STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

Matter 13-01288 – In the Matter of Financial Reports for Lightly Regulated Utility Companies
(Trade Secret 14-02)

DETERMINATION OF APPEAL OF TRADE SECRET DETERMINATION

(Issued August 13, 2014)

Assemblyman James F. Brennan appeals a Determination of the Records Access Officer (RAO) of the Department of Public Service that annual reports submitted by entities subject to lightened regulation were excepted from disclosure under the Freedom of Information Law (FOIL), Public Officers Law (POL) Article 6. Assemblyman Brennan protests that material in the reports is available elsewhere and cannot be excepted from disclosure because of a need for public access and a lack of competition in the New York wholesale generation market.

This Determination on Appeal upholds the exception of the reports from disclosure. Affidavits from the wholesale generators and the operator of New York's wholesale electric generation show that 1) the information in the reports is not available elsewhere, 2) the New York wholesale generation market operates by a competitive bidding process; and 3) the competitive positions of the electric generators would be harmed if the bases for the generators' bids were disclosed.

INTRODUCTION AND BACKGROUND

In Case 11-M-0294, the Commission reexamined the reporting requirements applicable to lightly regulated entities under Public Service Law (PSL) § 66(6).[1] Previously the Commission had allowed wholesale electric generators subject to lightened regulation to satisfy PSL § 66(6) by referencing annual reports filed with the Federal Energy Regulatory Commission (FERC). In light of FERC's reduction of its reporting requirements, the Commission required annual reports designed to fulfill its statutory responsibilities for review of the reliability and market power of entities subject to lightened regulation, most notably the wholesale electric generators.

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[1] Case 11-M-0294 – Filing of Annual Reports by Electric and Gas Corporations Subject to Lightened Ratemaking Regulation, Order on Annual Reporting under Lightened Ratemaking Regulation and Establishing Further Procedures (issued March 23, 2012) (Lightened Ratemaking Reporting Order).

The entities subject to the new reporting requirements filed those reports with requests for trade secret protection on various dates between July 1, 2013, and March 31, 2014. On March 31, 2014, the RAO received a FOIL request from Assemblyman Brennan which sought complete and unredacted access to the annual reports filed on or after July 1, 2013, by the entities subject to lightened ratemaking regulation, as well as lists of names and addresses of all entities subject to lightened ratemaking regulation and of the entities subject to the requirement that annual reports be filed. On May 5, 2014, the RAO supplied the requested lists to the Assemblyman and advised the entities requesting trade secret protection of 1) Assemblyman Brennan's request for unredacted access to the reports and 2) their opportunity to submit a written statement of necessity for exemption from disclosure under FOIL pursuant to POL § 89(5)(b)(2).

The Independent Power Producers of New York (IPPNY), a not-for-profit trade association, submitted a statement opposing disclosure. The New York Independent System Operator, Inc. (NYISO), which administers the state's wholesale electric markets and the dispatch of electric generators in response to generator bids, also supported exception of the reports from disclosure. In addition, 16 Statements of Necessity were submitted on behalf of 23 lightly regulated entities.

Arguments of IPPNY

IPPNY argues that disclosure of confidential unit-specific financial and operating data of wholesale electric generators would harm not only the generators, but also the competitive markets in which they function. IPPNY asserts that New York has established a robust competitive market for the trading of energy and capacity through NYISO auctions and that the auctions depend upon the confidentiality of proprietary generator-specific data such as heat rates, outage information and costs and revenues. IPPNY claims that such data can be used to determine generators' marginal costs, the basis for their bids on the NYISO auctions. It argues that ability to underbid once the generators' costs are known would not only harm the generators, but would also adversely affect the functioning of the NYISO market.

Arguments of the NYISO

The NYISO similarly contends for exception of data relevant to determination of generators' marginal costs.[2] According to the NYISO, its FERC-approved tariffs require that market participants' business strategies and specific unit cost information, as well as revenues, be secured as confidential. Like IPPNY, the NYISO states that releasing data used to determine marginal costs will interfere with generator bidding strategies. It will also create a disadvantage for generators attempting to reach contracts with buyers of energy.

Arguments of the Lightly Regulated Companies

The lightly rate-regulated entities argue for exception from disclosure of their income and balance sheets, unit-specific operational data, site-specific revenue and expense data. They assert that all of this information can be used to determine their marginal costs.

With respect to financial information, the wholesale generators that were not publicly traded state that none of the information in their annual reports is publicly available. Those companies express particular concern about their income and balance sheets, which could be used to estimate bids to sell electricity to the NYISO. Rivals could also identify improvements to facilities needed to reduce operating costs and thereby obtain insights on bidding strategies. Moreover, competitors would be able to combine disclosed financial information along with publicly available information to estimate the profitability of various generators.

With respect to unit-specific operating data, the wholesale generators, like the NYISO, explain that such data can be used to determine a generator's marginal costs and interfere with a generator's competitive position. Such unit-specific information would allow competitors an advantage in the generation market through predatory pricing, exercise of market power or collusion with other generators. In support of protection of unit-specific data, generators cited precedent relied upon in the Secretary's October 2013 decision to protect unit heat rates.[3] With respect to site-specific revenue and expense data, various generators argued for protection of such actual data, as providing a snapshot of competitor's current financial situation. They allege

[2] The NYISO adopted its statement and affidavit filed on April 24, 2014 in Case 12-E-0577, Proceeding on Motion of the Commission to Examine Repowering Alternatives to Utility Transmission Reinforcements.

[3] Case 12-E-0577, supra, Determination on Appeal of Records Access Officer's Determination (Trade Secret 13-03) (issued October 29, 2013), citing NYS Electric and Gas Corporation v Energy Planning Board, 221 AD2d 121, 124-25 (3d Dept. 1996).

that similar harms would occur for both the gas and the wind generation industries. Disclosure of site-specific information on gas facilities would allow competitors to determine costs of providing gas. Disclosure of siting costs of wind facilities would reveal the bidding strategy of wind generators.

Finally, the competitive entities pointed to the NYISO tariff and code of conduct under which the NYISO prevents disclosure of confidential information. The lightly regulated companies argue that code of conduct protects generator-specific data such as heat rates and business strategies. The wholesale generators also observe that the Commission has recognized that "bid data" and operational data would be protected from disclosure.[4]

The RAO's Determination

The RAO cited the applicable statutory and regulatory authority,[5] as well as the relevant case law, in her analysis of trade secret and competitive injury. After citing the definition of "trade secret" in Commission regulations and case law, the RAO observed that the generators had shown that the material sought to be disclosed was not publicly available. Applying the first prong of the two-part test of Encore College Bookstores,[6] the RAO concluded that the NYISO and companies subject to lightened regulation had sufficiently demonstrated the existence of actual competition in the electric generation market.[7]

Accordingly, the RAO concluded that whether the information at issue is entitled to an exception from disclosure as trade secrets or confidential commercial information would turn on the second prong of the Encore test – whether disclosure would be likely to cause substantial injury to the competitive position of the subject enterprises. To that end, the RAO determined

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[4] Case 00-E-1380, Provision by the New York Independent System Operator, Inc. of Information and Data to Department Staff, Order Clarifying Information and Data Provided and Measures Regarding Protection of Confidential Information (issued August 23, 2000).

[5] POL §§ 87(2)(d) and 89 (5)(b)(3), and 16 NYCRR § 6-1.3(b)(2).

[6] Matter of Encore Coll. Bookstores v Auxiliary Serv. Corp. of State Univ. of N.Y. at Farmingdale, 87 NY2d 410, 420-421 (1995) [adopting Federal test of "actual competition and the likelihood of substantial competitive injury" in determining whether there is "substantial injury to the competitive position" for exception from disclosure under POL § 87(2)(d)].

[7] The RAO relied in particular on the Affidavit of Charles McCall (McCall Affidavit) submitted by the Astoria entities and NYISO's Affidavit of Dr. Nicole M. Bouchez (Bouchez Affidavit).

that the lightly regulated companies had made a valid case that certain information provided in the companies' annual reports would cause substantial competitive injury if disclosed.

Specifically, the RAO observed that annual reports from entities subject to lightened rate regulation contained three types of financial data. Pages four, five and six of the reports, consisted of balance sheets detailing annual operating costs for generation facilities, including cost estimates for current and accrued assets and liabilities. These balance sheets are not disclosed for companies that are closely held or not publicly traded.[8] Page seven contains unit-specific operational data, including otherwise unavailable heat rate information. Page eight consists of actual site-specific revenues and expenses from the most recent completed year.[9]

Given the Statements of Necessity and supporting affidavits[10] of the lightly regulated utilities, IPPNY and the NYISO, the RAO concluded that, for the privately held companies, the information contained on pages four, five and six of the reports could be protected from disclosure. The RAO further decided that the heat rate information on page seven should be protected, along with the data on page eight, for all companies subject to lightened rate regulation, with the exception of publicly available property tax information.

The RAO determined that the data on each of the pages at issue, or portions thereof, should be excepted from disclosure since both prongs of the Encore test were met. Specifically, the RAO noted that the lightly regulated companies offered extensive arguments in support of a finding that release of the data contained in pages four, five, six, seven and eight would cause competitive harm to participants of the NYISO-administered energy markets. According to the RAO, the affidavits submitted by the companies and the NYISO show that the release of the data at issue would allow competitors to determine a generator's marginal cost, which, in turn, would allow competitors to more easily engage in predatory pricing, inappropriate exercise of market power or collusion with other generators, all of which can cause higher clearing prices and

[8] The RAO, however, concluded that publicly-traded companies are expected to include such data in the public version of the Annual Report and, thus, the information is not confidential.

[9] 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 10 – Gas Plant; page 11 – Steam Plant; or page 12 – Verification. Accordingly, the RAO noted that those pages would remain unprotected and accessible to the public.

[10] Expert affidavits were submitted by 11 companies. Five companies also submitted the Bouchez Affidavit, originally submitted by the NYISO. (Footnote 16 of the RAO Determination lists all of the affiants and respective companies.)

decreased competition.[11] Moreover, the RAO found that the affidavits demonstrate that the release of such data could also place generators at a disadvantage in negotiation of future bilateral arrangements for sale of energy and capacity.[12]

Similarly, the RAO noted the companies' arguments that access to the financial data at issue would give competitors information about bidding strategy, which would harm their competitive positions. The McCall Affidavit states that sophisticated entities "would 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" and gain intelligence related to the subject generator's bidding strategy.[13]

Lastly, the RAO identified provisions of the NYISO tariff and code of conduct that further support protecting the information at issue. Specifically, § 6.1 of the NYISO tariff requires that the NYISO use procedures to prevent the disclosure of confidential information and shall not publish, disclose or otherwise divulge such information without written consent from the party who supplied such information. The Code further provides that the NYISO shall not disclose confidential information to market participants. The RAO further 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.[14]

[11] McCall Affidavit, ¶¶ 89-90, 93-96; Bouchez Affidavit, ¶¶ 8-10.

[12] McCall Affidavit, ¶¶ 94-95; Bouchez Affidavit, ¶ 11.

[13] McCall Affidavit, ¶ 89.

[14] Case 00-E-1380, supra, Order Clarifying Information and Data Provided and Measures Regarding Protection of Confidential Information (issued August 23, 2000).

Mr. Brennan's Appeal

Assemblyman Brennan appealed the RAO's FOIL Determination on July 31, 2014.[15] He claims that the Determination should be overruled, inasmuch as it is inconsistent with the goals, purposes and objectives of the Commission in supervising the adequacy of competitive markets. The Assemblyman refers to the Commission's Lightened Regulation Reporting Order, which directed lightly regulated companies, including wholesale generators, to file the annual reports at issue. He opines that it is impossible to determine or evaluate the level of competition unless "core financial information" is disclosed to the public.

The Assemblyman further argues that market participants already have access to substantial price, fuel and cost information and, thus, the information at issue should not be considered trade secret.[16] He maintains that average heat rate and bidding information are published on FERC and Federal Energy Information Administration (FEIA) websites, and that competitors can estimate, with reasonable accuracy, generators' marginal costs. Assemblyman Brennan also claims that the NYISO makes bid information public and that information in the annual reports of the lightly regulated wholesale electric generators can be derived from the annual reports of the electric transmission utilities.

With regard to competition in the New York wholesale markets, the Assemblyman argues, upon information and belief, that limited generation and supply options cause constraints on the addition of new capacity in New York City and Westchester. Accordingly, the Assemblyman asserts that competition in New York wholesale markets is limited and that the

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[15] The RAO presumed that her June 30, 2014 Determination, which was sent electronically, was received on June 30, 2014, "[u]nless a contrary showing is made," so appeals would be due on July 10, 2014. Assemblyman Brennan subsequently claimed that his office was not aware of the RAO's decision until July 16, 2014, because of heavy e-mail traffic to his Assembly e-mail address, described in an automatic reply message. In light of these extremely unusual circumstances, he was given until July 31, 2014, to appeal, by letter dated July 23, 2014. Persons filing appeals in FOIL cases should not generally be able to offer similar excuses for extensions; they will be presumed to be aware of their receipt of e-mail. In addition, persons receiving extensions do so at their risk that they will not be in compliance with the seven business days for appeal stated in POL § 89(5)(c)(1). The RAO may hereafter wish to use software that determines the actual date an e-mail is opened, confirm with FOIL requesters that their e-mail addresses are monitored in real time or adopt the provision in the Commission's rules that extends time for action by only one day as a result of electronic service, 16 NYCRR § 3.5(f).

[16] Assemblyman Brennan cites Ruckelhaus v. Monsanto Co., 467 U.S. 986, 1002 (1984).

RAO erred in finding otherwise. He also alleges that nuclear plants and many fossil plants are baseline facilities that are dispatched as continuously as possible, rather than competing at the margin for peaking purposes and, thus, their costs and profits should be disclosed.

Further, Assemblyman Brennan complains that the NYISO awards “the market clearing price” to generators whose bids are accepted. He asserts that supply constraints and market entry problems mean this pricing structure results in excess profits. The Assemblyman argues that the public must have access to generator income statements in their annual reports in order to make the industry accountable for excess profits and allow the public to evaluate the reasonableness of wholesale electric prices.

Lastly, the Assemblyman maintains that certain segments of the New York State electricity market are unique and do not actively participate in competition for supplying power. Specifically, he believes that the two major hydroelectric plants owned and operated by the New York Power Authority (NYPA) and the Long Island electricity market are not actively competitive and, thus, should not be included in the analysis of competitive markets.

Letters in Support of Mr. Brennan’s Appeal

New York Public Interest Research Group (NYPIRG), Alliance for a Green Economy (AGREE), Environmental Advocates of New York (EANY) and Common Cause New York (CCNY) all filed letters in support of Assemblyman Brennan’s appeal, urging the Commission to disclose the unredacted information he has requested. NYPIRG argues that such records should be released inasmuch as it is in the public interest that the Commission disclose basic financial information on the operations of the wholesale electric industry. This information, NYPIRG alleges, can help determine whether industry deregulation has benefitted consumers or, conversely, resulted in higher rates in a noncompetitive market. NYPIRG further asserts that the requested information can help guide policy on other aspects of energy purchasing practices and consumer protection.

Likewise, AGREE maintains that, without the release of the requested records, it is impossible for the public to determine whether the current market structure is benefitting ratepayers. Similar to claims made by Assemblyman Brennan in his appeal, AGREE also asserts that most of the information at issue is already available in other forms in federal, state and private reports. Accordingly, industry players, AGREE argues, are able to assemble this information themselves, thereby gathering intelligence about their competitors. AGREE further

maintains that the redaction of the reports puts the public at a disadvantage, thereby damaging the public interest.

EANY opines that it is in the public interest that the records at issue are released inasmuch as the information could serve as a valuable data point for utilities, local governments, school districts, community organizations and other interested parties concerned with a particular generator's future viability. To that end, EANY believes that the release of this information will help communities establish lines of communication with generation owners and utilities in order to develop transition plans and ensure reliability needs in the event of plant retirements. Given that the generators play a vital role in ensuring the continued reliability of the State's power grid, EANY argues that it is in the public interest for the Commission to disclose the financial information at issue.

Lastly, CCNY also asserts that the Commission's protection of the financial information makes it impossible for the general public to determine whether deregulation of the industry provides reasonable profits. Echoing the arguments of Assemblyman Brennan and AGREE, CCNY alleges that most of the information is available in federal, state and private reports and, thus, the release of this information would not harm competition.

IPPNY Response

By letter dated August 6, 2014, IPPNY opposed Assemblyman Brennan's appeal.[17] It also transmitted an affidavit of Mark D. Younger (Younger Affidavit) contradicting the Assemblyman's claims that the information in the annual reports is publicly available and that information about baseload units should be public information.

IPPNY's letter first disputes Assemblyman Brennan's claim that the RAO's decision is inconsistent with the Commission's required filing of annual reports by wholesale generators. IPPNY observes that the Commission found that the reports were needed because the information was not publicly available and that the Commission routinely discharges its regulatory functions through review of confidential information.

IPPNY then explains that the Younger Affidavit shows that each of the sources of public information mentioned by Assemblyman Brennan does not provide the information protected by the RAO. FERC's Electronic Quarterly Reports (EQR) do not require revenue information in

[17] FOIL neither authorizes nor prohibits responses to appeals of RAO determinations.

the same form as the PSC annual reports for lightly regulated entities. Information publicly filed at FEIA does not permit computation of heat rates, and heat rates are filed at FEIA, pursuant to an exemption from disclosure under the Federal Freedom of Information Act (FOIA). Bidding information is filed at the NYISO with the owner's identity masked. Finally, disclosure of the electric utilities' purchased power costs does not reveal generator costs.

The Younger Affidavit supports each of the claims made by IPPNY with respect to the unavailability of the information protected by the RAO. It states that, while FERC's EQR do require filing of capacity, energy and ancillary service revenues, those revenues are sometimes not the same as those required by the Commission's annual reports because of differences between reporting entities, and that, in any event, the EQR do not supply other data in the annual reports.[18] The Younger Affidavit explains that the publicly available FEIA information, on annual unit fuel consumption, does not permit computation of full load heat rates.[19] It also observes that the names of the generators filing bidding information at the NYISO are masked.[20] The Younger Affidavit further states that retail utility filings provide no information on generator costs and are likely to only state a subset of generator revenues.[21]

The Younger Affidavit then responds to the Assemblyman's assertions about lack of competition in the NYISO markets. It states that the NYISO clearing price mechanism provides generators with incentives not to bid above their marginal costs.[22] The Younger Affidavit further opines that the NYISO Market Monitoring Unit has found the New York electric markets to function competitively, despite transmission bottlenecks, and that the NYISO has adopted market power mitigation measures to address supplier market power.[23] In addition, the Younger Affidavit responds to Assemblyman Brennan's claims that information relating to "baseload" unit with high capacity factors must be disclosed by observing that 1) such units make bids based on their marginal costs; 2) those units have fixed operating and maintenance costs that are not reflected in bids based on marginal costs; and 3) those units may not in fact run based on the

[18] Younger Affidavit, ¶ 10.

[19] Younger Affidavit, ¶ 11.

[20] Younger Affidavit, ¶ ¶ 12-13.

[21] Younger Affidavit, ¶ 14.

[22] Younger Affidavit, ¶ ¶ 12-13.

[23] Younger Affidavit, ¶ 17.

other bids supplied.[24] Finally, the Younger Affidavit notes that all generation in the state, including NYPA hydropower and generation in Long Island, is bid into the NYISO market and competes with other generation.[25]

DISCUSSION

The issue on appeal is whether filings required of certain lightly rate-regulated entities, pursuant to PSL § 66(6), are entitled to an exception from disclosure under FOIL. The lightly regulated companies argue that the release of the information at issue would cause them substantial competitive harm. Specifically, wholesale electric generators assert that the NYISO must protect its market participants' business strategies and unit-specific information, such as heat rates. The NYISO agrees that it must treat information that may allow a party to "reverse engineer" or otherwise determine market participants' trade secrets, such as their marginal costs, as confidential. The release of such information, the lightly regulated generators argue, would allow competitors to determine marginal costs, thereby allowing market participants to more easily engage in predatory pricing, the inappropriate exercise of market power or collusion with other generators. Such conduct, they argue, would lead to higher prices and a decreased level of competition in the electricity market.

In Encore College Bookstores, supra, the Court of Appeals established a two-prong test for determining whether records or portions thereof may be excepted from public disclosure which "would cause substantial injury to the competitive position of the subject enterprise." In adopting the first prong of the Encore test, the Court evaluated the extent to which competitors could use FOIL to obtain information without cost, and required that the existence of "actual" competition must be established.[26] Thereafter, the second prong is met if the party seeking the exemption demonstrates that disclosure of the information would be likely to cause substantial competitive injury.[27] In order to meet its burden, the party seeking the exemption must present specific, persuasive evidence that disclosure will likely cause it, or another affected enterprise, to suffer competitive injury.[28]

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[24] Younger Affidavit, ¶ ¶ 18-20.

[25] Younger Affidavit, ¶ ¶ 21-22.

[26] 87 NY2d at 420.

[27] 87 NY2d at 421.

[28] Matter of Markowitz v Serio, 11 NY3d 43, 51 (2008).

In this case, the RAO properly found that the entities seeking to prevent disclosure have met their burden. The RAO observed that, in addition to providing statements of necessity, most of the companies provided substantial detailed affidavits, speaking to the harms that would arise from disclosure of their confidential information. The RAO thus concluded that the companies have conclusively proved that the trade secret test based on factors specified in the Commission's regulations, 16 NYCRR § 6-1.3(b)(2), has been met. The RAO also found that the affidavits showing the harms from disclosure, including price fixing, reverse engineering of bids, increased operating costs, higher prices for consumers and a decreased level of competition, had satisfied the second prong of the Encore test. In finding the necessary showings were made, the RAO carefully parsed the requirements of the reports. In contrast, Assemblyman Brennan's appeal does not consider the specific information claimed to be excepted from disclosure in arguing that information is publicly available. He also does not address the affidavits arguing both for the competitive value of the information sought to be protected and the harms that would arise if it were disclosed.

Before considering the merits of the Assemblyman's appeal, it is to be noted that, on August 6, 2014, the Commission received a July 31, 2014 decision from Albany County Supreme Court in Matter of Verizon New York Inc. v. New York State Public Service Commission et al. (Index No. 6735-13). That decision held that the Encore test did not apply to "trade secret" materials. That decision gives rise to the question of whether it is appropriate to remand this case to the RAO for consideration of whether the information sought to be protected is "trade secret" or should be deemed "confidential commercial information." Given that the RAO concluded that the material was both trade secret and confidential commercial information under the tests in the Commission's regulations and, more critically, that the Encore test was met, a remand is not appropriate. There is New York Court precedent that the information at issue should be deemed "confidential commercial information" to which the Encore test applies.[29] For reasons discussed below, the wholesale generators have shown that they meet the "likelihood of substantial competitive injury" prong of the Encore test. Because the entities seeking to prevent disclosure have met their burden by showing that they would be likely to suffer substantial competitive injury if the information were disclosed, the question of whether the information is only "trade secret" need not be reached. Since that question can therefore be considered moot, the merits of Assemblyman Brennan's appeal will be reached.

[29] NYS Electric and Gas Corporation v. Energy Planning Board, supra.

Assemblyman Brennan's allegation that the RAO's determination is inconsistent with the Lightened Regulation Reporting Order does not address FOIL requirements for excepting information from disclosure, let alone either prong of the Encore test. That the Commission has required generators to produce information does not address the question on this appeal, which is whether information must be disclosed to the public under FOIL. That the Commission found the wholesale generators must file certain information in order to facilitate the Commission's exercise of its regulatory responsibilities does not thereby automatically render that information subject to disclosure. In fact, the need for the information is not a factor affecting the analysis of whether it must be publically disclosed.

Moreover, Assemblyman Brennan seems to misunderstand the basis for the annual report requirements imposed on the wholesale generators. Instead of seeking information to set rates, the Commission has stated its intent is to use the information supplied to "pursue policies intended to ensure that markets remained effectively competitive and are meeting reliability needs."[30] Indeed, the Commission cannot set rates of return for the generators, which are not subject to retail rate regulation, but to FERC wholesale rate regulation. FERC has, however, exempted generators from regulation based on rates of return and relied on the NYISO markets to set prices and determine profitability.

Assemblyman Brennan next seems to dispute that the material is "confidential commercial information" by claiming that it is publicly available. He maintains that FERC, FEIA and the NYISO all require public disclosure of information related to electric generation. He argues that specific data like heat rate can be calculated or estimated with reasonable accuracy, based on information that is publicly available. In so claiming, however, Assemblyman Brennan does not rebut the affidavits filed with the RAO stating that the information they seek to protect is not available from other sources.

Moreover, the Younger Affidavit filed on appeal refutes Assemblyman Brennan's claims that the FERC or FEIA websites release the information in the reports to the public. The FERC website does not provide the same information as that sought in the annual reports; indeed, the Commission adopted the Lightened Regulation Reporting Order precisely because FERC does not require the information now provided by the reports. Moreover, FEIA does not, in fact,

[30] Lightened Ratemaking Regulation Order at 19.

make public heat rate information on a per unit basis.[31] And, it seems that such information is not "easily calculated" based on information on the FEIA website or elsewhere.

In claiming that bid information is disclosed, the Assemblyman does provide a specific citation to NYISO tariff § 6.3. As the Younger Affidavit observes, however, that NYISO tariff on its face provides that bidding information is only to be made public anonymously. Further, the Assemblyman's claim that bidding material is available through the NYISO's website is refuted by the NYISO's statement that it keeps that information confidential. Finally, the Younger Affidavit rebuts the claim that transmission utility reports make public the information in question.

As his next claim, the Assemblyman appears to maintain that the NYISO downstate markets should not be considered "competitive markets" because they are not workably competitive. This claim fails, as the Younger Affidavit observes, because the NYISO markets are explicitly constructed as competitive market exchanges. Entities bid into the market on the basis of marginal costs and earn revenues based on those marginal costs. That some suppliers may have market power does not defeat a trade secret or confidential commercial information showing, particularly since FERC has imposed mitigation measures that address suppliers' market power. The NYISO exchange remains workably competitive, and it need not be demonstrated that it is perfectly competitive in order to protect the requested information from disclosure.

The Assemblyman's argument with respect to capacity factors seems to go to the second prong of the Encore test; it appears that he is arguing that there is no substantial competitive injury resulting from disclosure of the operating data of these plants. Again, however, the Assemblyman's claims are without merit. He has not refuted the evidentiary showing before the RAO and in the Younger Affidavit that plants are dispatched by the ISO based on generator bids. The unit-specific information and revenues used to determine those bids is competitively valuable information and its disclosure would give rise to competitive harm. That some units are dispatched more often than others, based on their marginal costs, does not defeat the competitively sensitive nature of those costs or show that no market exists. Large generators that run continuously are participating in the NYISO market on the basis of their costs, just as much as the entities that only supply capacity or energy on peak.

[31] Younger Affidavit, ¶ 11.

In an apparent attempt to address the first ("actual competition") prong of the Encore test, Assemblyman Brennan, for his final argument, states that NYPA operates hydroelectric plants, comprising nearly 15% of New York's generation, which should be considered baseload outside the scope of the NYISO exchange. The Assemblyman further argues for the subtraction of the Long Island electric market because of its comparative electrical isolation. Neither argument supports the disclosure of the information that Assemblyman Brennan seeks. As Public Authorities Law § 1014 provides, the Commission does not regulate NYPA and cannot require it to file annual reports, so its circumstances are not relevant to the disclosure of the annual report information at issue here. Moreover, NYPA participates in the NYISO exchange and characterizing NYPA generation as "baseload" does not change that fact. As to the Long Island Power Authority (LIPA), generators in its territory, as pointed out in the Younger Affidavit, are still part of the NYISO exchange, which, again, is a workably competitive market notwithstanding imperfections such as the transmission constraints between LIPA and the rest of the State.

CONCLUSION

The lightly rate-regulated entities seeking to shield information contained in their annual reports from disclosure under FOIL, POL Article 6, have met their burden of showing exemption from public disclosure, as provided in POL §§ 87(2)(d) and 89(5)(e). For the reasons discussed above, Assemblyman Brennan's appeal of the RAO's June 30, 2014 Determination is denied.[32]

KATHLEEN H. BURGESS
Secretary

[32] The four letters in support of Assemblyman Brennan's appeal have been considered and do not change the outcome.