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March 4, 2010

Mr. Steven Blow
Records Access Officer
New York Public Service Commission
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Albany, NY 12223-1350
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RE: Request for Records Showing 2009 Breakdown of Revenue and Number of Residential Customers for Gas & Electric per ESCO's per Utility Company

Dear Mr. Blow:

The National Energy Marketers Association (NEM)¹ hereby submits these letter comments requesting that the records showing 2009 breakdown of revenue and number of residential customers for gas & electric per ESCO per utility company, as requested by Carmen Martinez, be excepted from disclosure.

Under Section 87(2)(d) of the Freedom of Information Law (FOIL), an agency, “may deny access to records or portions thereof that” . . . “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.” In determining whether the requested information should be excepted from disclosure in other recent similar Trade Secret cases, this Commission has applied the two-prong test set forth in Encore College Bookstores, Inc. v. Auxiliary Service Corporation, 87 N.Y.2d 410 (1995), that the information submitting entities be subject to actual competition and whether the disclosure of the information would be likely to cause substantial competitive injury to the competitive position of the subject enterprise.

In both of the Commission’s determinations in Trade Secret 06-1 and Trade Secret 08-1, it was found that requests for unredacted ESCO gas flow-thru data reports should be excepted from disclosure. Specifically, “disclosure of a list of ESCOs, with total number of customer [sic] 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

¹ NEM is a non-profit trade association representing both leading suppliers and major consumers of natural gas and electricity as well as energy-related products, services, information and advanced technologies throughout the United States, Canada and the European Union. NEM's membership includes independent power producers, suppliers of distributed generation, energy brokers, power traders, global commodity exchanges and clearing solutions, demand side and load management firms, direct marketing organizations, billing, back office, customer service and related information technology providers. NEM members also include inventors, patent holders, systems integrators, and developers of advanced metering, solar, fuel cell, lighting and power line technologies.

geographic areas in the State.”² While the requested information in the instant case differs from that sought in Trade Secret 06-1 and Trade Secret 08-1, NEM submits that the same reasoning supports a determination that ESCO-specific revenue and residential customer information should be excepted from disclosure under the test set forth in Encore.

Actual Competition

As noted in your February 19, 2010, letter in the instant matter, the Commission recently made a statement as to the maturity of the ESCO retail markets which bears directly on whether “actual competition” exists to warrant an exception from disclosure under Encore. In October 2008, the Commission found that, “the competitive market has grown into a robust market for non-residential customers and a sizeable market for residential customers.”³ The Commission’s finding supports a determination here that actual competition exists amongst the information submitting entities in the subject inquiry.

Likelihood of Substantial Competitive Injury

The Encore Court noted that the policy behind POL §87(2)(d) is, “to protect businesses from the deleterious consequences of disclosing confidential commercial information, so as to further the State’s economic development efforts and attract business to New York.” The nature of the requested information in this case is confidential and intrinsically linked to energy marketers competitive positioning in the marketplace. Indeed, the revenue data is in the nature of tax information, which is subject to a high standard of protection from disclosure. Consequently, there is a strong likelihood of substantial competitive injury attendant with the release of this proprietary information of energy marketers.

Moreover, requiring disclosure of this ESCO-specific information imposes a degree of political, financial and business risk that was never factored into the business models of unregulated energy marketers. As such, disclosure of the requested information could have a chilling effect on competitive entry into the New York market. Information of this nature has been requested on a number of other occasions and the Commission has properly excepted the information from disclosure. However, in the absence of a more formal on-going Commission determination that the information should not be disclosed, we are concerned about the impact on future market entry and participation by ESCOs in New York.

When the Commission decided how to implement the Temporary State Assessment under 18-a it determined that the appropriate manner to estimate ESCO revenues for that purpose was to multiply the utility’s average commodity price by the known amount of electricity or gas delivered to ESCO customers. The Commission found this was a reasonable and expedient manner of determining ESCO revenues, particularly because, “no other direct source of the information is readily available, due to the fact that ESCOs are not required to file the information with the Department of Public Service or with utilities.”⁴ NEM submits that this strongly demonstrates the “economic windfall” that the

² Trade Secret 06-1 (October 20, 2006), and Trade Secret 08-1 (May 19, 2008).

³ Case 98-M-1343, Retail Access Business Rules, 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), page 10.

⁴ Case 09-M-0311, Order Implementing Temporary State Assessment (issued June 19, 2009), page 25.

Encore Court was concerned with, wherein a competing entity under a FOIL request would potentially be able to “obtain the requisite information without expending its resources, thereby reducing its cost of business and placing [competitors] at a competitive disadvantage.” This further demonstrates the substantial competitive injury that ESCOs would incur should the revenue and residential migration data not be excepted from disclosure, when as here, there is no other direct source of the information readily available.

NEM submits 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. The Commission currently publishes on its website marketer migration reports that set forth migration statistics in an aggregated fashion by utility and customer type. Additionally, the Commission also makes 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.⁵ NEM submits that this is a de facto ruling by the Commission that data of the specificity and granularity as that requested here, ESCO revenue and residential migration data, should not be subject to disclosure.

For the foregoing reasons, NEM urges the Commission to except the requested information from disclosure because of the substantial competitive injury it would impose on ESCOs in the New York market.

Respectfully submitted,

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⁵ Cases 06-M-0647 and 98-M-1343, Order Adopting ESCO Price Reporting Requirements and Enforcement Mechanisms (issued November 8, 2006).