence of likely competitive injury. They failed to do so.

Accordingly, for all of the reasons set forth above, the decision of the RAO should be reversed, the appeal granted, and the unredacted annual electric company reports should be made public

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<sup>9</sup> *Washington Post v. NYS Insurance Dept.*, 61 NY 2d 557, 565 - 566 (1984).

Respectfully submitted,



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