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March 16, 2010

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Re: Request for Records Showing 2009 Breakdown of Revenue and Number of Residential Customers for Gas & Electric per ESCO per Utility Company (Cases 93-G-0932 and 94-E-0952).

Dear Addressed Parties:

This letter constitutes my determination, pursuant to §89(5)(b)(3) of the Public Officers Law (POL). It discusses the entitlement to an exception from disclosure as trade secrets or confidential commercial information of information contained in records

prepared by utility companies showing the revenue and number of residential gas and electric customers for each energy service company (ESCO) in each utility's service territory, for the year 2009.

By letter dated February 19, 2010, I advised representatives of the utilities addressed herein (collectively, Utilities) of Ms. Martinez's request.¹ I stated that access to the requested records would be determined in accordance with POL §89(5). I also advised the Utilities of DPS's intention to determine the entitlement of the specifically-requested information contained therein to an exception from disclosure and permitted them to submit written statements of the necessity for such exception from disclosure, pursuant to POL §89(5)(b)(2). The Utilities later advised the ESCOs operating in their service territories that they should consider submitting statements as to why such information should be excepted from disclosure. The Utilities² and numerous ESCOs³ (including representative organizations) timely submitted such statements.⁴

¹ Ms. Martinez's request for the disclosure of information under the Freedom of Information Law (FOIL) was submitted to the Department of Public Service (DPS) by e-mail letter on February 17, 2010; it was subsequently disseminated to the utilities by a letter from me dated February 19, 2010.

² The Utilities are Brooklyn Union Gas Company, KeySpan Gas East Corporation and Niagara Mohawk Power Corporation d/b/a National Grid; Central Hudson Gas & Electric Corporation; Consolidated Edison Company of New York, Inc.; National Fuel Gas Distribution Corporation; New York State Electric & Gas Corporation and Rochester Gas & Electric Corporation, and Orange and Rockland Utilities, Inc.

³ The ESCOs and organizations are Ambit Energy, LP; Columbia Utilities, LLC and Columbia Utilities Power, LLC (collectively, Columbia); Constellation NewEnergy, Inc.; IDT Energy; IGS Energy; NATGASCO, Inc.; National Energy Marketers Association (NEM); National Fuel Resources; NOCO Natural Gas, LLC and NOCO Electric, LLC; NYS Energy Marketers Coalition (NYSEMC); Retail Energy Supply Association (RESA) (the members of which include Consolidated Edison Solutions, Inc.; Constellation NewEnergy, Inc.; Direct Energy Services, LLC; Exelon Energy Company; GDF SUEZ Energy Resources NA, Inc.; Gexa Energy; Green Mountain Energy Company; Hess Corporation; Integrys Energy Services, Inc.; Just Energy; Liberty Power; PPL EnergyPlus; and Sempra Energy Solutions LLC.); Small Customer Marketer Coalition (SCMC); UGI Energy Services, Inc.; U.S. Gas and Electric, Inc.; and Vectren Source.

⁴ In a number of submissions, parties failed to focus on the wording of the Martinez request, instead referring to that of earlier requests and determinations regarding the volume of gas, rather than the revenue figures requested here. One Utility's cover letter stated that, since the Martinez request was similar to another request made in

Argument

Two primary arguments are made by the Utilities and ESCOs to except the requested information from disclosure: (1) that the release of the information in question (on the number and type of residential customers and associated revenues) would harm the competitive positions of the ESCOs to negotiate for the best price within New York State; and (2) that, based on Commission precedent, the information should continue to be excepted from public disclosure.

RESA, SCMC, and Columbia submitted the most comprehensive arguments supporting the notion that the public disclosure of the requested information would cause substantial competitive injury. Columbia was the only party to include an affidavit of a corporate officer in support of its statement of necessity.⁵ With regard to the first argument – that disclosure would harm the competitive positions of the ESCOs in New York State – RESA asserts that the broad dissemination of ESCO-specific customer information will create the potential for competitors to interfere with established supply arrangements and to identify and target lucrative customers based on the information disclosed. The information could therefore be used by competitors seeking to enter the marketplace and provide similar services and could be extremely useful in targeting strategic geographic market segments. Citing *Encore Col. Bookstores v. Auxiliary Service Corp. of State Univ. of N.Y.*⁶ and other precedent,⁷ RESA claims that the release of this information would have substantial commercial value to competitors, or potential competitors, of those ESCOs currently serving in the marketplace. According to RESA, effective marketing to retail customers is a time-consuming and resource-intensive process that requires significant investment. Competitors that acquire this valuable marketing information under a FOIL request without investing in extensive market research would receive an unfair advantage in the form of an economic windfall.

April 2008 to which it had responded, the company was submitting a copy of its 2008 statement of necessity to serve as its response in the current matter.

⁵ See affidavit of Columbia President, Robert Palmese.

⁶ 87 N.Y.2d 410 (1995).

⁷ Matter of Troy Sand and Gravel Company, Inc. v. NYS Department of Transportation, 277 A.D.2d 782 (3rd Dept., 2000).

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

RESA claims that the changing forces in the ESCO marketplace underscore the potential economic harm that disclosure could bring about. It uses the example of an ESCO that has recently entered a new utility service territory, whose position is susceptible to harm if the number of customers is publicly disclosed. It argues that customers and potential customers might incorrectly perceive an ESCO marketer that has fewer customers or serves only a limited area as not being commercially viable or otherwise operationally capable of providing service when, in fact, the ESCO may have just entered a new market or started serving a new class of customers in a specific market (possibly due to a change in applicable regulations or in the ESCO's marketing plan).

Columbia argues that the disclosure of the type of ESCO-specific customer and revenue information sought would directly affect its ability to procure energy supplies on favorable terms because disclosure would provide its suppliers with a knowledge of its exact supply needs in each utility service territory, give suppliers an unfair competitive advantage, and enable suppliers to demand higher prices from Columbia based on information unfairly obtained.⁸ Columbia also maintains that disclosure would assist new entrants in deciding the correct timing of entry into the New York ESCO gas and electric sales marketplace, and help them determine which markets to target and enter, and which market segments to avoid. According to Columbia, "disclosure of ESCO-specific customer data would also allow our existing competitors to potentially interfere

⁸ Palmese affidavit, paragraph 6, p. 2.

with supply arrangements and develop strategies to target specific products, services, customers, and market segments."⁹

Several ESCOs argue that disclosure of the ESCO-specific information would impose a degree of financial and business risk that was never factored into the business models of unregulated energy marketers and that it could have a chilling effect on both the competitive entry into the New York market and on current ESCOs entering into different utility territories in the state. They opine that disclosure might actually have the unintended consequence of influencing customers' perception of ESCO viability due to their market share, volume, business acumen and reliability. A few parties assert that new ESCOs might be deterred from entering the market not only because of the presence of a few very strong players, but also because public perception of new entrants may be negatively affected by disclosure of small enrollments without regard to ESCO reliability or business considerations. Disclosure, they aver, could harm competition and deter new entrants into the deregulated marketplace.

The other companies that have submitted letters in response to my request make similar arguments, albeit lacking in comparable detail.

With respect to the second argument, the ESCOs cite Secretary Brilling's appeal determination in Trade Secret 06-1, which denied the release of similar data.¹⁰ The ESCOs argue that nothing has changed since that ruling was issued. Moreover, several parties claim that Secretary Brilling's determination did not hinge on the maturity of the market. Due to the history of denial of access to similar data, several parties request that a determination be made that forestalls future requests.

SCMC contends that the full Commission had an opportunity to consider in the 2008 UBP Order¹¹ whether and to what extent ESCO customer data in the possession

⁹ Id. at paragraph 7. p. 2 – 3.

¹⁰ Request for Certain Information in Unredacted ESCO Gas Flow-Thru Data Reports for November and December 2005 (issued October 20, 2006).

¹¹ Case 98-M-1343, In the Matter of Retail Access Business Rules; Case 07-M-1514, Petition of New York State Consumer Protection Board and the New York City Department of Consumer Affairs Regarding the Marketing Practices of Energy Service Companies; Case 08-G-0078, Ordinary Tariff Filing of National Fuel Gas Distribution Corporation to Establish A Set Of Commercially Reasonable Standards For Door-To-Door Sales Of Natural Gas By ESCOs,

of utilities should be shielded from disclosure. In that proceeding, certain parties proposed that the data on the number and type of customers that an ESCO serves, and the number of complaints filed against an ESCO should be made public. The Commission cited the previously noted ruling by Secretary Brillinger and then concluded that disclosure was not warranted.

Quoting further precedent, SCMC notes a 2009 FOIL Ruling in which I denied disclosure of ESCO-specific data in the possession of utilities, stating that it would engender competitive harm.¹² Moreover, RESA alleges that principles of due process require that, if this precedent is to be changed, notice be given pursuant to the rule making provisions of the State Administrative Procedure Act.¹³

All parties that address my request regarding the potential use of a confidentiality agreement between the Utility and Ms. Martinez allege that this type of agreement would be unreasonable and fail to address the competitive injury associated with disclosure. The Utilities maintain that the information is proprietary to the ESCOs and cannot be disclosed by the Utilities absent a Commission directive.¹⁴ SCMC argues that using a confidentiality agreement would violate the provisions of BSAs (billing service and assignment agreements) in effect between the utilities and ESCOs serving firm residential customers.¹⁵

Several ESCOs claim that the Commission has, in effect, answered the question of the permissible degree of granularity/aggregation of marketer information that should be subject to disclosure by publishing on its website market migration reports that set forth migration statistics in an aggregated fashion by utility and customer type and also

Order Adopting Amendments to the Uniform Business Practices, Granting in Part Petition on Behalf of Customers and Rejecting National Fuel Gas Distribution Corporation's Tariff Filing (issued October 27, 2008) ("UBP Order").

¹² Trade Secret 09-1, May 11, 2009. Request for a Copy of the Unredacted ESCO Customer Data – Preliminary Customer Enrollment by ESCO and Customer Annualized Gas Usage by ESCO for the Period May 2008; January 2009 Residential Non-Heating Customers; and March 2009 Customer Migration Activity.

¹³ RESA's statement, p. 12.

¹⁴ See letter to Steven Blow from Adam L. Benshoff, Counsel, National Grid, March 5, 2010.

¹⁵ See SCMC Statement of Necessity, March 3, 2010, p. 5.

making available on its website an ESCO Directory that lists marketer offerings by zip code or as a function of customer type and utility service area.¹⁶

Finally, RESA complains that Ms. Martinez has not explained how the public would be better off if such information were disclosed. RESA opines that the requester has not met her burden to show that the benefit of disclosure outweighs the likelihood of competitive harm.¹⁷

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 *New York Telephone Co. v. Public Service Commission*, 56 N.Y.2d 213(1982) 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 §757, comment (b) of Restatement of Torts (1939). The statutory provision there at issue was §16(1) of the Public Service Law (PSL), which provides: “all proceedings of the commission and all documents and records in its possession shall be public records.” Thereafter, the Commission adopted a virtually identical definition of “trade secret”. 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.

¹⁶ See letter to Steven Blow from Mickey Zablonksi, General Manager, NOCO Natural Gas, LLC and NOCO Electric, LLC, March 5, 2010, page 3; see letter to Steven Blow from Craig G. Goodman, President, National Energy Marketers Association (NEM), March 4, 2010, p.3; letters referring to Cases 06-M-0647 and 98-M-1343, Order Adopting ESCO Price Reporting Requirements and Enforcement Mechanisms (issued November 8, 2006).

¹⁷ RESA's statement, p. 17.

In *Matter of Capital Newspapers v. Burns*, 67 N.Y.2d 562, 566, 570 (1986), 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*, 82 N.Y.2d 395, 407 (1993), again cited the Restatement of Torts definition of “trade secret.” In addition, the Court noted that Section 757, comment b of the Restatement suggested the following factors for consideration 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 by him in developing the information;
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.” Section 6-1.3(b)(2) also provides:

A person submitting trade secret or confidential commercial information to the department shall clearly state the reason(s) why the information should be excepted from disclosure, as provided for in §87(2)(d) of the Public Officers Law. 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.

The Court of Appeals, in *Encore Col. Bookstores v. Auxiliary Serv. Corp. of State Univ. of N.Y.*, 87 NY2d 410(1995), 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*, 498 F.2d 765, 770 (D.C. Cir., 1974), a case that arose under the federal Freedom of Information Act (*Id.* p. 419-20). In particular, the Court paraphrased and quoted with approval from another D.C. Circuit Court of Appeals decision in *Worthington Compressors v. Costle*, 662 F.2d 45, 51 (D.C. Cir., 1981).

Thus, the Court in *Encore*, supra 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 (*Id.* p. 420).

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 (*Id.*). Finally, in applying the enunciated 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*, 615 F. 2d 527, 530 (D.C. Cir., 1979) to show “actual competition and the likelihood of substantial competitive injury” (*Id.* p. 421).

Application of Pertinent Law

At the outset, two points should be clear. First, the purpose for which a FOIL requester seeks records is almost never relevant in determining whether access should

be granted;¹⁸ nor does a FOIL requester bear any burden of proof. Second, an agency may not establish a policy of nondisclosure that contravenes FOIL;¹⁹ nor has the Commission done so. Thus, if a determination made following the procedures set forth in POL §89(5) were to state, in a particular instance, that information contained in a record does not warrant an exception from disclosure, such decision would not violate principles of due process.

In applying the first prong of the test enunciated in *Encore*, supra, I conclude that entities submitting records on which the reports in question are based face actual competition. Therefore, the question of whether the specific information sought by Ms. Martinez 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 applying the second prong of the Court's test, 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. In doing so, I am mindful of the appeal determination of Secretary Jaclyn A. Brillling in Trade Secret 06-1 (October 20, 2006). Secretary Brillling concluded that public disclosure of the relative size of the ESCOs operating in the State would have some value because it would confirm the educated guesses of ESCO employees and other knowledgeable market watchers. She opined that disclosure of the total number of customers each ESCO has in the State and of the total volume of gas moved

¹⁸ Data Tree, LLC v. Romaine, 9 N.Y. 3d 454 (2007). As the Court observed in *Gould v. New York City Police Department*, 89 N.Y.2d 267, 274 (1996), "Access to government records does not depend on the purpose for which the records are sought."

¹⁹ Washington Post Co. v. NYS Insurance Dep't, et al., 61 N.Y. 2d 557 (1984).

to such customers would be even more valuable because it would make clear each ESCO's exact position in the statewide market.

The Secretary further explained that the value competitors place on this information is only one measure of competitive injury. More important in this context, she determined, is the distortion of the perception of potential customers that would be occasioned by the disclosure of the number of customers and associated gas volumes on a statewide basis. Public disclosure of such information would not take into account the fact that ESCOs can enter and exit a utility market for a number of reasons, which may have nothing to do with their reliability or price offerings. For instance, an ESCO that has just entered the State, or one that has chosen to concentrate the marketing of its products and services in the service territories of one or two utilities, would be likely to suffer injury to its competitive position if on a statewide ranking list it were to appear at last. Customers or potential customers probably would incorrectly perceive the ESCO that has fewer customers or delivers less volume as not being financially, operationally or otherwise capable of providing service when, in fact, the ESCO may have just entered the market. Given these considerations, Secretary Brilling concluded that public disclosure of a list of ESCOs, with the total number of customers and associated volume of gas of each ESCO on a statewide basis would be likely to cause substantial injury to the competitive positions of ESCOs, particularly new entrants and those that have chosen to concentrate their marketing efforts in specific geographic areas in the State. While the information sought then is somewhat different from that sought now, the Secretary's rationale is certainly instructive.

In applying the second prong of the Encore test, I also find it noteworthy that, in adopting its UBP Order, the Commission found no occasion to change the reasoning set forth in Secretary Brilling's appeal determination in Trade Secret 06-1 relating to the number of customers served by each ESCO.²⁰ Secretary Brilling's decision also related to the type of customers and gas volumes.²¹ In a determination last year, moreover, I

²⁰ UBP Order, p. 26.

²¹ While the earlier decisions are relevant for their general tenor and the fact that they also dealt with access to the number of customers, many parties failed to properly

found no reason to disturb the Secretary's rationale relating to these categories of information, stating: "While I cannot conclude that public disclosure of the information in question will forever be likely to cause substantial injury to the competitive position of ESCOs, it is my opinion that current circumstances are similar to those existing at the time Secretary Brillling made her determination. I therefore conclude that the ESCOs and Utilities have met the burden of proof they bear pursuant to POL §89(5)(e)."²² The Commission signaled that such information might well not always warrant an exception from public disclosure when it stated that the ESCO retail markets are more mature than when they began in 1996.²³ In the less than 17 months since the Commission's UBP Order, there have been no significant changes in the ESCO market to support or warrant a change in how the requested information is treated under the law. The precedential value of the decisions of the Secretary and the Commission cited herein is significant and provides support for the exception from disclosure of information on the number and type of residential customers that an ESCO serves and on the associated revenues.

Columbia's opinion that disclosure of the customer and revenue information sought would be likely to cause substantial injury to its competitive position by enabling its energy suppliers to demand higher prices as a result of the knowledge they gain as to Columbia's supply needs in each utility service territory also has merit. While disclosure of the 2009 breakdown of revenue and number of residential gas and electric customers per ESCO per utility might not allow an energy supplier to determine the ESCO's exact supply need, it might well provide sufficient information to significantly effect the price demanded by such supplier and thus the position of the ESCO in the competitive marketplace.

distinguish the facts of the present case from those in Trade Secret 06-1, 08-1 or 09-1.

²² Trade Secret 08-1 (May 19, 2008), p. 5, Request for a Copy of the Unredacted ESCO Gas Flow-Thru Data Reports for November 2007 and January 2008.

²³ "Although the competitive market has grown into a robust market for non-residential customers and a sizeable market for residential customers, the need for regulatory oversight has also grown as a result of legislative amendments to the Public Service Law and as questionable marketing practices by some ESCOs have developed." UBP Order, p. 10.

Conclusion

While I cannot conclude that public disclosure of the information in question will forever be likely to cause substantial injury to the competitive position of ESCOs, it is my opinion that current circumstances are similar to those existing at the time Secretary Brillling made her determination in 2006 such that the rationale set forth therein remains pertinent. Moreover, I am persuaded that disclosure of the highly disaggregated information at issue would be likely to cause substantial competitive injury to ESCOs because of the higher prices energy suppliers would almost certainly demand as a result of the knowledge thereby gained. I therefore conclude that in this instance the ESCOs and Utilities have met the burden of proof they bear pursuant to POL §89(5)(e).

Review of my determination may be sought, pursuant to POL §89(5)(c)(1), by filing a written appeal with Jaclyn A. Brillling, Secretary, at the address given above, within seven business days of receipt of this determination. Unless a contrary showing is made, receipt will be presumed to have occurred on March 16, 2010 (because this letter is being served by e-mail), so the deadline for the receipt of any such written appeal is March 25, 2010.

Very truly yours,

Steven Blow
Records Access Officer

cc: Robert J. Freeman, Executive Director,
Committee on Open Government