

**STATE OF NEW YORK
PUBLIC SERVICE COMMISSION**

**Proceeding on Motion of the Commission
as to the Rates, Charges, Rules and Regulations
of Niagara Mohawk Power Corporation
d/b/a National Grid**

CASE 12-E-0201

**Proceeding on Motion of the Commission
as to the Rates, Charges, Rules and Regulations
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d/b/a National Grid**

CASE 12-G-0202

**MEMORANDUM OF THE PUBLIC UTILITY LAW PROJECT
OF NEW YORK, INC., IN OPPOSITION TO MOTION OF
RETAIL ENERGY SUPPLY ASSOCIATION FOR
CONFIDENTIALITY DETERMINATION**

Introduction

The Public Utility Law Project of New York, Inc. (“PULP”), an active intervenor party in this proceeding, is a nonprofit organization representing the interests of utility consumers in matters affecting universal service, affordability, and consumer protection.¹ The inability of many lower income customers to afford gas and electric service is a significant problem. To illustrate, in July 2011,

- 240,848 Niagara Mohawk customers were more than 60 days in arrears,
- they owed a total of \$243,002,020,

¹ PULP was formed in 1981 to promote and defend the legal rights of utility consumers, *inter alia*, by educating the public about rates for utility service, conducting research on the legal rights of utility consumers, and litigation in the public interest with a primary emphasis on the rights of low income utility consumers.

- 94,713 customers were sent Final Termination Notices,
- 96,881 deferred payment agreements (“DPAs”) were in effect,
- 31,047 customers defaulted in making payments under their DPAs,
- 20,757 customers were “eligible for field action”, i.e., possible termination, and
- service was terminated to 6,138 customers as a bill collection measure.

Affordability of its service is recognized as an issue in Niagara Mohawk’s initial filed testimony and exhibits, which addresses current rate structures for low-income customers, and low-income programs. In the course of conducting discovery as PULP made numerous Information Requests (“IRs”) relating, *inter alia*, to Niagara Mohawk d/b/a National Grid’s (“Niagara Mohawk’s”) practices, policies and tariffs regarding its low-income customers, and sought data relating to customer arrears and the interruption of service to customers as a measure to collect unpaid arrears.

In a situation where many customers are having difficulty paying their bills, any means of lowering bills, whether it be through rate design changes, low income assistance programs, energy efficiency measures, or any other means are of obvious interest. The New York State Public Service Commission (“PSC” or “Commission”) tells utility customers that they might save money by arranging for unbundled “supply” of electricity and natural gas from alternative companies.

History of Electric Competition

The [PSC] opened the State's electric industry to competition. * * * * The PSC approved utility plans that give electric customers access to new energy suppliers known as energy service companies, or "ESCOs." The plans require the utilities to

offer retail choice to customers who want to shop for electricity and related services. * * * * *In a competitive market, electricity prices should be lower than they would be under government regulation.* Competition should also produce innovation and new technologies that promote new services. You as a consumer, and the state as a whole, will benefit.

Savings

You could save money by shopping for lower cost power from an ESCO. It is important to compare the prices offered by any supplier who sells electricity and to know what you are signing up for.

*Energy Choices - The Facts from the PSC, (emphasis supplied).*² Niagara Mohawk has a program to encourage its customers to buy ESCO service, which it calls “The New Choices® Program” (“New Choices”). According to Niagara Mohawk,

Highlights

The New Choices® program is aimed at promoting greater participation in the competitive retail energy markets among residential and small commercial electric and gas customer classes. The objective of the program is to encourage customers currently taking supply from National Grid to explore the competitive energy market. This program provides you with a one-time offer of 7% off the energy supply costs you would have otherwise paid National Grid for a two month introductory period. You are free to designate a participating supplier you would like to sign up with, or let National Grid randomly select a participating supplier for you. * * * *

Why is National Grid promoting a program like New Choices®?

This program offers you the opportunity to try the competitive market for two months, risk free. National Grid believes that competition for electricity and gas supply will produce more choices than traditional regulation. National Grid is committed to finding ways to best foster the migration of customers to alternate suppliers.

What are the highlights of the New Choices® program?

- New Choices® is a one-time introductory program that offers a guaranteed 7% discount on gas and electric supply costs for a two-month period.
- If you sign up both electric and gas services, you will receive the discount on each (7% off electric and 7% off gas).
- You can choose a supplier from the list of participating suppliers, or have National Grid randomly select one for you.
- Savings beyond the introductory period are not guaranteed

² <http://www.dps.ny.gov/energychoices.htm> (Accessed August 26, 2012).

- Once you sign up, you will receive a letter from National Grid confirming your participation in the program.
- After enrollment, the supplier will send you a sales agreement that will contain the pricing for both the introductory period and for the period after the introductory period. Terms and pricing offers will vary by supplier.
- You have three business days from receipt of the sales agreement to cancel the sales agreement by contacting National Grid or the supplier. If you do this, you will not receive the introductory period discount.
- If you want to cancel your participation after the introductory period, you can contact the supplier or National Grid directly to cancel further participation in the program. You need to make this request at least fifteen days prior to their scheduled read date at the end of the second month or fifteen days prior to the first of the month for gas. You may choose a different supplier or return to National Grid for electricity and/or gas supply.
- You can receive only one discount per service per the life of the account.
- You will get one bill from National grid and make only one monthly payment to National Grid. National Grid will pay the supplier for you.

*The New Choices® Program - Frequently Asked Questions.*³ According to ESCO migration statistics published by the PSC, 118,529 of 542,779 National Grid's natural gas customers, or 21.8%, bought ESCO service in March 2011(the latest monthly report available online).⁴ Of its 1,487,978 residential electric customers, 299,121, or 20.1%, bought ESCO service in January 2012, (the latest monthly report available online).⁵ Thus, at the same time many customers are experiencing difficulty paying their bills, a significant portion of Niagara Mohawk's customers, consistent with the advice and exhortation of the PSC and Niagara Mohawk, are trying ESCO

³ http://www.nationalgridus.com/niagaramohawk/non_html/new_choice_faq.pdf (accessed August 25, 2012).

⁴ NY PSC, *New York Natural Gas Retail Access Migration Data for March, 2011*, http://www.dps.ny.gov/Gas_Migration_Web_Report_mar11.pdf (Accessed August 25, 2012).

⁵ NY PSC, *New York Electric Retail Access Migration Data for March, 2012*, [http://www3.dps.ny.gov/W/PSCWeb.nsf/96f0fec0b45a3c6485257688006a701a/441d4686df065c5585257687006f396d/\\$FILE/Electric%20Migration_3.2012%20rev.pdf](http://www3.dps.ny.gov/W/PSCWeb.nsf/96f0fec0b45a3c6485257688006a701a/441d4686df065c5585257687006f396d/$FILE/Electric%20Migration_3.2012%20rev.pdf) (Accessed August 25, 2012).

service.

Also, a significant number - 62,633 - quit ESCO service and returned to Niagara Mohawk for full service in 2011; in the four years 2008 - 2011, 219,822 customers returned; and in 2012 to date, approximately 5,000 customers per month return.⁶ Reasons for these switch-backs from ESCO service have not been studied by Niagara Mohawk.⁷

Some of PULP's IRs seek information relating to Niagara Mohawk's customers who buy unbundled natural gas or electricity supply service from ESCOs. In its Response to PULP IR-108, Niagara Mohawk indicated that its customers who bought from ESCOs were sent 377,736 Final Termination Notices in 2011, averaging 31,478 per month.⁸

In PULP IR-90, PULP asked Niagara Mohawk what percentage of its ESCO customers received separate bills from ESCOs and what percentage received bills from Niagara Mohawk.

Niagara Mohawk responded that

Based on the May 2012 Electric Migration Report, 99% (257,046) of Residential Customers in NMPC are under the One Bill Purchase of Receivables Program. Residential customers whose bills are sent separately by the ESCO are less than 1% (1,839) of total Residential Customers in Niagara Mohawk.

Based on the August 2012 Gas Migration Report, 99% (130,901) of Residential Customers in NMPC are under the One Bill POR Program. Residential customers whose bills are sent separately by the ESCO are less than 1% (1,240) of total

⁶ Response of Niagara Mohawk to PULP IR-101.

⁷ "The Company does not have any analysis or report regarding the reasons why customers return from ESCO commodity service to full service from Niagara Mohawk." Response of Niagara Mohawk to PULP IR 102.

⁸ Because ESCO customer selection hypothetically could tilt toward those also likely to default in paying their bills, it cannot be concluded from this datum whether these payment-troubled customers receiving service termination threats were nonetheless receiving a benefit of lower charges through ESCO service.

Residential Customers in Niagara Mohawk.

In PULP IR-91, Niagara Mohawk was asked to provide "any internal analysis of whether residential customers receiving commodity service from ESCOs whose charges are billed by Niagara Mohawk paid more or less than full (bundled) service customers for their electric or gas service for 2008 through 2011 and monthly for 2012 to date." In its IR 92, PULP asked a similar question: whether Niagara Mohawk had analyzed whether its *low-income* customers who subscribe to ESCO service paid more or less than they would have paid had they not switched from Niagara Mohawk to an ESCO for supply service.

Niagara Mohawk responded to PULP IR 91 and 92 with a tabular report which shows the differences between Niagara Mohawk's bills to customers who had bought supply from ESCOs and what their charges would have been had the customer not switched, for two months: July and December 2011. The Response shows, *inter alia*, for each ESCO, the total "delta" (the difference, positive or negative) by which the ESCO customers owed less or more to Niagara Mohawk in comparison to what their bills would have been had they received full service from Niagara Mohawk, and the average difference in charges per customer for each of the two months. *Significantly, this analysis does not contain the name of any ESCO or the rates of any ESCO.*⁹

In its answer to PULP IR 91, Niagara Mohawk cautioned that no conclusions could be drawn from the two months sample and that more data would be needed to compare Niagara Mohawk's bills to customers who bought supply from ESCOs with what the company's bills

⁹ Charts illustrating the data provided under IR-91 are attached (For ALJs only).

would be for full service.¹⁰ Niagara Mohawk also indicated, in its response to PULP IR-91, that its billing system calculates a shadow bill of what the ESCO customer's bill would be if she were a full service Niagara Mohawk customer, so that whenever service is suspended for nonpayment of charges including those for ESCO service, a payment plan can be offered based on the "lesser amount" required to be calculated under the Home Energy Fair Practices Act ("HEFPA").¹¹

Following up, PULP requested that Niagara Mohawk provide a "comparison of single bill residential ESCO natural gas and electric service with residential bundled service from National Grid for the most recent 24 month period." PULP IR No. 107. The Response to IR-107 has been held in abeyance.

Charts illustrating the data provided under IR-91 are attached (For ALJs only).

RESA's Motion to Bar Disclosure

The Retail Energy Supply Association (RESA),¹² a party to the proceeding, seeks to bar

¹⁰ "It should be noted that looking at single points in time cannot provide a complete answer to the question of whether customers are paying more or less from taking service from an ESCo. For a complete study, the period of time would need to reflect multiple cycles and consider the terms of individual ESCo contracts with customers." Response of Niagara Mohawk to PULP IR-91.

¹¹"Such suspension shall end * * * upon the receipt of payments by or on behalf of the customer to the terminating utility such that the amount paid by such customer to the terminating utility plus the amount previously paid the terminating utility plus any other charges paid to the utility providing distribution service during the period when such customer's arrears accrued is equal to or greater than the amount such customer would have paid if the entire utility service had been obtained from the utility providing distribution services during such period. PSL § 32 (5)(d).

¹² RESA's members include: Champion Energy Services, LLC; ConEdison Solutions; Constellation NewEnergy, Inc.; Direct Energy Services, LLC; Energetix, Inc.; Energy Plus Holdings LLC; GDF SUEZ Energy Resources NA, Inc.; Green Mountain Energy Company; Hess Corporation; Integrys Energy Services, Inc.; Just Energy; Liberty Power; MC Squared Energy Services, LLC; Mint Energy, LLC; NextEra Energy Services; Noble Americas Energy Solutions

disclosure by Niagara Mohawk of the information requested by PULP in its IR-91 and IR-107.¹³ Relying upon several prior Commission orders and letters from the Commission Secretary and FOIL officer, and the Commission regulations governing the release of information in its possession under the Public Officer's Law, RESA moved pursuant to Section 6-1.3 of the Commission's rules (16 NYCRR § 6-1.3) for a ruling that the information requested by PULP and provided in Niagara Mohawk's Response to IR-91 is not disclosable. RESA maintains that the information requested - including the portion provided in Niagara Mohawk's response to PULP IR-91- is "private confidential billing information" which should be afforded "trade secret" status.¹⁴ RESA motion, p. 2.

LLC; PPL EnergyPlus, LLC; Reliant; Stream Energy; TransCanada Power Marketing Ltd. and TriEagle Energy, L.P..

¹³ Although RESA does not expressly seek to bar the information requested in PULP IR-92, relating to the comparison of charges experienced by low income customers who chose ESCO service, PULP assumes this was an oversight, and that RESA also intends, by its motion, to deny release of all the information relating to low income customers that is combined with Niagara Mohawk's answer to IR-91.

¹⁴ RESA raises claims of confidentiality under a contract between ESCOs and Niagara Mohawk, and under Commission regulations. Under New York common law, "[a] trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it." *Integrated Cash Management Serv., Inc. v. Digital Transactions, Inc.*, 920 F.2d 171 (2d Cir. 1990) (*citations omitted*). The Commission's regulations adopted to implement the Public Officer's Law (the Freedom of Information Law or FOIL) similarly provide that "[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 NYCRR § 6-1.3(a). The POL states that each agency shall 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...." POL § 87(2) (b), (c) (d) and (f). Accordingly, there is no difference in the definition of "trade secret" for purposes of RESA's non-regulatory claims for trade secret protection, the Commission's regulations, or the Public Officer's Law.

Pending their decision on RESA's motion, the ALJs directed parties not to divulge Niagara Mohawk's response to IR-91 (Niagara Mohawk's two month comparison of its actual charges to ESCO customers with what they would have been charged for full bundled Niagara Mohawk service), and asked Niagara Mohawk to defer answering PULP IR 107 pending a preliminary ruling on its possible relevance, in order to avoid inappropriate or inadvertent disclosure if the motion were to be granted. The ALJs also asked the parties to address the following particular issues:

In reviewing RESA's motion we have several questions that we would like answered, either in response to this email or included in the formal response to the motion.

Company

1. Has the Company responded to PULP IR No. 107? If yes, the Company should provide its response to us. The Company should also provide us with the response to PULP IR No. 91.¹⁵

PULP

2. How is the information sought by PULP IR Nos. 91 and 107 relevant or likely to lead to relevant information or how may it be used in cross-examination or the preparation of PULP's case? (16 NYCRR 5.1 and 5.8 (a)(1)).¹⁶

RESA

3. How does the Company's response to PULP IR Nos. 91 and 107 violate Section 14.7 of the Billing Services Agreement (attached to Motion)?¹⁷

4. Why would public release of the Company's response to PULP IR Nos. 91 and 107 potentially result in an unfair economic advantage to competitors of energy services companies? (16 NYCRR 6-1.3(b)(2))

5. How is the information provided in response to PULP IR Nos. 91 and 107 different from the type of information that is readily available on the

¹⁵ Niagara Mohawk distributed its Response to PULP IR-91 to parties on the service list.

¹⁶ PULP addresses these questions in this answer in opposition to RESA's motion.

¹⁷ In an August 27, 2012 email, RESA responded to the ALJ's questions. These responses are addressed *infra*.

Commission's Power To Choose web page, where customers can obtain price offers from multiple ESCOs for electric and/or gas commodity service?

Parties

6. Parties should let us know if they have released the Company's responses to PULP IR Nos. 91 or 107 to non-parties.¹⁸

As a consequence of RESA's motion, Niagara Mohawk's Response to PULP IR-91 is being withheld from public dissemination, and Niagara Mohawk is holding its Response to PULP IR-107 in abeyance pending a determination of the ALJs on RESA's motion.

Standard of Review

"Existence of a trade secret is a question of fact for the determination of the trier of fact, secrecy being a basic element." *Integrated Cash Management Serv., Inc. v. Digital Transactions, Inc.*, 920 F.2d 171 (2d Cir. 1990) (quoting 1 Milgrim on Trade Secrets Sec. 2.03, at 2-32 to 2-33 (1984)). The burden of proof is on the possessor to establish that its information is a trade secret that cannot be disclosed.

Information that comes into the possession of the Commission and Department of Public Service Staff, such as Niagara Mohawk's Response to PULP IR-91 which was provided to all parties in the case, including Department of Public Service Staff, is normally public and readily available upon request to the public, without any showing of necessity, under the Freedom of Information Law (FOIL). Accordingly, any restriction on availability of the information must pass muster under Commission regulations adopted to implement the Public Officers Law.

¹⁸ PULP's senior financial analyst and the expert witness retained to provide testimony received copies of IR-91 when Niagara Mohawk distributed it to persons on the service list. PULP provided a copy of Niagara Mohawk's Response to IR-91 to a state law enforcement official, and when the ALJs subsequently issued their directive, informed that official of the directive. PULP has not provided the information to any other person.

ARGUMENT

1. RESA Fails to Identify any Real Trade Secrets in the Information it Seeks to Suppress.

RESA's motion, inter alia, seeks an order directing Niagara Mohawk not to answer the challenged PULP IRs 91 and 107, and asks for a directive requiring retraction of the utility's previously provided Response to IR-91. Commission regulations require the putative holder of a trade secret to specify exactly what information it claims to be confidential, and allows for redaction only of information really necessary to maintain a genuine trade secret.¹⁹ RESA's motion did not attach the Response of Niagara Mohawk to PULP IR-91 which it seeks to suppress,²⁰ and did not identify the portions of that document which it deems to be confidential. In response to the ALJs' questions, RESA describes the information it seeks to suppress as follows:

In these interrogatories, PULP seeks release of long term comparative pricing information delineated by individual ESCO in the Niagara Mohawk service territory. The data included in the utility's compilation includes individual ESCO pricing, revenues, number of customers and number of low income customers.

Perusal of the Niagara Mohawk Response to IR-91, however, would immediately show that the information provided does not mention the name of any ESCO, it does not mention the price of any ESCO's services, nor any "comparative pricing information," and it does not state any ESCO's revenues. Rather, the information provided is basically a report on differences in the

¹⁹ "A party requesting confidential status shall submit the record containing such information to the presiding officer in electronic form or by mail *and shall clearly identify the portions of the record considered to be confidential.*" 16 NYCRR 6-1.4(a).

²⁰ The ALJs subsequently asked Niagara Mohawk to provide a copy of its Response to PULP IR-91, which the utility had provided to parties on the service list but not the ALJs, as is the routine procedure.

bottom line of bills that Niagara Mohawk sends to ESCO customers with the bottom line of the bills it would have sent if the customer were a full service Niagara Mohawk customer. It is not possible, from the face of the document or by inference from the data provided to ascertain the name of any ESCO or its prices.

Thus, RESA's claims are overblown and counterfactual, perhaps to foster a misapprehension that PULP is seeking data that in the past was not made available. As discussed below, the precedents invoked did not involve the type of data involved here.

2. RESA's Claim that Prior Letters and Orders Bar Release of the Information is Misplaced.

RESA claims that prior letters from the Secretary and FOIL officer, and prior Commission orders, have already decided that the information at issue in this case has been deemed confidential in the past and should be suppressed. None of the cited decisions and letters is directly applicable to this situation. We address them, starting with the cited orders.

The Commission Order in Case 98-M-1343 is Inapplicable.

RESA relies on the Commission's *2008 ESCO Marketing Order*²¹ which said that certain information received by the Commission regarding ESCOs should not be revealed. The Commission stated:

In response to the Commission's March 19, 2008 Notice, CPB and PULP believe that information on the number and type of customers that an ESCO serves, and

²¹ *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*, in Cases 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, (issued October 27, 2008) ("2008 ESCO Marketing Order").

the number of complaints filed against an ESCO should be made public. The ESCOs disagree, and in support of their argument cite an October 20, 2006 letter, in which Secretary Brilling stated that the disclosure of such customer information could cause substantial injury to the competitive positions of ESCOs, especially new market entrants and those with specific geographic marketing campaigns. We see no reason to adopt a different reasoning in this case. Accordingly, we will continue to maintain the confidentiality of the information which describes the numbers of customers served by each ESCO.

2008 ESCO Marketing Order, p. 26. In this case, PULP did not seek information regarding the number of customers who migrated to named ESCOs or the number of complaints against them. The Commission's policies regarding release of information regarding named ESCOs, initially protective of the nascent industry, evolved as the industry matured, and as larger numbers of customers migrate and more are affected by ESCO service. For example, the Office of Consumer Services now issues reports listing each ESCO by name and the number of complaints against them.²² And, as discussed more fully below, the Commission's Power to Choose website lists ESCOs by name and includes pricing information regarding each of them.

In marked contrast, the identity of each ESCO is masked in Niagara Mohawk's response to PULP IR #91, so there is no name of any ESCO on the information that was provided. PULP is not seeking to unmask the data, and has not sought further information regarding any named ESCO. The request for information in PULP IR #107, which has not been provided, does not seek any qualitatively different information – it only seeks more months of data than the two months data already provided in response to IR #91.

²²See *NY PSC Monthly Report on Consumer Complaint Activity*, June 2012, [http://www3.dps.ny.gov/W/PSCWeb.nsf/a8333dcc1f8dfec0852579bf005600b1/448c499468e952c085257687006f3a82/\\$FILE/June%202012%20MR.pdf](http://www3.dps.ny.gov/W/PSCWeb.nsf/a8333dcc1f8dfec0852579bf005600b1/448c499468e952c085257687006f3a82/$FILE/June%202012%20MR.pdf)

Secretary Brillling's 2006 Letter is Inapplicable.

In 2006, Secretary Brillling apparently reviewed a FOIL Request that sought disclosure involving the volumes and customers served by individually named ESCOs.²³ The Secretary determined that as disclosure of the information would "likely ... cause substantial injury to the competitive positions of ESCOs", the "specific information sought in the FOIL request should be exempted from disclosure." That is not the situation here, as Niagara Mohawk's information did not divulge the name of any particular ESCO, or any price of any ESCO, or the customer count of any named ESCO, and so any competitive concerns regarding information that would reveal the size, market position, competitive strength or weakness of a particular ESCO is simply inapplicable. As we discuss below, Niagara Mohawk's Response to IR-91 provided data comparing the charges it would impose for its full bundled service with the bottom line of bills it renders to customers which include its charges for receivables purchased from ESCOs, now owned by Niagara Mohawk.

The 2009 Decision of the Records Access Officer is Inapplicable.

RESA also relies upon a 2009 FOIL Ruling issued by Steven Blow, Records Access Officer, in which a request for disclosure of ESCO specific data was denied on the ground that it would engender competitive harm. That decision, however, simply harks back to the Commission's 2005 UBP Order and the Secretary's 2006 FOIL ruling, which also addressed the release of data regarding specifically named ESCOs, a situation simply not present here. Accordingly, RESA's effort to invoke confidentiality rulings in dissimilar factual situations is unavailing.

²³ A copy of the letter was not provided by RESA.

3. RESA's Contract Claim Under an Agreement for Billing Services and for the Purchase of Accounts Receivable (ABSPEAR) is Meritless.

Rather than identify any particular information in the Niagara Mohawk response to IR-91 that is really confidential or a trade secret, RESA instead argues that Response of Niagara Mohawk is based on "private confidential billing information"²⁴ that came to the utility from ESCOs confidentially, in the utility's "capacity as a billing vendor for the ESCO,"²⁵ as part of a "consolidated billing" arrangement whereby an ESCO customer, rather than receiving two bills, receives one bill from Niagara Mohawk which includes charges for ESCO service.²⁶

RESA supplied an Agreement for Billing Services and for the Purchase of Electric Accounts Receivable ("ABSPEAR") which it indicates is used by ESCOs and Niagara Mohawk to formalize the latter's billing practices with respect to receivables purchased by the utilities from ESCOs. RESA maintains that PULP is seeking a benefit that is barred by a provision expressly barring third parties from seeking any benefit under the ABSPEAR, and that the ABSPEAR "does not authorize [Niagara Mohawk] from to release or disclose any of the billing information provided to Niagara Mohawk by the ESCO."²⁷

There are several short answers to these claims. First, PULP seeks no information that

²⁴ RESA Motion, p. 1.

²⁵ RESA Motion, p. 3.

²⁶ As previously mentioned, more than 99% of the residential ESCO customers in Niagara Mohawk's territory receive such single bills, which are fully payable by the customer to Niagara Mohawk for all the service received from both the ESCO and Niagara Mohawk.

²⁷ RESA Motion, p. 2.

would be in an ABSPEAR, assuming there were one in the record with the blanks filled in.²⁸ The form ABSPEAR basically sets up the arrangement where an ESCO files its rates (“billing price determinants”) privately with Niagara Mohawk. Niagara Mohawk agrees to bill ESCO customers based on that rate, and on the billing date buys their receivables from the ESCO customer at a discount,²⁹ and then collects the full debt - now owed directly to Niagara Mohawk, not the ESCO - keeping the net value of the discount, after expenses, as a profit for its services.³⁰ The ABSPEAR basically allows the ESCO to state billing price determinants - i.e., its rates - twice every 30 days.³¹ PULP asked for no information about this procedure or these billing

²⁸ The BSA attached to RESA’s motion is blank and unsigned, and a footer indicates it is “Billing Services - Electric, Version 12/15/05. An internet search reveals a blank Gas Version dated December 2011 is at the Niagara Mohawk website, at http://www.nationalgridus.com/niagaramohawk/non_html/supplier_gas_onebill.pdf (Accessed August 27, 2012).

²⁹ ABSPEAR, p. 8.

³⁰ Niagara Mohawk’s 2011 annual report to the PSC indicates at page 42 that it received net revenue of \$3,774,736 from *electric* ESCO Third Party Billing services. See http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&ved=0CCIQFjAA&url=http%3A%2F%2Fdocuments.dps.ny.gov%2Fpublic%2FCommon%2FViewDoc.aspx%3FDocRefId%3D%257B4BF61C7C-E830-4D09-A4AC-B06F453F345F%257D&ei=ybc7UJC uMIj26AH3qoGwBA&usg=AFQjCNEsgae7M8SowYjIUBZ354Yqfm3_SQ&sig2=-tfde_hOgdy n-jB50AEc3Q, (Accessed August 27, 2012). The revenue Niagara Mohawk received from collection of ESCO receivables for *gas* services is not readily ascertainable from the report.

³¹ ABSPEAR, para. 2.3 This enables the ESCO to change its rates after making the required rate filing on the first of each month with the PSC for posting at the PSC Power to Choose website. PULP expresses no view here whether the ABSPEAR, which at page 3 purports to bind all ESCO customers, is just and reasonable, or whether the ability to deviate from filed prices and use of teaser promotional rates facilitates “bait and switch” tactics to induce customers to switch providers. On the latter point, see Testimony of Neil Fisher on behalf of Duquesne Light, opposing RESA proposals in a pending Pennsylvania proceeding.

determinants.³² To be sure, Niagara Mohawk uses the information in the ABSPEARS to calculate the amount *due to Niagara Mohawk* and of course it could not calculate the amounts owed without having the rate information. But what Niagara Mohawk provided in its Response to PULP IR-91 was merely information about the difference between the bills *Niagara Mohawk* charges and collects from customers who bought ESCO service and what the utility would normally charge a full service customers. All of this information is about *Niagara Mohawk's* charges, because the ownership of the charge shifts from the ESCO to Niagara Mohawk under the ABSPEAR. From the limited information provided in the Response to IR-91 regarding the “deltas” between ESCO service and bundled service, it is not possible to calculate the “billing price determinants” of the ESCOs, or their identities, which is the primary information that would be contained in an ABSPEAR.

RESA argues that nothing in the ABSPEAR authorizes Niagara Mohawk “to release or disclose any of the billing information provided to Niagara Mohawk by the ESCO.”³³ Even if one accepts that ABSPEAR billing information is a necessary precondition for calculating Niagara Mohawk’s total bills to its ESCO customers, and was at the root of Niagara Mohawk’s disclosure, and even if one accepts that the ABSPEARS do not expressly allow Niagara Mohawk

³² PULP expresses no view here whether the ABSPEARS are required to be filed publicly by Niagara Mohawk under Public Service Law 65, or whether the Commission should require Niagara Mohawk to file all ABSPEAR contracts affecting rates, under Public Service Law 66. See *MCI v. Public Service Commission*, 169 A.D.2d 143 (3d Dept. 1981) (requiring filing of contractually set rates).

³³ RESA Motion, p.2. In today’s submission to the ALJs’ question 3, RESA reiterates that “the [ABSPEAR] does not authorize the Company to release publicly or to any other party except the ESCO, any of the pricing data conveyed to the Company as part of its contractual obligation to perform billing services for the ESCO.”

to reveal its bills to ESCO customers, nothing in the ABSPEAR purports to forbid Niagara Mohawk from revealing a comparison of ESCO customer bills with bundled customer bills. Thus, the ABSPEAR is silent or at least ambiguous on the issue. In such circumstances, the failure of the ABSPEAR to address the issue should be construed against its drafters. See *Lauer v. N.Y Telephone Co.*, 231 App.Div.2d 126, (3d Dept. 1997).

Finally, even if it were assumed that the ABSPEAR was intended by the parties to it to bar the bill comparisons contained in the Niagara Mohawk response, a party cannot frustrate the operation of the open government laws with contract provisions that bar the release of otherwise available information about the level of charges for utility service. As the ALJs in this case recently ruled, “[c]onfidentiality promises between parties do not preempt the statutory requirement for disclosure of information,” quoting *Anonymous v. Board of Education*, 162 Misc. 2d 300 (S.Ct. 1994) (“[A]n agreement to keep secret that to which the public has a right of access under Article 6 of the Public Officers Law would be unenforceable as against public policy.”)³⁴

4. RESA Fails to Demonstrate that Release of the Information would Cause Competitive Injury.

In its motion, RESA lodged vague claims of potential competitive injury if the Response to PULP IR-91, and similar data for more months, were to be publicly known. The ALJs requested further elaboration, and RESA responded today, stating:

PULP seeks release of long term comparative pricing information delineated by

³⁴ *CASE 12-E-0201, etc., Ruling Denying Protection from Disclosure for Site Investigation and Remediation Expenses*, (Issued July 23, 2012) (ALJs Harriman and Stegemoeller).

individual ESCO in the Niagara Mohawk service territory. The data included in the utility's compilation includes individual ESCO pricing, revenues, number of customers and number of low income customers. This data can provide a competitor or prospective competitor with detailed information concerning the specific customer base, pricing patterns and behavior by existing ESCOs for a lengthy prior period. This type of information can be extremely useful in determining how to price a product, whether to enter a market and potential margins that can be achieved in this market. Therefore, disclosing this information can result in an unfair competitive advantage.

To be accurate, the information already produced by Niagara Mohawk in the Response to PULP IR-91 and sought in PULP IR-107 does not contain or call for the price of any ESCO service. It calls for information about the bottom line of bills. Without information about individual usage, it is not possible to derive the rate - or rates - actually used by any ESCO in any month or portion thereof. Likewise, there is no identification of any *individual ESCO* in the information produced and requested. The ESCO data is anonymous and information is provided only by a number, from 1 to 29. PULP has not sought information that would reveal the identities. This is a critical difference between the information at issue here and the information sought and denied in some prior instances relied upon by RESA, which involved the identity of named ESCOs and their prices.

5. Cognizable Competitive Injury Should not Occur if ESCOs are Actually Charging the Rates Reported Monthly to the PSC.

The ALJs propounded to RESA the following question:

How is the information provided in response to PULP IR Nos. 91 and 107 different from the type of information that is readily available on the Commission's Power To Choose web page, where customers can obtain price offers from multiple ESCOs for electric and/or gas commodity service?

RESA responded today, as follows:

On the PTC website, the ESCO submits the offerings that it has available for general applicability as of the first of each month. It does not cover offers and products

available for the remainder of the month, Further it does not incorporate long term historical pricing analysis comparing the ESCO charges to the utility charges for all customers in a class served by the ESCO. It is thus singularly limited in scope and does not attempt to publicly disclose the ESCOs entire pricing activity for a previous material historical period.

As previously discussed, what is at issue are total charges billed and collected by Niagara Mohawk, payable by customers to Niagara Mohawk, not to ESCOs, because the ESCOs have sold their receivables to Niagara Mohawk. The data belongs to Niagara Mohawk, not the ESCOs. While these total charges will depend partially on ESCO prices, they will also depend on volume of usage, and the information sought does not indicate either volume or price. Furthermore, the information sought regarding total charges to customers seeks aggregate data, and does not reveal the identity or usage of any particular customer, or the identity or price of any particular ESCO.

As indicated in the ALJ's question, ESCOs already divulge their individual rates monthly for publication at the PSC Power to Choose website. ESCO prices are not a secret, and if prices are not a secret, Niagara Mohawk's charges to customers based in part on those prices cannot be a confidential trade secret.

6. The Information Requested is Relevant

RESA argues in its Motion that the requested discovery is not relevant or material to the issues in the pending rate cases. The ALJs asked PULP to address the following question:

How is the information sought by PULP IR Nos. 91 and 107 relevant or likely to lead to relevant information or how may it be used in cross-examination or the preparation of PULP's case? (16 NYCRR 5.1 and 5.8 (a)(1)).³⁵

³⁵ Part 5.1 of the Commission's Rules provides: "Consistent with the limitations and procedures set forth in this part, parties shall fully disclose to each other, upon request, all information (including data, records, objects, and documents) relevant and material to a

A rate case places all of a utility's tariffs, rules, practices and procedures potentially at issue. PULP's questions are germane to the subject of how Niagara Mohawk can best address the serious affordability problem facing its low-income residential customers, many of whom face actual service termination or threats of service termination for non-payment of their bills. The Commission has previously approved low income rates and programs to begin to address the problem of large amounts of customer arrears, uncollectibles, service termination for collection purposes, and customer hardship, but these salutary efforts have not solved the problems or reduced them to a point of acceptability. Niagara Mohawk's initial testimony in part addresses the affordability issues and payment problems, and PULP expects to file testimony of its expert witness discussing, inter alia, affordability issues and remedies. As previously discussed above, the customers facing potential termination include many ESCO customers, approximately 31,000 of whom are threatened with service termination each month.

As previously indicated above, the Commission advises utility customers that it may be possible to save money by switching to ESCO service, and customers are exhorted by Niagara Mohawk to switch to ESCO service, with the utility promoting a program with ESCOs promising guaranteed short term savings for two months. If shopping for ESCO service can lower bills significantly over time, and not just for two months, this would be highly relevant, as successful

proceeding in which they are participating and any information likely to lead to such information.”

Part 5.8(a)(1) provides: “Discovery requests should be tailored to the particular proceeding and commensurate with the importance of the issues to which they relate. They should be limited to materials or information that: (1) the requesting party expects to use in cross-examination or in preparing its case; (2) are not already possessed by or readily available to that party; and (3) are not conveniently obtainable elsewhere. Unduly broad requests will not be allowed.”

shopping for a lower cost supply provider might result in savings that could ease low-income customer hardships, reduce uncollectibles, reduce overall arrears, and reduce intentional service interruptions for bill collection purposes. If ESCO service is shown to lower bills of payment troubled customers, it would also be relevant to the emphasis placed on other measures, such as the reduction of delivery rates for low income customers, or expenditures for energy efficiency.

On the other hand, if the answers to PULP's requests do not show customer savings over time from shopping for ESCO service, it would militate for other solutions, including, for example, improved low income rate structures, improved Niagara Mohawk customer assistance programs, improved referrals of payment troubled high usage customers to energy efficiency programs, measures to reduce reliance on service termination as a bill collection measure, and closer attention to the information and services Niagara Mohawk provides to customers regarding switching to ESCO service.

If some but not all customers enjoy significant savings from ESCO service, this may signal the need for better information to be provided by Niagara Mohawk to its customers to foster smart decisions. Such information may come at a cost. For example, PULP IR 108 inquires regarding the cost of Niagara Mohawk making a bill calculator available at its website so that customers, whether receiving ESCO service or not, might assess what Niagara Mohawk would charge for a given amount of usage, and compare that with what an ESCO charges, either before signing up for ESCO service or before deciding to continue it at critical junctures. Niagara Mohawk indicated that it could cost from \$400,000 to \$900,000 to create such a capability. Answers to PULP's IRs would be relevant to whether it would be worth it for customers to have better price comparison tools. If it appears that customers are making

economic choices without the suggested additional tools and information provided by Niagara Mohawk, that may be revealed in the Responses. On the other hand, if many customers are paying more for ESCO service, then it might warrant a closer look at what Niagara Mohawk is providing in the way of customer information and assistance and bill comparison tools.


These information requests elicit information that would reveal whether individual customer choice of an alternative energy supplier is a market solution now helping low-income customers - and others - to reduce their energy burdens. They are clearly relevant to testimony PULP expects to file relating to its proposals regarding low-income rates and programs. Also, they may be relevant to testimony yet to be filed, for example, by RESA or Staff, regarding their proposals for dealing with affordability programs or enhancement of retail competition.

Conclusion

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. For the reasons set forth above, PULP respectfully requests that RESA's motion be denied in its entirety, and that the ALJs issue a ruling declaring that the information requested in PULP IRs 91 and 107 is discoverable, is not a trade secret or commercially confidential, should not be given confidential status, and granting such other and further relief as is just and reasonable under the circumstances.

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Respectfully submitted,



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Attachment for ALJs Only: Charts illustrating the data provided under PULP IR-91