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June 30, 2014

Via Electronic Mail

The Honorable James F. Brennan
New York State Assembly
Legislative Office Building, Room 422
Albany, NY 12248
brennaj@assembly.state.ny.us

RE: Matter 13-01288 - Request for Records: 1) Complete list of names and addresses of all entities subject to lightened rate-making regulation¹; 2) entities subject to regulation that filed annual reports on or after July 1, 2013² and 3) copies or link to complete/un-redacted annual reports filed on or after July 1, 2013.

(DETERMINATION – Trade Secret 14-02)

Dear Assemblyman Brennan:

This letter constitutes my Determination as Records Access Officer (RAO) pursuant to §89(5) of the Public Officers Law (POL). It discusses the entitlement to an exception from disclosure as trade secrets, POL §89(5)(a)(1) of certain records submitted by certain lightly regulated entities under §66(6) of the Public Service Law (PSL) in the above-entitled matter.

¹ Caithness Long Island, LLC and Indeck-Olean Limited Partnership are entities subject to Public Service Law §66(6) reporting, but Caithness submitted its 2012 report prior to July 1, 2013, the date specified by the Brennan FOIL request, and Indeck-Olean submitted its 2012 report after the date of the Brennan FOIL request. As such, the companies were not included in the notification mailing regarding the opportunity for submitting a Statement of Necessity. Caithness, however, submitted a “Confirmation of Request for Confidentiality” on May 16, 2014 and Indeck-Olean submitted a Statement of Necessity on June 2, 2014.

² Canandaigua Power Partners, LLC; Emkey Transportation, Inc.; Howard Wind LLC; and Lockport Energy Association L.P., while subject to PSL §66(6), did not submit requests for trade secret protection and did not submit redacted documents. These companies are not discussed herein. Additionally, in the May 5, 2014 letter, the RAO incorrectly identified CCI Rensselaer LLC, Empire Generating Co., LLC, Entergy, Noble Environmental Power, LLC and US Power Generating Company, LLC as companies that failed to file properly under PSL §66(6). USPG files on behalf of Astoria Generating Company Holdings, LLC and does not have a separate filing obligation. See USPG Statement of Necessity on behalf of Astoria Generating Company Holdings, LLC on May 19, 2014.

BACKGROUND

By way of background, in the Wallkill Ruling issued in 1991, the Commission decided that it was not necessary to impose extensive recordkeeping obligations on electric corporations whose business was the generation of electricity for sale into competitive wholesale markets under federal law.³ As a result, those wholesale generators were permitted to fulfill the annual report filing requirements established in PSL §66(6) through meeting requirements for the submission of records and information to the Federal Energy Regulatory Commission (FERC). In 1994, this interpretation of the PSL §66(6) annual report filing requirement applicable to wholesale generators was confirmed in the Wallkill Order,⁴ and it remained in effect. As a result, wholesale generators subject to the lightened ratemaking regulation provided for in the Wallkill Ruling and Order fulfilled their PSL §66(6) obligation to file an annual report through the filings they were required to make with FERC.⁵

In the intervening decades, FERC repeatedly reduced the scope of the filing requirements it imposed on wholesale generators. In this context, the Commission issued a Notice Soliciting Comments⁶ in 2011⁷ to reexamine the annual report filing requirements applicable under PSL §66(6) to wholesale generators and to other electric and gas corporations granted lightened ratemaking regulation in reliance upon the Wallkill Ruling and Order.⁸

Following extensive analysis and careful consideration of comments of affected parties, the Commission determined that requiring the lightly regulated companies⁹ to file the Annual Reporting requirements of PSL §66(6) was reasonable in that the information provided could be relevant to the financial stability and viability of the filers, and was not unduly burdensome.¹⁰

³ Case 91-E-0350, Wallkill Generating Company, L.P., Declaratory Ruling on Regulatory Policies Affecting Wallkill Generating Company and Notice Soliciting Comments (issued August 21, 1991).

⁴ Case 91-E-0350, supra, Order Establishing Regulatory Regime (issued April 11, 1994).

⁵ See, e.g., Case 10-E-0197, NRG Astoria Power LLC, Order Granting Certificate of Public Convenience and Necessity, Providing For Lightened Regulation and Approving Financing (issued January 24, 2011), p. 17.

⁶ Assemblyman Brennan, submitted comments in the 2011 case in which he asserted that dispensing with the PSL §66(6) annual reporting requirement for wholesale generators operating under lightened ratemaking regulation Orders had no basis in law. He maintained that the existing Annual Report format applicable to combination electric and gas utilities is the appropriate standard that should be imposed on wholesale generators.

⁷ 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, Notice Soliciting Comments (issued June 3, 2011).

⁸ See, e.g., Case 10-G-0364, Norse Pipeline LLC, Order Providing For Lightened Ratemaking Regulation (issued February 23, 2011); Case 06-E-0287, Griffiss Local Development Corporation, et al., Order Approving Economic Development Rate and Transfer of a Certificate and Providing For Lightened Regulation (issued July 20, 2006).

⁹ This includes wholesale generators and lightly regulated providers of electric, gas and steam services that have not been awarded incidental regulation and do not qualify for an exemption from the PSL.

¹⁰ Case 11-M-0294, supra. Order on Annual Report Under Lightened Ratemaking Regulation and Establishing Further Procedures. (issued March 23, 2012) p. 21-24.

PSL §66(6) provides that the verified annual report every electric or gas corporation is required to file must show:

- (a) the amount of its authorized capital stock and the amount thereof issued and outstanding;
- (b) the amount of its authorized bonded indebtedness and the amount of its bonds and other forms of evidence of indebtedness issued and outstanding;
- (c) its receipts and expenditures during the preceding year;
- (d) the amount paid as dividends upon its stock and as interest upon its bonds;
- (e) the names of its officers and the aggregate amount paid as salaries to them and the amount paid as wages to its employees;
- (f) the location of its plant or plants and system, with a full description of its property and franchises, stating in detail how each franchise stated to be owned was acquired; and
- (g) such other facts pertaining to the operation and maintenance of the plant and system, and the affairs of such person or corporation as may be required by the commission.

The Report Form itself consists of 14 pages including an instruction and cover sheet (no number) and a verification page (page 12). A copy of a Report Form is attached to this Determination. Page one includes general instructions for filing out the report; page two lists officers and management [see (e) above]; page three lists control of stock corporations (if so organized) [see (a) above]; page four consists of a comparative balance sheet (assets and other debits) [see (b) - (d) above]; page five consists of comparative balance sheet (liabilities and other credits) [see (b) - (d) above]; page six is the statement of income for the year [see (b) - (d) above]; page seven includes generation unit annual operational data including name and location of unit(s) [see (g) above]; page eight includes site specific revenues and expenses [see (b) - (d) above]; page nine lists electric plant [see (f) above]; page ten lists gas plant [see (f) above]; page 11 lists steam plant [see (f) above]; and page 12 is the verification page.

The Commission noted that “Nothing would prevent wholesale generators from seeking to protect information from disclosure as a trade secret pursuant to 16 NYCRR §6-1.3, if the facts so warrant. In those instances, a redacted version would be filed with the Secretary, and a confidential version would be submitted to the Records Access Officer.”¹¹

FOIL PROCEDURAL BACKGROUND

Between July 1, 2013 and March 31, 2014, the following companies submitted a request to the RAO for trade secret protection for certain information in their 2012 Annual Filings, and filed a redacted copy of the report required under PSL §66(6) with the Secretary: Astoria Project Partners LLC and Astoria Project Partners II LLC; Astoria Generating Company Holdings, LLC; Brookfield Power New York Thermal Services LLC; Brooklyn Navy Yard Cogeneration

¹¹ Id. p. 22, note 33.

Partners, L.P.; Calpine Corporation; Cayuga Operating Company, LLC and Somerset Cayuga Holding Company, Inc.; CCI Rensselaer LLC; Constellation Energy Nuclear Group, LLC, Nine Mile Point Nuclear Station, LLC, and R. E. Ginna Nuclear Power Plant, LLC; DMP New York, Inc., Laser Northeast Gathering Company, LLC, and Williams Field Services Company, LLC; Empire Generating Co, LLC; Entergy Nuclear FitzPatrick, LLC, Entergy Nuclear Indian Point 2, LLC, Entergy Nuclear Indian Point 3, LLC, and Entergy Nuclear Operations, Inc; Noble Environmental Power, LLC; NRG Energy, Inc.; and PSEG Power New York, Inc.¹²

On March 31, 2014, the RAO received a request pursuant to the Freedom of Information Law (FOIL) under POL Article 6, from Assemblyman James F. Brennan for “1) a complete list of names and addresses of all entities that are subject to lightened rate-making regulation; 2) a list of all entities subject to the lightened rate-making regulation that filed annual reports on or after July 1, 2013 pursuant to aforementioned orders; and 3) copies of, or electronic link to, the complete and un-redacted annual reports filed by the entities listed in item “2”, above, on or after July 1, 2013.”

On April 8, 2014, the RAO sent a letter to Mr. Brennan acknowledging his request and informing him that a search for responsive records had been initiated and that a response to his request could be expected on or before May 5, 2014.

On May 5, 2014, the RAO sent Mr. Brennan two documents which were responsive to his first and second requests. The first was a complete list of names and addresses of all entities subject to lightened rate-making regulation, and the second was a list of entities subject to the aforementioned regulation that filed annual reports on or after July 1, 2013. The RAO provided the link to the annual reports and advised that additional relevant documents could be accessed through the departmental website.

Also on May 5, 2014, the RAO advised the list of lightly regulated entities of Mr. Brennan’s request stating that access to the records would be determined in accordance with POL §89(5). The RAO advised the list of lightly regulated entities of the opportunity to submit a written statement of necessity for such exception pursuant to POL §89(5)(b)(2). Mr. Brennan was duly advised of the process to be followed.

On May 16, 2014, the Independent Power Producers of New York, Inc. (IPPNY) submitted a statement in support of its members.¹³

On May 19, 2014, several entities – Astoria Generating Company Holdings, LLC; Brookfield Power New York Thermal Services LLC; DMP New York, Inc., Laser Northeast Gathering Company, LLC, and Williams Field Services Company, LLC; PSEG Power New York, Inc. – submitted Statements of Necessity and reports with fewer redactions. The New

¹² Of the companies subject to the reporting requirement listed here, only four are publicly traded companies: Calpine Corporation; Entergy Nuclear Operations, Inc; NRG Energy, Inc.; and PSEG Power New York, Inc.

¹³ IPPNY is a not-for-profit trade association representing the independent power industry in New York State. Its members include nearly 100 companies involved in the development and operation of electric generating facilities and the marketing and sale of electric power in New York. Its Board of Directors include Astoria Energy LLC; Brookfield Power New York Thermal Services LLC; Brooklyn Navy Yard Cogeneration Partners, L.P.; Calpine Corporation; Caithness Long Island, LLC; Entergy Corporation; First Wind; New Athens Generating Company, LLC; NRG Energy, Inc.; PSEG Power New York, Inc.; and US Power Generating Company.

York Independent System Operator (NYISO)¹⁴ submitted a statement in support of a number of market participants, along with an affidavit of Dr. Nicole Bouchez.¹⁵ On that same date Astoria Project Partners, LLC and Astoria Project Partners II, LLC; Noble Environmental Power, LLC; and IPPNY, on behalf of its members, requested until May 23, 2014 to submit Statements of Necessity. The RAO granted the requests and notified Mr. Brennan of the extension.

On May 23, 2014, the following entities – Astoria Project Partners LLC, Astoria Project Partners II LLC, Astoria Energy LLC and Astoria Energy II LLC; Brooklyn Navy Yard Cogeneration Partners, L.P.; Calpine Corporation; Cayuga Operating Company, LLC and Somerset Cayuga Holding Company, Inc.; CCI Rensselaer LLC; Constellation Energy Nuclear Group, LLC, Nine Mile Point Nuclear Station, LLC, and R. E. Ginna Nuclear Power Plant, LLC; Empire Generating Co., LLC; Entergy Nuclear FitzPatrick, LLC, Entergy Nuclear Indian Point 2, LLC, Entergy Nuclear Indian Point 3, LLC, and Entergy Nuclear Operations, Inc; Noble Environmental Power, LLC; and NRG Energy, Inc. filed Statements of Necessity and redacted reports.

In addition to IPPNY and the NYISO, 16 Statements of Necessity were submitted on behalf of 23 companies, and in many cases, one¹⁶ or more¹⁷ affidavits as exhibits for review. Their respective arguments, affidavits, and submissions (redacted reports) consist of approximately 450 pages of text.

¹⁴ The New York Independent System Operator (NYISO) operates New York's high-voltage transmission network, administering and monitoring wholesale electricity markets, and planning for the state's energy future. The NYISO is responsible for the reliable operation of New York's nearly 11,000 miles of high-voltage transmission and the dispatch of over 500 electric power generators. It also administers bulk power markets that trade an average of \$7.5 billion in electricity and related products annually.

¹⁵ This same Affidavit was presented by the NYISO in Matter 12-E-0577 along with its Statement of Necessity in that case. There, the Statement and Affidavit addressed the impact that the release of certain confidential information can have on the subject generator's competitive position and New York energy markets.

¹⁶ Expert affidavits were submitted by 11 companies as follows: Charles McCall, Chief Executive Officer of the Astoria companies; Liam T. Baker I am employed by (Astoria) US Power Generating Company as Vice President, Commercial Operations; Christopher Trabold, Projects General Manager for Power Plant Management Services, LLC, which manages the operation and maintenance of Brooklyn Navy Yard Cogeneration Partners, L.P.'s Brooklyn Navy Yard Cogeneration Project; Jennings Goodman, Vice President of Power Trading, East Desk, Calpine Corporation; Jeffrey R. Williams, Chief Financial Officer of Constellation Energy Nuclear Group, LLC; Alan P. Dunlea, Chief Financial Officer Empire Generating Co, LLC and Executive Vice President and Chief Financial Officer of EquiPower Resources Corp., an affiliate of Empire; Marc L. Potkin, Vice President of Power Marketing for Entergy Wholesale Commodities, Entergy; Michael D. Ferguson, Vice President of Asset Management for Indeck Energy Services, Inc. and Indeck-Olean Limited Partnership; C. Kay Mann, Chief Executive Officer of Noble Environmental Power, LLC; William Lee Davis, Executive Vice President and President, East Region at NRG Energy, Inc.; Ryan Neal Savage, Vice President and General Manager for Pennsylvania and New York for Williams Field Services Company LLC.

¹⁷ Five companies - Brooklyn Navy Yard, Calpine Corporation, Constellation Energy Nuclear Group, LLC, Indeck-Olean Limited Partnership, and NRG Energy, Inc. - also submitted the affidavit of Dr. Nicole Bouchez, as originally submitted by the NYISO.

DETERMINATION

Arguments of IPPNY

As the trade association representing the independent power industry in New York, whose members include owners of wholesale electric generating facilities which are required to file annual reports with the Commission, IPPNY seeks to underscore the potential disastrous consequences that would occur if it was determined that confidential, unit-specific financial and operating data of wholesale generators should be disclosed publicly instead of shielded from disclosure. It argued that the release of such confidential data would harm not only wholesale generators but the competitive markets in which they function, ultimately harming New York's consumers.

IPPNY asserted that it has been an active participant in the development of fair and complete electric markets in New York for many years, that at every step of the process, it has advocated for increased competition, both before the Commission and federal regulators, as a means of providing low-cost energy to New York's consumers. In the process, IPPNY argues, New York has established a robust competitive market for the trading of energy and capacity through competitive auctions run by the New York Independent System Operator (NYISO). The success of these auctions to produce the most efficient price for consumers, IPPNY reasons, greatly depends upon proprietary, generator-specific data such as heat rates, outage information and cost and revenue information being kept strictly confidential, both by the generators themselves and the NYISO under its Code of Conduct.

IPPNY claims that this data can be used to determine a generator's marginal costs; thus, releasing this data publicly is akin to releasing a generator's marginal costs publicly. It further states that the NYISO's auction-based markets are designed to incentivize suppliers to offer their electricity and capacity at their marginal costs to maximize the supplier's chance of being selected to operate, thereby minimizing prices to consumers. IPPNY contends that if one supplier knows a second supplier's marginal costs, the first supplier can submit a bid just under the second supplier's bid, and that this action could cause the second supplier to miss being selected in the auction, eventually driving it out of the market. Once this happens, the first supplier can raise its offer to above what the displaced generator would have charged to provide the same service.

IPPNY argues that this behavior not only harms the displaced supplier but also the entire market because it would result in higher prices and a decreased level of competition. Similarly, a supplier that knows its competitor's marginal costs can raise its own offers to well above its own costs, but to a level still below its competitor's costs. IPPNY insists that should this happen, the supplier will continue to be selected in the auctions, albeit at a higher price than would have been available otherwise, and that, again, this action could result in higher clearing prices in the markets to the ultimate detriment of New York consumers.

IPPNY stresses that protecting from public disclosure an individual generator's unit-specific data that can be used to derive that generator's marginal costs is an indispensable requirement for a competitive market. It avows that should this data be publicly available, decades of progress towards workably competitive markets in the State would be jeopardized, and therefore, this information is entitled to exception from public disclosure under the Freedom of Information Law as trade secret or confidential commercial information.

Arguments of the NYISO

In its statement, the NYISO provided information to the RAO regarding its treatment of certain information contained within the Annual Reports of entities subject to lightened rule-making regulation at issue here.

According to the NYISO, its FERC-approved tariff requires that certain information in its possession be treated as confidential. The NYISO Code of Conduct, Attachment F to the NYISO Open Access Transmission Tariff (OATT) defines confidential information to include, pertinently: “any commercially sensitive information including, without limitation, trade secrets, equipment specific information (e.g., generator specific data such as heat rates, etc.), and business strategies, affirmatively designated as Confidential Information by its supplier or owner.” Information that the NYISO must treat as confidential pursuant to its Tariff consists not only of its market participants’ trade secrets, business strategies, and generator specific information such as heat rates, but also information such as revenues that may permit a party to “reverse engineer” or otherwise determine its market participants’ confidential information or trade secrets – such as its marginal cost for providing electricity.

On April 25, 2014 the NYISO submitted a Statement of Necessity and supporting Affidavit by Dr. Nicole Bouchez addressing material designated as confidential by the NYISO in Matter 12-E-0577.¹⁸ The statement and affidavit addressed the impact that the release of certain confidential information – in particular, information that could permit a competitor to determine a generator’s marginal cost of producing energy – can have on the subject generator’s competitive position and New York energy markets. Certain information provided by generators in the Annual Reports, such as unit heat rates and revenue data, is among the information cited by Dr. Bouchez.

According to Dr. Bouchez, releasing data that can be used to determine a generator’s marginal cost can disadvantage the generator in bidding against other generators to serve load and therefore causes competitive harm to the generator. Making such data public can also place the subject generator at a negotiating disadvantage with buyers in future bilateral arrangements for energy and capacity. She states that if competitors are able to determine a generator’s marginal cost, they can more easily engage in predatory pricing, inappropriately exercise market power, or collude with other generators, which can cause higher clearing prices. For example, a generator or generators with knowledge of another generator’s marginal costs could increase its offer prices to an amount significantly in excess of its own marginal costs, but sufficiently below the marginal cost of their more expensive competitors, to ensure the generator will continue to be dispatched, resulting in a higher price (assuming the unit was the unit setting the price). These outcomes, she opines, would result in harm to the competitive nature of NYISO markets and, ultimately, harm New York consumers of electricity if such behavior resulted in higher prices.

Arguments of the Lightly Regulated Companies

The respective arguments, affidavits, and submissions (redacted reports) of the companies consist of approximately 450 pages of text. I will not summarize the individual

¹⁸ See Case 12-E-0577, Proceeding on Motion of the Commission to Examine Repowering Alternatives to Utility Transmission Reinforcements, Nicole Bouchez Affidavit (April 24, 2014).

submissions of each company here as most raised many of the same issues and cited the same authorities. All of the submissions are available on the Department’s website at www.dps.ny.gov. Only 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.

All of the companies submitting Statements of Necessity recited the applicable statutory and case law to support a finding of trade secret.¹⁹ The first prong of the Encore test – the existence of competition – was addressed in the affidavits²⁰ and in case law by both electric and gas companies.²¹

With regard to the second prong of the Encore test, the companies raised a number of issues to demonstrate that disclosure would result in the likelihood of substantial competitive injury. The first argument shared by the non-public companies was the negative impact the release of financial data would likely have on their companies; the remaining arguments followed along three paths: Unit-Specific Annual Operating Data, Site Specific Revenues and Costs, and the NYISO tariff and Code of Conduct. Each argument correlates to specific pages of the Annual Report, as noted below.

Financial Data (Pages Four, Five & Six)

The majority of the companies (all private) stated that none of the information sought to be protected in their Annual Reports is publicly available and can only become publicly known through a FOIL request.

Of particular concern to the non-public companies are the income and balance sheets. These pages of the Annual Report include annual operating costs for the facility, including cost estimates for the current and accrued assets. With this information, suppliers could adjust their behavior in wholesale markets to enhance their competitive position. Brookfield Power New York Thermal Services LLC noted in its Statement of Necessity that rival suppliers could use

¹⁹ POL §87(2)(d), 16 NYCRR 6-1.3(a), Encore Coll. Bookstores v Auxiliary Serv. Corp. of State Univ. of N.Y., 87 N.Y.2d 410 (1995).

²⁰ Case 12-E-0577, supra, Bouchez Affidavit, ¶4 (“There is competition among suppliers in the sale of electricity to New York consumers in that a diverse set of unaffiliated suppliers have resources in excess of the demand for those resources.) See Matter 13-01288, supra, Baker Affidavit, p. 6 (merchant generators, like USPG, do not have rates that are set by cost-of-service ratemaking requirements. Rather, “[t]o secure such revenues, we must compete with other suppliers by submitting bids to provide energy, capacity and ancillary services to meet demand”).

²¹ New York State Electric & Gas Corporation v. New York State Energy Planning Board, 221 A.D.2d 121, 124-125 (3d Dep’t 1996). Glens Falls Newspapers, Inc. v. Cos. of Warren & Washington Ind. Dev’t Agency, 257 A.D.2d 948 (3d Dep’t 1999). Case 94-E-0952 et al., 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, 273 A.D.2d 708. Case 11-G-0656, DMP New York, Inc., Laser Northeast Gathering Company LLC and Williams Partners, L.P., Declaratory Ruling on Review of an Ownership Transfer Transaction (February 21, 2012) at 8; Case 13-G-0210, Inergy Pipeline East LLC, Declaratory Ruling on Review of a Transfer Transaction and Order Approving Financing (November 13, 2013) p. 3; Case 12-G-0214, Bluestone Gas Corporation of New York, Inc., Order Providing for Lightened Rate Making Regulation (October 18, 2012) p. 2; Case 10-G-0462, DMP New York, Inc. and Laser Northeast Gathering Company LLC, Order Granting Certificate of Public Convenience and Necessity and Providing for Lightened Ratemaking Regulation (February 22, 2011).

this information to accurately estimate Brookfield's bids to sell electricity to the NYISO and then undercut those bids. Rivals could use this information to identify the least cost improvements to their facilities needed to reduce their operating costs and heat rates to levels that would permit them to consistently undercut Brookfield's bids in the future. Both of these actions would result in serious and substantial competitive injury not only to Brookfield, but also to consumers who depend on the proper operation of New York's competitive wholesale power markets to provide reliable supplies of electric power at just and reasonable rates.²²

This sentiment was echoed by CCI Rensselaer LLC, which noted that a competing generator with access to CCI's income statement would acquire a keen insight into its bidding strategy and could therefore bid more effectively in competition. Such an outcome would have a direct and material impact on the prices that customers pay for products sold into the NYISO markets by CCI, as well as on CCI's revenues. It could impact the prices that retail customers pay for CCI's energy and capacity, and would introduce an inequitable competitive advantage into a marketplace that strives for fair competition – “reverse engineering” of CCI's bidding strategy.²³

With regard to release of information on page six, the Astoria plants – APP and APP II – noted, as supported by Mr. McCall's affidavit, that sophisticated commercial entities that compete with APP and APP II in the various markets would be able to combine the disclosed financial information, along with publically available information and their knowledge of how the energy markets are administered, to estimate with a reasonable degree of certainty the profitability, by product, of APP and APP II, and gain intelligence with regards to APP and APP II product bids. Armed with this intelligence, competitors would have a significant advantage in the NYISO administered wholesale energy, ancillary and capacity markets; i.e., could offer their products at a price below their estimate for APP and/or APP II.²⁴

Release of the information on these pages could also lead to competitive harm in the form of increased operating costs, in particular for fuel oil inventories. Companies could suffer substantial competitive harm from disclosure because it would provide fuel suppliers with knowledge of available fuel inventory and procurement strategies. Fuel suppliers seek to maximize the price they can secure for their commodities. To the extent that they can obtain confidential fuel-related information, fuel suppliers would gain significant negotiating leverage that will increase operating costs.²⁵

Finally, release of the information on these pages could harm the competitive positions of companies by degrading the value and liquidity of their equity. The redacted information provides the original investment (constructed cost) of each facility. In companies where equity

²² Matter 13-01288, In the Matter of Financial Reports for Lightly Regulated Utility Companies. Statement of Necessity of Brookfield Power New York Thermal Services LLC (May 19, 2014) p. 3.

²³ Id., Statement of Necessity of CCI Rensselaer LLC (May 23, 2014) p. 4.

²⁴ Id., Affidavit of Charles McCall ¶¶89, 98-104.

²⁵ Id. ¶¶48, 51-53.

interests are reasonably liquid it is common for multiple such transactions in a given annual period. The process of negotiating a sale price for equity shares is a multistage process. Prospective buyers typically do not progress to the later stages of negotiation unless they offer a purchase price that adequately reflects the value of the facility's anticipated future performance in the State's energy markets. Prospective buyers do not gain access to historic financial information until after a preliminary offer valued on the basis of future performance is accepted by the prospective seller; in every instance, subsequent access to historic financial information is conditioned on the prospective buyer executing a confidentiality agreement. This staged negotiation is very typical in the industry and is designed to maximize equity value by focusing initial bids on future performance. The disclosure of commercially-sensitive financial information at an earlier stage of negotiations would very likely depress initial bids by enabling a prospective buyer to cherry-pick historical information that suggests a below-market equity value.²⁶

Unit-Specific Annual Operating Data (Page Seven)

The companies, as well as Dr. Bouchez, explained that unit-specific operating data can be used to determine a generator's marginal cost for providing electricity, which can have several deleterious effects on a generator's competitive position.

First, the release can harm a generator's ability to negotiate competitively with its suppliers. Specifically, generator outage and maintenance costs are kept confidential because generators obtain vendor services on a competitive basis. Knowledge of a generator's outage and maintenance rates could put the generator at a disadvantage when negotiating contracts for these services.

Second, releasing data that can be used to determine a generator's marginal cost can disadvantage the generator in bidding against other generators to serve load and therefore cause competitive harm to the generator. Specifically, heat rate, unit-specific revenues, expenses, assets and liabilities can permit a competitor to derive a generator's marginal costs. Releasing this data would disadvantage the generator because it would allow a competitor to underbid the generator thereby driving it out of the market.

Third, making such data public can also place the generator at a negotiating disadvantage with buyers in future bilateral arrangements for energy and capacity.²⁷

Additionally, Dr. Bouchez explains that release of unit-specific operating data, or any data that can be used to determine a generator's marginal costs, can have a broader negative anti-competitive effect on the electricity market. According to Dr. Bouchez, if a competitor or competitors are able to determine a generator's marginal cost, they can more easily engage in predatory pricing, inappropriately exercise market power, or collude with other generators, which can cause higher clearing prices. For example, a generator or generators with knowledge of another generator's marginal costs could increase its offer prices to an amount significantly in

²⁶ *Id.* ¶¶33, 37-39. The McCall affidavit provided extensive observations on each of the areas in this section.

²⁷ Case 13-01288, *supra*, Statement of Necessity of Brooklyn Navy Yard Cogeneration Partners, L.P. (May 23, 2014), p. 3.

excess of its own marginal costs, but sufficiently below the marginal cost of their more expensive competitors to ensure the generator will continue to be dispatched, resulting in a higher price (assuming the unit was setting the price). These outcomes would result in harm to the competitive nature of NYISO markets and, ultimately, harm New York consumers of electricity.²⁸

This harm would also impact the ability of companies to solicit bids from various vendors to perform different types of maintenance at its facilities. According to NRG, if vendors have access to individual unit operating characteristics – specifically, forced outage hours, partial forced outage hours, and planned maintenance hours – in conjunction with unit-specific operation and maintenance (O&M) costs, vendors will be able to adjust their future bids preventing NRG from obtaining the lowest bids possible for maintenance services.²⁹

More broadly, C. Kay Mann, on behalf of Noble Environmental Power, LLC, asserts 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. The ability of a competitor to assess Noble’s strategy and “reverse engineer” Noble’s bids depends on operational and financial data, such as that which comprises the redacted information. She further opined that although a wind energy generator’s strategic goals may vary from time to time, at least some of the data from which those goals may be derived does not. The redacted information either is fixed, or typically changes over time in a predictable manner. It will remain relevant over time and, if disclosed, the information could be used against Noble in future transactions. A competitor could use the redacted information drawn from successive Annual Reports to develop a profile of a Noble wind farm from which various strategies could be modeled.³⁰ While conceding the ICAP values of facilities located in New York are reported in the “Gold Book” published annually by the NYISO, Mr. McCall in his affidavit notes the heat rate data is not reported there. He believes that data is highly commercially-sensitive and he agrees with Ms. Mann that competitors of APP and APP II could use the data to attempt to develop marginal costs and “reverse engineer” bids in NYISO capacity markets. Mr. McCall, however does not distinguish between the ICAP and heat rate data in his line-by-line redactions.

The companies cited case law precedent that the PSC Secretary relied on in an October 2013 ruling. In New York State Electric and Gas Corp. v. Energy Planning Board,³¹ the court held that the disclosure of generation unit operational data including, but not limited to, unit heat

²⁸ Id., Calpine Corporation, (May 23, 2014), p. 5, and affidavit of Jennings Goodman ¶4, p.1.

²⁹ See Case 13-01288, supra, Affidavit of William Lee Davis, in Support of NRG Energy, Inc. (May 23, 2014), p. 1; and Affidavit of C. Kay Mann, in Support of Noble Environmental Power, LLC (May 23, 2014), ¶¶ 12, 13, pp. 2-3.

³⁰ See Id., Affidavit of C. Kay Mann, ¶¶ 8, 9, p. 2. See also, explanation of redactions to Annual Report, Affidavit of C. Kay Mann, page 4, ¶17, Comparative Balance Sheet (Assets & Other Debits) lines 2-6, 40; p. 5, Comparative Balance Sheet (Liabilities & Other Credits) lines 12, 13, 19, 28 & 35; page 6, Statement of Income for the Year lines 7, 8, 9, 12, 13, 19 and 26; p. 8, Site Specific Revenues and Expenses lines “Accumulated Depreciation” and “Depreciation Charged to Reporting Period”: This information 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 the subject company.

³¹ 221 A.D.2d 121, 124-25 (3d Dep’t, 1996).

rates, would cause substantial injury to the competitive position of the subject enterprise. The court explained that the disclosure of such information “could result in competitors, like petitioner, inferring essential aspects of Indeck’s production costs fundamental to projecting future costs,” thereby causing competitive damage.³²

The companies cited an October 2013 ruling of the PSC Secretary that reversed a Determination of the RAO insofar as it provided for disclosure of facility heat rate data as one component of bidding information.³³ In so ruling, the Secretary explained that the NYISO “treats heat rates as confidential and declines to publicly release this information.” The Secretary acknowledged that the NYISO protects other generator-specific information, and stated that “I would be inclined to likewise consider protecting such data....”³⁴

Site Specific Revenue and Expense Data (Page Eight)

As noted by Entergy’s expert, Marc Potkin, the confidential information at issue is the actual data from the most recent completed year, not forecasted data or projections of future conditions.³⁵ Mr. Potkin argues that “From a competitive market standpoint, data concerning your competitors’ most recent revenues and costs is valuable because it is the most accurate snapshot of your competitors’ current financial condition. Given this fact, “it provides guidance on whether - and how well - the competitor can be expected to continue to compete in the markets, all else being held equal. It may also reflect the likely terms under which a competitor will compete in these markets in the near term and, perhaps, over the long term as well. Again, to fully understand why this information is so sensitive, it is important to remember that merchant generators compete with each other to secure their needed revenues by serving a limited amount of load. They do not otherwise have any other assured revenue streams.”³⁶

Ryan Neal Savage, Williams Field Services Company LLC’s affiant, opined that the release of revenue and expense data of the type sought to be protected here, can have a broader negative anti-competitive effect on the gas gathering and transportation market. If a competitor or competitors are able to determine an operator’s costs of providing service, they can more easily manipulate the market, which can cause higher overall prices. For example, a competitor with knowledge of another provider’s costs could increase its prices to an amount significantly in excess of its own marginal costs, but sufficiently below the marginal cost of their more expensive competitors to ensure the provider will continue to receive business, resulting in overall higher prices for the service. These outcomes would result in harm to the competitive nature of New York’s gas transportation markets and, ultimately, harm New York consumers of natural gas.³⁷

³² Id. p. 125.

³³ Case 12-E-0577, supra, Determination on Appeal of Records Access Officer’s Determination (Trade Secret 13-03) (issued October 29, 2013) p. 7-8.

³⁴ Id.

³⁵ See Case 13-01288, supra, Statement of Necessity of Entergy (May 23, 2014), p. 9, quoting Marc L. Potkin p. 14.

³⁶ Id.

³⁷ See Case 13-01288, supra, Statement of Necessity of Williams Field Services Company LLC (May 19, 2014), p. 4, quoting Ryan Neal Savage.

Ms. Mann was more specific when referencing the actual Annual Report pages. For example, with regard to redactions to Revenues and Costs, page 6, Statement of Income for the Year line 6; page 8, Site Specific Revenues and Expenses line “On Site O&M”, she stated “This information includes the cost to operate and maintain each of the company facilities (here, wind farms). Depending on the bidding strategy employed from time to time, these data could enable a competitor to “reverse engineer” bids by the subject company.”³⁸

She further stated with regard to page 6, Statement of Income for the Year lines 2-6, 12, 13, 19, 26; and page 8, Site Specific Revenues and Expenses lines “Capacity Revenues” and “Other Revenues,” “This information provides total revenues, operating costs, gross margin, operating margin and net income. Depending on the bidding strategy employed from time to time, these data could enable a competitor to “reverse engineer” bids by the subject company. Disclosure would also eliminate any incentive that service providers currently have to offer the best and lowest market price for their services, rather than an inflated price based on perceived facility-specific information.”³⁹ In his affidavit, Mr. McCall asserts that competitors of APP and APP II could use the information to bid their capacity at a price below their estimate of what APP and APP II would bid, adversely affecting their ability to participate in the NYISO forward capacity markets.

NYISO Tariff and Code of Conduct (Pages Seven and Eight)

Many of the companies cited that the NYISO routinely receives highly-sensitive commercial information during the course of its administration of the State’s energy markets and that the NYISO has well-developed rules and procedures regarding the designation and protection of trade secrets and commercially-sensitive confidential information. Specifically, §6.1 of the NYISO’s Market Administration and Control Area Services Tariff (MST) provides that the NYISO “shall use reasonable procedures to prevent the disclosure of Confidential Information and shall not publish, disclose or otherwise divulge Confidential Information to any person or entity without the prior written consent of the party supplying such Confidential Information, except as provided for under the ISO Market Monitoring Plan and/or ISO Code of Conduct.”

The NYISO Code of Conduct explains that Confidential Information consists of “any commercially sensitive information including, without limitation, trade secrets, equipment specific information (e.g., Generator specific data such as heat rates, etc.), and business strategies, affirmatively designated as Confidential Information by its supplier or owner”⁴⁰ The Code of Conduct explicitly states that the NYISO “shall not disclose Confidential Information to any Market Participant.” Although there are certain circumstances under which the NYISO may be compelled to share Confidential Information with the Federal Energy Regulatory Commission or Commodity Futures Trading Commission, the NYISO still must seek

³⁸ Id. Affidavit of C. Kay Mann, p. 4, ¶18.

³⁹ Id. ¶19.

⁴⁰ NYISO Open Access Transmission Tariff (“OATT”), §12.4.

protective relief or otherwise act to ensure that the Confidential Information is not disclosed to the public.⁴¹

Several companies noted that the Commission has recognized that an array of unit-specific performance and operational information submitted to and/or held by the NYISO should be exempt from public disclosure under FOIL.⁴² In 2000, the Commission sought, among other things, “bid data” from the NYISO. The Commission defined “bid data” as “load and generator offers and bids both within and outside the New York Control Area” and “operational data such as ramp rates, costs, levels, and minimum run times.”⁴³ The Commission recognized the confidential nature of such information stating “[i]n our experience, the courts have consistently upheld withholding from disclosure confidential commercial information of the type at issue here. We will take all available measures to ensure that this pattern continues.”⁴⁴ The information comprising the bid data is no different than the information contained in the Annual Reports filed by the companies. If the Commission was sincere in its commitment to follow court precedent, this office should determine that the information in the annual report is confidential and/or constitutes trade secret and is not subject to release under FOIL.⁴⁵

DISCUSSION

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,⁴⁶ 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).⁴⁷ Thereafter, the Commission adopted a virtually identical definition of “trade secret”.

⁴¹ Id.

⁴² Case 00-E-1380, The Provision by the New York Independent System Operator, Inc., of Information and Data to Department Staff, Order Directing Provision of Data and Information (issued August 14, 2000) (NYISO Order I); Case 00-E-1380, supra, Order Clarifying Information and Data to be Provided and Measures Regarding Protection of Confidential Information (issued August 23, 2000) (NYISO Order II).

⁴³ Id. NYISO Order II, p. 5.

⁴⁴ Id. p. 4.

⁴⁵ Case 13-01288, supra, Financial Reports for Lightly Regulated Utility, Statement of Necessity of Cayuga Operating Company, LLC and Somerset Operating Company, LLC (May 23, 2014), p. 5.

⁴⁶ 56 N.Y.2d 213, 219 – 220 (1982).

⁴⁷ 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).

According to 16 NYCRR §6-1.3(a): “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.”

In Matter of Capital Newspapers v. Burns,⁴⁸ the Court of Appeals held that the exceptions from disclosure in POL §87(2) are to be narrowly construed, that the party resisting disclosure bears the burden of proof, and that such party must demonstrate a particularized and specific justification for denying access.

The Court of Appeals, in Matter of Ashland Management, Inc. v. Janien,⁴⁹ again cited the Restatement of Torts definition of “trade secret.” In addition, the Court noted that Restatement §757, comment b suggested the following factors be considered in deciding a trade secret claim:

1. the extent to which the information is known outside of his business;
2. the extent to which it is known by employees and others involved in his business;
3. the extent of measures taken by him to guard the secrecy of the information;
4. the value of the information to him and to his competitors;
5. the amount of effort or money expended in developing the information; and
6. the ease or difficulty with which the information could be properly acquired or duplicated by others.

The explicitly non-exclusive list of factors to be considered in explaining whether information constitutes a trade secret that is set forth in 16 NYCRR §6-1.3(b)(2) is similar, though not identical, to the Restatement list. The only substantial dissimilarities between the two lists are that the list adopted by the Commission does not explicitly contain a factor like the third factor quoted above and that it does include two additional factors, as follows: “(i) the extent to which the disclosure would cause unfair economic or competitive damage; [and] (vi) other statute(s) or regulations specifically excepting the information from disclosure.”⁵⁰

The Court of Appeals, in Encore Coll. Bookstores v Auxiliary Serv. Corp. of State Univ. of N.Y.,⁵¹ stated that the Legislature had signaled its intent 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,⁵² a case that arose under the federal Freedom of Information Act.⁵³ In particular, the Court paraphrased and quoted with approval from another D.C. Circuit Court of Appeals decision in Worthington Compressors v. Costle.⁵⁴

⁴⁸ 67 N.Y.2d 562, 566, 570 (1986).

⁴⁹ 82 N.Y.2d 395, 407 (1993).

⁵⁰ 16 N.Y.C.R.R. §6-1.3(b)(2) also provides: “In all cases, the person must show the reasons why the information, if disclosed, would cause substantial injury to the competitive position of the subject commercial enterprise.”

⁵¹ 87 N.Y.2d 410 (1995).

⁵² 498 F.2d 765, 770 (D.C. Cir., 1974).

⁵³ Encore, supra at 419 – 420.

⁵⁴ 662 F.2d 45, 51 (D.C. Cir., 1981).

Thus, the Court in Encore stated that, where government disclosure is the sole means by which competitors can obtain the requested information, the inquiry ends with a consideration of how valuable the information at issue would be to a competing business and how much damage would result to the enterprise that submitted the information. By contrast, the Court held that, where the material is available from another source at some cost, consideration must be given not only to the commercial value of such information but also to the cost of acquiring it through other means, because competition in business turns on the relative costs and opportunities faced by members of the same industry, which might be substantially different if one could obtain information by paying the copying cost rather than the cost of replication.

The Court also observed that the reasoning underlying these considerations is consistent with the policy behind POL §87(2)(d) to protect businesses from the deleterious consequences of disclosing confidential commercial information to further the state's economic development efforts and attract business to New York. Finally, in applying the test to Encore's request, the Court concluded that the information submitting enterprise was not required to establish actual competitive harm. Rather, it was required, in the words of Gulf and Western Industries v. United States, to show "actual competition and the likelihood of substantial competitive injury".⁵⁵

While "competitive injury" is not defined by the statutes, regulations, or case law, the Court of Appeals has interpreted the phrase on various occasions since its 1995 decision in Encore. 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,⁵⁶ 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."⁵⁷

In at least one lower court case since Markowitz, the evidence offered to sustain a finding of competitive injury was quite extensive and sophisticated. In Saratoga Harness Racing, Inc. v. Task Force on the Future of Off-Track Betting,⁵⁸ petitioners Saratoga Harness Racing, Inc. (Saratoga) and Finger Lakes Racing Association, Inc. (Finger Lakes) sought exemption from disclosure of information contained in their 2004-2008 year-end financial statements. Petitioners provided this information to the New York State Racing and Wagering Board (RWB), which compiled it into chart form and provided it to respondent, Task Force on The Future of Off-Track Betting (FOTB). The FOTB planned to publish the chart on its website. The Court found that petitioners had demonstrated that the information they sought to prevent from disclosure was not publically available and had exhausted their administrative remedies for challenging disclosure.

Saratoga submitted affidavits of its executives and of experts in gaming market analysis and labor negotiations. The affidavit submitted by Saratoga's General Manager established the

⁵⁵ 615 F. 2d 527, 530 (D.C. Cir., 1979).

⁵⁶ 11 N.Y.3d 43 (2008).

⁵⁷ Markowitz, *supra* at 51; Encore, *supra*.

⁵⁸ Saratoga Harness Racing, Inc. v. Task Force on the Future of Off-Track Betting, 2010 N.Y. Misc. LEXIS 2531 (Sup. Ct. Albany Co. 2010).

competitive pressures Saratoga faces. It detailed Saratoga's racing and gaming competitors, outlined its food and beverage competitors, set forth Saratoga's current and future labor negotiations and the potential for outside competitors to enter the market that Saratoga serves. The injuries that the disputed information would cause Saratoga were detailed by its General Manager, along with a gaming market analysts' expert opinion affidavit. The injury it would suffer by the disclosure of the disputed information was detailed by its Human Resources Director and an expert in labor negotiations. The court found that Saratoga demonstrated "specific, persuasive evidence" that Respondents' dissemination of its financial data falls "squarely within a FOIL exemption."⁵⁹

Likewise, the court found that Finger Lakes demonstrated the applicability of Public Officers Law § 87(2)(d)'s exemption. Its Director of Labor Relations detailed the competitive pressures of Finger Lakes' labor market, and the injury that Finger Lakes would suffer if the disputed financial information were released. Finger Lakes submitted the affidavit of a Vice President of its parent company which oversees its financial performance. That affidavit set forth the specific racing and gaming venues Finger Lakes competes against, explained the potential for competition from national gaming companies, and corroborated Finger Lake's labor market pressures. Finger Lakes also submitted affidavits of a gaming market analyst and an expert in labor negotiations. The court found that Finger Lakes had outlined the competitive pressures facing it and had adequately described the injury it would incur if the disputed financial information were released, and therefore, demonstrated that the trade secret exception squarely applied.⁶⁰

Since Markowitz and Saratoga, the Second Department has held that such evidence may be provided by affidavits that demonstrate the likelihood of substantial competitive injury, and that are based upon the personal knowledge of people employed or retained by the party seeking such exemption.⁶¹

Application of Pertinent Law

It should be noted that making a "one-size-fits-all" Determination for the lightly regulated utilities filing Annual Reports pursuant to PSL §66(6) is a particularly challenging task. This Determination encompasses both public and private companies; gas transporters and electric generators; and, single unit generators and multi-unit generators. Moreover, companies filed Annual Reports both prior to and following Assemblyman Brennan's FOIL request. While arriving at a determination applicable to all of these companies is a significant undertaking, it should also be noted that as there is one Report format for all the companies filing in this matter. As a result, there should be only one set of rules that applies to that Report format.

On the issue of trade secrets or confidential commercial information, the two-pronged test established by the Court in Encore is applicable. In applying the first prong of the Encore

⁵⁹ Markowitz, supra.

⁶⁰ POL§87(2)(d).

⁶¹ See Dilworth v. Westchester County Dep't of Correction, 93 A.D.3d 722, 724-25 (2d Dep't 2012) holding that an affidavit sworn by a Sergeant with the Westchester County Department of Correction provided sufficient evidence to support an exception from disclosure.

test, (in which the Court implicitly assumed the non-public nature of the information in question), the existence of competition must first be established. This element of the Encore test was addressed by every company submitting a Statement and/or affidavit in this case.⁶² Since the lightly regulated entities submitting Statements in this case included electric and gas companies, the existence of competition in both areas must be established. The electric and gas companies provided information and data sufficient to support finding that the electric generation market and gas gathering and transportation market in New York State are highly competitive. Therefore, competition in these markets has been established.⁶³

The question of whether the information at issue is entitled to an exception from disclosure as trade secrets or confidential commercial information turns on the proper application of the second prong of the test — whether disclosure would be likely to cause substantial injury to the competitive position of the subject enterprise. 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. Because the information in question appears to be available solely through disclosure by DPS, I must consider only the commercial value of such information to competitors and the competitive injury to the commercial enterprise possessing the information that would likely result.

Because the overall purpose of FOIL is to ensure that the public is afforded greater access to governmental records, FOIL exemptions are interpreted narrowly.⁶⁴ To meet its burden, the party seeking the 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.⁶⁵

Before discussing the pages and specific lines of the Annual Report that are the subject of the Statements of Necessity and whether the companies have sustained their burden of proving the likelihood of competitive injury, those pages not in dispute should be noted. None of the parties made claims to protect page one – General Instructions; page two – Officers and Management; page three – Control of Stock Corporation; page nine – Electric Plant; page ten – Gas Plant; page 11 – Steam Plant; or page 12 – Verification. Hence, these pages will remain unprotected and accessible to the public.

The entitlement to an exception from disclosure as trade secrets regarding the remaining pages of the Annual Report – four, five, six, seven, and eight, is discussed below.

Financial Data (Pages Four, Five & Six)

Extensive arguments in support of a finding that release of the data would cause competitive harm to companies participating in the NYISO-administered energy markets were made by several companies. They maintain disclosure would increase their operating costs and

⁶² See citations listed under Arguments of the Lightly Regulated Companies, herein.

⁶³ Id.

⁶⁴ Washington Post Co. v New York State Ins. Dept., 61 NY2d 557, 564 (1984).

⁶⁵ Markowitz, supra at 51.

degrade the value and liquidity of company equity. The main distinction in this category is between private companies and those that are publicly traded. For those individual companies that are closely held or are not publically traded, the information on these pages would not be otherwise accessible to the public but for FOIL, as it is site-specific. As outlined by the relevant companies, significant competitive injury would result – in numerous ways – if this information was released publicly. The companies have sustained their burden of proof with regard to this information.

For those companies that are publically traded and use data they report elsewhere to comply with the requirements at the pages four through six, however, the information is not confidential because already publically available. Moreover, in the case of these companies, the information at pages four through six is aggregated data from multiple sites. Therefore, the considerations affecting site-specific data for individual companies at these pages, and for all companies reporting at page eight, do not adhere. The publically-traded companies, however, are expected to include the data that is disclosed elsewhere in the publically available version of their Annual Reports, as Entergy already has.

Unit-Specific Annual Operating Data (Page Seven)

The Unit Specific Operating Data described by the companies is located on page seven of the Annual Report. Here, the companies presented arguments as well as precedent. Dr. Bouchez’s affidavit makes general claims and arguments which are further substantiated by the specific comments of Ms. Mann and Mr. McCall, among others.

The companies also cited the October 2013 ruling of the PSC Secretary that reversed a Determination of the RAO insofar as it disclosed facility heat rate information as a component of bidding information.⁶⁶ In so ruling, the Secretary explained that the NYISO “treats heat rates as confidential and declines to publicly release this information.” The Secretary acknowledged that the NYISO protects other generator-specific information, and stated that “I would be inclined to likewise consider protecting such data...”⁶⁷

Additionally the companies cited case law precedent that the PSC Secretary relied on in an October 2013 ruling. In New York State Electric and Gas Corp. v. Energy Planning Board,⁶⁸ the court held that the disclosure of generation unit operational data including, but not limited to, unit heat rates, would cause substantial injury to the competitive position of the subject enterprise. The court explained that the disclosure of such information “could result in competitors, like petitioner, inferring essential aspects of Indeck’s production costs fundamental to projecting future costs,” thereby causing competitive damage.⁶⁹

With regard to this aspect of the redactions the companies have sustained their burden of proof and demonstrated that disclosure of the heat rate information would be likely to cause substantial injury to the competitive position of the subject enterprise. However, that data,

⁶⁶ Case 12-E-0577, supra, Trade Secret 13-03 (issued October 29, 2013) p. 7-8.

⁶⁷ Id.

⁶⁸ 221 A.D.2d 121, 124-25 (3d Dep’t, 1996).

⁶⁹ Id. at 125.

contrary to Mr. McCall's line-by-line redactions, does not include the summer capacity, winter capacity, and DMNC test data. The first two, summer and winter capacity, are already publicly available; the third, DMNC test, is derived from these two items, making it essentially public information. Otherwise, the remainder of the information on page 7 is either related to heat rates or has a similar impact and so will remain protected information.

Site Specific Revenues and Expenses Data (Page Eight)

As noted by Entergy's expert, Marc L. Potkin, the confidential information at issue is the actual data from the most recent completed year, not forecasted data or projections of future conditions.⁷⁰ Mr. Potkin argues that "From a competitive market standpoint, data concerning your competitors' most recent revenues and costs is valuable because it is the most accurate snapshot of your competitors' current financial condition. Given this fact, "it provides guidance on whether - and how well - the competitor can be expected to continue to compete in the markets, all else being held equal. It may also reflect the likely terms under which a competitor will compete in these markets in the near term and, perhaps, over the long term as well. Again, to fully understand why this information is so sensitive, it is important to remember that merchant generators compete with each other to secure their needed revenues by serving a limited amount of load. They do not otherwise have any other assured revenue streams."⁷¹

Williams Field Services Company LLC's affiant, Ryan Neal Savage, opined that the release of revenue and expense data of the type sought to be protected here, can have a broader negative anti-competitive effect on the gas gathering and transportation market. If a competitor or competitors are able to determine an operator's costs of providing service, they can more easily manipulate the market, which can cause higher overall prices. For example, a competitor with knowledge of another provider's costs could increase its prices to an amount significantly in excess of its own marginal costs, but sufficiently below the marginal cost of their more expensive competitors to ensure the provider will continue to receive business, resulting in overall higher prices for the service. These outcomes would result in harm to the competitive nature of New York's gas transportation markets and, ultimately, harm New York consumers of natural gas.⁷²

With one exception, the information provided by the companies on page eight is specific and timely data that, as demonstrated by the Statements of Necessity and affiants herein, would result in the likelihood of competitive harm – to the subject companies and the industry, and to consumers – if released publicly. That exception is property taxes, a line item on page 8 that can be determined or derived from public sources. Therefore, while the information on page 8 other than property taxes is protected, that line item must be provided subject to public disclosure.

⁷⁰ See Matter 13-01288, supra, Statement of Necessity of Entergy (May 23, 2014), p. 9, quoting Marc L. Potkin p. 14.

⁷¹ Id.

⁷² See Matter 13-01288, supra, Statement of Necessity of Williams Field Services Company LLC (May 19, 2014), p. 4, quoting Ryan Neal Savage.

NYISO Tariff and Code of Conduct (Pages Seven and Eight)

Many of the companies cited §6.1 of the NYISO’s Market Administration and Control Area Services Tariff (MST) that requires that the NYISO “shall use reasonable procedures to prevent the disclosure of Confidential Information and shall not publish, disclose or otherwise divulge Confidential Information to any person or entity without the prior written consent of the party supplying such Confidential Information, except as provided for under the ISO Market Monitoring Plan and/or ISO Code of Conduct.”

The NYISO Code of Conduct explains that Confidential Information consists of “any commercially sensitive information including, without limitation, trade secrets, equipment specific information (e.g., Generator specific data such as heat rates, etc.), and business strategies, affirmatively designated as Confidential Information by its supplier or owner”⁷³ The Code of Conduct explicitly states that the NYISO “shall not disclose Confidential Information to any Market Participant.” Although there are certain circumstances under which the NYISO may be compelled to share Confidential Information with the Federal Energy Regulatory Commission or Commodity Futures Trading Commission, the NYISO still must seek protective relief or otherwise act to ensure that the Confidential Information is not disclosed to the public.⁷⁴

The Commission has recognized that an array of unit-specific performance and operational information submitted to and/or held by the NYISO should be exempt from public disclosure under FOIL.⁷⁵ In 2000, when the Commission sought, among other things, “bid data” from the NYISO, the Commission defined “bid data” as “load and generator offers and bids both within and outside the New York Control Area” and “operational data such as ramp rates, costs, levels, and minimum run times.”⁷⁶ The Commission recognized the confidential nature of such information stating “[i]n our experience, the courts have consistently upheld withholding from disclosure confidential commercial information of the type at issue here. We will take all available measures to ensure that this pattern continues.”⁷⁷ I find that the information comprising the bid data is no different than the information set forth in most of the line items at page seven of the Annual Reports filed by the companies. Since the Commission has already demonstrated its commitment to conform to judicial precedent, the information at Annual Report, page seven – with the exception of summer capacity, winter capacity, and DMNC test – and page eight – with the exception of property taxes – will remain protected information as provided for under the NYISO Tariff and Code of Conduct and is not subject to release under FOIL.

The companies have shown that the information in question fits within the definition of trade secret, and, by the sum of the submittals, they have shown that release of the information at issue, would put generators and other companies owning delivery facilities in competitive markets at a competitive disadvantage if their competitors had access to the information. The

⁷³ NYISO Open Access Transmission Tariff (OATT), Section 12.4.

⁷⁴ Id.

⁷⁵ Case 00-E-1380, supra.

⁷⁶ Id. NYISO Order I, p. 5.

⁷⁷ Id. p. 4.

companies have demonstrated that disclosure of the information would be likely to cause substantial injury to the competitive position of a commercial enterprise and therefore have met the burden of proof they bear pursuant to POL §89(5)(e).

In numerous Determinations where the RAO has found that the company did not 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, the RAO observed that the inclusion of an affidavit of an engineer, economist or other expert can help the party seeking protection from disclosure meet the burden of proof it bears pursuant to POL §89(5)(e), but only if the affidavit contains more compelling facts and stronger arguments. The courts have recognized this concept as well.⁷⁸ As noted by Astoria, while the courts have not ruled that the inclusion of an affidavit is required to demonstrate competitive injury,⁷⁹ such additional information is, however, of significant assistance to the RAO and the Secretary on Appeal. In this case, most of the companies provided substantial, detailed affidavits from experts in the energy generation field who spoke to the likelihood of price fixing, “reverse engineering” of bids, increased operating costs, higher prices for consumers and a decreased level of competition. The NYISO and IPPNY also presented factual and persuasive arguments to assist the RAO in making a decision.

Taken as a whole, these statements go beyond mere conclusory allegations, are factual and are sufficient to sustain non-disclosure.⁸⁰ The party resisting disclosure must demonstrate a particularized and specific justification for denying access.⁸¹ The companies have done that here.

The companies have conclusively proved that the trade secret test cited in New York Telephone and Ashland had been met on the basis of the factors set forth in 16 NYCRR §6-1.3(b)(2). They have also shown that public disclosure of the information would be likely to cause substantial injury to the competitive position of a commercial enterprise.

The party seeking protection from disclosure must satisfy both prongs of the test enunciated in Encore. The companies satisfied the second prong. The Encore Test must be met before an exception from disclosure may be granted because that test is essentially reflected in the Commission’s regulations. Furthermore the Court in Bahnken v. New York City Fire Department⁸² implicitly concluded that the Encore Test is the one to be used in determining whether portions of records should be excepted from public disclosure pursuant to POL §87(2)(d). The arguments provided in the Statements of Necessity, combined with the affidavits make a compelling case for granting trade secret protection for the redacted material in the Annual Reports to the extent discussed above.

CONCLUSION

⁷⁸ See Dilworth v. Westchester County Dep’t of Correction, *supra*.

⁷⁹ Matter 13-01288, *supra*, Statement of Necessity of Astoria Project Partners LLC, et al., p. 3-4, note 6.

⁸⁰ See, Church of Scientology of New York v. State of New York, 46 N.Y.2d 906 (1979).

⁸¹ Capital Newspapers v. Burns, 67 N.Y.2d 562, 566, 570 (1986).

⁸² 17 A.D.3d 228 (1st Dept., 2005).

In light of all the forgoing, the information claimed by the companies redacted from Annual Reports of Lightly Regulated Utilities for the year ending December 31, 2012, on pages four, five and six, shall remain protected from disclosure as trade secrets – for the private companies only. Since the public companies listed herein are already required to provide this data, the protection does not adhere to them, as they seem to concede. As for page seven, lines four through and including 10 shall remain protected from disclosure as trade secrets; page eight, with the exception of property tax information which is available to the public through various means, shall remain protected from disclosure as trade secrets. Additionally, pages seven and eight, as described above, are also protected from disclosure pursuant to requirements of the NYISO.

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 June 30, 2014 so the deadline for the receipt of any such written appeal is July 10, 2014.

Sincerely,
/s/
Donna M. Giliberto
Assistant Counsel &
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