

STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION

CASE 09-E-0715 - Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of New York State Electric & Gas Corporation for Electric Service.

CASE 09-G-0716 - Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of New York State Electric & Gas Corporation for Gas Service.

CASE 09-E-0717 - Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of Rochester Gas and Electric Corporation for Electric Service.

CASE 09-G-0718 - Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of Rochester Gas and Electric Corporation for Gas Service.

RULING DENYING REQUEST FOR CONFIDENTIALITY

(Issued November 24, 2009)

DAVID L. PRESTEMON and MICHELLE L. PHILLIPS,  
Administrative Law Judges:

In a letter dated October 19, 2009, (October 19 Letter) New York State Electric & Gas Corporation (NYSEG) and Rochester Gas and Electric Corporation (RGE) (collectively the Companies) requested confidential status pursuant to Commission Rules 6-1.3 and 6-1.4 for information they submitted in response to a discovery request from the Department of Public Service Staff designated DPS-8. The information is included in work papers for which the Companies previously requested confidential treatment in a letter to the Commission's Records Access Officer dated September 17, 2009. The work papers support exhibits to the Companies' rate filings designated NYSENGSP-3 and RGEENGSP-3. The Companies also requested confidentiality for these

exhibits in their September 17, 2009, letter.<sup>1</sup> This Ruling applies to both the work papers and the exhibits.

The information in the work papers and exhibits that is the subject of the Companies' request is incorporated in a spreadsheet-based model the Companies used to forecast their monthly cost of gas for 2009, 2010 and 2011. It comprises model inputs for gas commodity costs, pipeline transportation and storage charges, financial hedging costs, and system throughput, and the calculations by which the inputs are combined to produce the weighted average monthly and annual gas cost forecasts.<sup>2</sup>

In support of their request, the Companies initially contended that public disclosure of the information "would provide the Companies' competitors [an] unfair economic or competitive advantage" by allowing them:

to ascertain unfairly the Companies' cost of doing business and their patterns and parameters in negotiating prices for gas, which, in turn, could be used to gain unfair bargaining advantage over the Companies.<sup>3</sup>

Release of the information, they said, could harm their hedging programs because competitors could "estimate the Companies' commodity cost of gas," and then with that "knowledge of the Companies' business operations and strategies ... improperly could attempt to alter their own hedging strategies and price

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<sup>1</sup> The September 17, 2009, letter was referred to us by the Records Access Officer after our assignment to this case. The letter requested confidential status for a list of nine items. Exhibits NYSENGSP-3 and RGEENGSP-3 were item 1 on the list; the work papers for those exhibits were item 2.

<sup>2</sup> Initially, the request also encompassed the output of the model - the forecast monthly average cost of gas. As discussed below, the Companies have clarified that they did not intend those numbers to be confidential.

<sup>3</sup> October 19 Letter, p. 3.

offerings ... to the financial detriment of the Companies."<sup>4</sup> Finally, the Companies noted that that the information they seek to protect is not normally made available to the public, reflects a significant investment of specialized staff time and could not be replicated without substantial expense, work, and cooperation from NYSEG and RG&E.

Because we initially had some confusion as to whether we had been provided all the information covered by the confidentiality request, and whether redacted copies of the documents had been provided to all parties, we sent an e-mail message to the Companies on October 20, 2009, requesting clarification. In that message, we also asked for responses to three questions about the filing. Paraphrased, those questions were:

1. What competitors would gain an unfair advantage over the Companies if the information were released, and how would that translate into a negative impact on Company earnings or customer rates?
2. How are the Companies' interests in confidentiality different from those of National Grid which regularly publishes its gas cost forecasts on its website?
3. If the advantage gained by competitors' knowing the Companies' hedging strategies enables them to offer lower prices to consumers, what harm is being addressed by the confidentiality request?

In a letter to us dated November 2, 2009 (November 2 Letter), the Companies acknowledge some problems with the initial filing, state that they are providing all parties with redacted versions of the attachments to DPS-8, and resubmit their information to us in a manner that clarifies what is

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<sup>4</sup> October 19 Letter, pp. 3-4.

subject to the request for confidentiality and what is not. They also respond to our questions.<sup>5</sup>

In addressing our request for an explanation of the potential harm that might result from disclosure of the gas pricing model (question 3), the Companies clarify that their October 19 letter should have read "to the financial detriment of the Companies' customers," rather than "to the financial detriment of the Companies." They acknowledge that if the model information were disclosed, NYSEG and RG&E "would not be harmed to the extent all of their costs are recovered through the gas supply charge."<sup>6</sup> Rather, they say, it is competition, generally, and customers, who could be harmed.

The basis for the assertion of harm to competition is set out in the Companies' response to question 1. There they say that "it is possible" that gas marketers could use knowledge of the details of the gas pricing model "to discern the Companies' commodity cost of gas and hedging practices."<sup>7</sup> This, they contend, would enable those marketers "to determine the optimal times to add or drop customers as well as the amounts to charge customers," and:

to determine when there are potential opportunities for increased marketing activities to attract customers or encourage customers to migrate back to the Companies.<sup>8</sup>

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<sup>5</sup> In answer to question 2, the Companies point out that National Grid provides only its forecast of the monthly cost of gas and that they are not requesting confidential status for that information, which is, in fact, clearly shown on the redacted public version of their response to DPS-8 as resubmitted with the November 2 Letter.

<sup>6</sup> November 2 Letter, p. 5.

<sup>7</sup> November 2 Letter, p. 3.

<sup>8</sup> November 2 Letter, p. 4.

In addition, the Companies assert that disclosure of the model information is "inconsistent with the development of fair, rational and economically efficient markets," and "could disrupt the gas supply market to the detriment of New York customers."<sup>9</sup> This, they say, is because a marketer participating in this proceeding "could unfairly gain a competitive advantage" over marketers who do not participate.

The November 2 Letter implies, but does not expressly state, that the Companies are requesting that the pricing model information be withheld from marketers even if they have agreed to be bound by the Protective Order we adopted in our Ruling on Procedure, Schedule and Protective Order issued October 23, 2009 (Procedural Ruling). In response to an inquiry from us, the Companies state that this is, in fact, the relief they are seeking (described in our Procedural Ruling as a request to restrict access).<sup>10</sup>

#### DISCUSSION

No party has yet objected to the Companies' request for confidentiality for its gas pricing model information. In our Procedural Ruling, we said that we would normally not make the determination of entitlement to confidential status required by Rule 6-1.4(b)(1) unless we received such an objection.<sup>11</sup> We also said, however, that we might reject requests for confidentiality even in the absence of an objection if they were "inadequately supported by the accompanying brief."<sup>12</sup> Despite our

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<sup>9</sup> Ibid.

<sup>10</sup> Procedural Ruling, p. 4.

<sup>11</sup> Procedural Ruling, p. 3.

<sup>12</sup> Ibid.

having given the Companies a second chance to explain the basis for their request, this is such a case.<sup>13</sup>

The Freedom of Information Law (FOIL) requires State agencies to make information they receive available to the public unless a specified exception applies.<sup>14</sup> The exception relied upon by the Companies provides that an agency may deny access to records which, "if disclosed would cause substantial injury to the competitive position of" the commercial enterprise that made them available.<sup>15</sup> The Companies state, however, that disclosure of the gas pricing model information would not harm NYSEG or RG&E.<sup>16</sup> The exception does not apply. The information must be disclosed.

Apparently in anticipation of this conclusion, the Companies suggest that the absence of "statutes or regulations specifically excepting the Confidential Information from disclosure ... is not dispositive."<sup>17</sup> In support of this contention, they cite only the granting of confidential status to certain financial forecasts and related financial information that was included in a ruling on a protective order issued by the presiding Administrative Law Judge (ALJ) in a proceeding

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<sup>13</sup> In our Procedural Ruling, we stated that there would normally be no such second chances, and we want to emphasize here that we will apply that rule going forward. This request for confidentiality however, was received four days before that ruling was issued.

<sup>14</sup> "Each agency shall ... make available for public inspection and copying all records" (emphasis supplied). POL §87(2).

<sup>15</sup> POL §87(2)(d).

<sup>16</sup> We accord no significance to the proviso, "to the extent all of their costs are recovered through the gas supply charge." We know of no reason why that would not be the case, and the Companies have suggested none.

<sup>17</sup> October 19 Letter, p. 4.

involving the acquisition of KeySpan Corporation by National Grid PLC.<sup>18</sup>

Even if that ruling were binding precedent, which it is not, it does not stand for the proposition for which it is cited by the Companies. In considering the various pending requests for confidential status, the ALJ in the National Grid/KeySpan case made it clear that:

all information in Commission proceedings must be public unless the party requesting protection can establish conclusively that such treatment is warranted pursuant to one or more of the exceptions specified in Public Officers Law (POL) §§87(2)(a) through (j).<sup>19</sup> (emphasis supplied)

He added that "all the criteria for one or more of the POL exceptions must clearly be met before protection is granted."<sup>20</sup> Therefore, regardless of the merits of the ALJ's ultimate conclusions on the entitlement of certain financial information to confidential status, it is clear that they were based on his finding that one or more of the exceptions defined in the Public Officers Law "clearly" and "conclusively" applied. The ruling does not stand for the proposition that we have the authority to carve out new exceptions to the Freedom of Information Law that have not been defined by the legislature.

Even assuming we could consider the impact of disclosure on competition generally, rather than on the "competitive position of the subject enterprise" as the law prescribes, we would still not grant the Companies' request. First, the assertion that knowledge of the utilities' commodity

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<sup>18</sup> Case 06-M-0878, Joint Petition of National Grid PLC and KeySpan Corporation for Approval of Stock Acquisition and other Regulatory Authorizations, First Permanent Protective Order (issued November 9, 2006).

<sup>19</sup> Id., p. 8.

<sup>20</sup> Ibid.

costs and hedging practices could enable marketers to change their own hedging and pricing practices to the detriment of consumers is completely unsupported by any information establishing a link between the knowledge and the harm. Certainly, it is hard to imagine that marketers stand to gain anything by deliberately setting their prices above those of the Companies, and if they deliberately set them lower, it is difficult to see how that is harmful to their customers.

It is equally unclear how it would be harmful to customers or competition for marketers to have a better sense of when to actively pursue new business and when not. One would expect sales to pick up when marketers are able to offer good prices to customers, and to tail off when they cannot. That is fairly fundamental to all price-based competition.

Finally, the argument that marketers participating in this proceeding and receiving responses to information requests will "unfairly gain a competitive advantage" over those who do not, is simply wrong. If marketers who expend time and resources participating in these cases are able to learn of public information that non-participating marketers may not know about, any competitive advantage they gain from their efforts is fairly earned. This is no different than the advantage gained by a marketer who reads and studies utilities' tariffs over those who do not. Our obligation is to assure that our proceedings are open to all interested parties. It is not our responsibility, nor is it consistent with the requirements of FOIL or with support for competitive markets, for us to deny information to parties who actively seek it just because those parties have competitors who may not make the same effort.

CONCLUSION

The Companies' request for confidential treatment of information contained in the attachments to information request DPS-8, the corresponding work papers supporting Exhibits NYSENGSP-3 and RGEENGSP-3, and the exhibits themselves, is denied. However, because the harm postulated by the Companies to result from disclosure of this information to marketers could not be undone by a decision overturning this ruling, we will grant the request for restricted status. Until the information has been publicly disclosed by the Companies or has lost its protected status under the Commission's Rules, it may not be disclosed to natural gas marketers even if they have agreed to be bound by the Protective Order.

Pursuant to Rule 6-1.4(d)(1), this determination may be appealed to the Secretary of the Commission within seven business days. All parties are reminded that the information that is the subject of this ruling remains protected from disclosure under the Commission's Rules. It may not be used or revealed except in accordance with the Protective Order issued in this case "until 15 days after entitlement to confidential status has been finally denied or such further time as ordered by a court." (Rule 6-1.3(c)(5))

(SIGNED)

DAVID PRESTEMON

(SIGNED)

MICHELLE PHILLIPS