



February 1, 2016

RE: Case 12-M-0476 and Matters 14-02555 and 14-02554 - Disclosure of 2014 and 2015
Historic Pricing Information for Residential Service Provided By ESCOs.
Determination of Request for Confidentiality Pursuant to Public Officers Law §87(2)(d).

(Determination 16-01)

Dear Energy Service Companies (ESCOs) and representatives:

This letter is a Determination of the Department of Public Service (DPS) Records Access Officer (RAO) under Public Officers Law (POL) §89(5)(b)(3). It determines that certain information for which Energy Service Companies (ESCOs) doing business in New York State have requested confidential treatment under POL §87(2)(d) and 16 NYCRR §6-1.3, is not entitled to an exception from disclosure as trade secrets or confidential commercial information under the Freedom of Information Law (FOIL).¹

BACKGROUND

On February 25, 2014 the NYS Public Service Commission (PSC) issued the Retail Markets Order which provided for the disclosure of ESCO-utility bill and price comparison information.² The PSC directed the ESCOs to file certain historic pricing information, for dissemination to the public, consisting of quarterly reports including a separate average unit price for products with no energy-related value-added services for each of four groups of customers

¹ POL Art. 6.

² Case 12-M-0476, Proceeding on Motion of the Commission to Assess Certain Aspects of the Residential and Small Non-Residential Retail Energy Markets in NYS. Order Taking Actions to Improve the Residential and Small Non-residential Retail Access Markets (issued February 25, 2014) (Retail Markets Order). Only National Energy Marketers Association (NEM) stated that the publication of “highly confidential and proprietary pricing data identified by the Commission would undermine the marketplace and competitively injure ESCOs” during the proceeding. See *Id.*, Attachment A, at 22.

and by geographic area.³ A subsequent PSC Order, issued April 25, 2014, stayed the requirement for ESCOs to submit historic data for non-residential customers.⁴

The template prepared by DPS, which identifies and governs the data submittal requirements approved in the Retail Markets Order, obligates each ESCO serving residential customers to file, on a historical quarterly basis, a compilation that includes the following specific information and data:

1. Name of ESCO
2. Applicable Quarterly Period
3. Customer Service Class
4. Customer Service Type
5. For variable service, the average unit variable price provided to the customer, the associated volume taking such product further delineated by specific utility service territory and within any subset of the overall utility service territory.
6. For fixed rate service, the average unit fixed rate and associated term (3, 6, 9, 12, 24, 36, 48, 60 and 72 months) provided to customers, the associated volume taking each identified product further delineated by NYISO zone and by specific utility service territory and within any subset of the overall utility service territory.

The Order specifically states the PSC's intention "to publish comparative pricing information We anticipate development of a list of the average price billed for each ESCO, separately for consumers in specific geographic areas of a utility service territory. We expect to sort the list based on average price, and organize ESCOs into quartiles, based on the average price charged to customers in the historical period. For the category of variable priced products with no energy related value-added attributes, we anticipate that comparable information regarding utility charges will also be presented. . . . Publishing this comparative historic bill information will assist mass market consumers in assessing whether their current energy supplier meets their needs."⁵ There was never any mention in the Retail Markets Order or in the template itself that the template as developed by Staff would be published as described above.

Although only one party made an argument for confidentiality in the underlying proceeding, the majority of those ESCOs filing historic pricing information in accordance with the Retail Markets Order sought protection from disclosure with their first filing in the second quarter of 2014.⁶

³ The four original groups were: i) residential price fixed for a minimum 12 month period; ii) residential variable price; iii) small non-residential price fixed for a minimum 12 month period; and iv) small non-residential variable price. Id. at 17.

⁴ Case 12-M-0476, Order Granting Requests for Rehearing and Issuing a Stay (issued April 25, 2014).

⁵ Id., Retail Markets Order at 17.

⁶ Only NEM stated that the publication of "highly confidential and proprietary pricing data identified by the Commission would undermine the marketplace and competitively injure

On December 4, 2015, the RAO advised the ESCOs of Staff's intention to make the historic pricing information for 2014 and 2015 public as outlined in and directed by the Order.⁷ Since ESCOs have submitted such information to the RAO with a request for protection from disclosure under POL §§87(2)(d) and 89(5)(a) and 16 NYCRR §6-1.3, the RAO further informed the ESCOs that a Determination would be made pursuant to POL §89(5)(b)(3) regarding all requests for protection from disclosure as outlined above. Those ESCOs challenging disclosure were strongly urged to explain why the previous decisions of the RAO and Secretary are not dispositive of the issue.⁸ Companies were given ten business days in accordance with POL §89(5)(b)(2) to submit to the RAO a written Statement of the Necessity for such exception from disclosure.

On December 9, 2015, the Retail Energy Supply Association (RESA)⁹ sought an extension to submit a written Statement of Necessity to January 4, 2016. The RAO granted this request on the same date and applied it to all ESCOs.

On December 15, 2015, in response to the RAO's initial extension, the Impacted ESCO Coalition (IEC)¹⁰ sought an additional extension to submit its written Statement of Necessity to January 11, 2016. IEC also sought clarification of the RAO's December 4, 2015 letter, specifically "how and in what format will the historic pricing information be disclosed; will any data be aggregated; how will each ESCO be tied to its customer data; and will any data submitted by ESCOs be exempted from disclosure."

The RAO responded to IEC's request on December 16, 2015, seeking to clarify the points in IEC's December 15, 2015 letter by directing it to the PSC's Feb. 25, 2014 Order, page 17 (cited supra), which specifically states the intention to publish this information.

ESCOs" during the proceeding. See *Id.*, Attachment A, at 22. See also, N.Y. Pub. Off. Law §§87(2)(d), 89(5)(a) and 16 NYCRR 6-1.3

⁷ No FOIL request was received for these records; however, the statute and regulations allow the agency, on its own initiative, to determine whether such exception should be granted or continued. See POL §89(5)(b) and 16 NYCRR §6-1.3(e)(2).

⁸ The Retail Markets Order was cited in a subsequent Determination of the RAO and upheld on Appeal by the Secretary to the PSC; both writings denied confidential treatment to historic pricing information. See Matter 11-01661 and Matter 12-00172, DPS Records Access Officer Determination of Trade Secret 14-01, issued March 27, 2014; and Appeal of Trade Secret Determination 14-01, issued April 28, 2014.

⁹ RESA is a trade association founded in 1990 representing the interests of more than 20 retail energy suppliers including ESCOs in New York State. RESA is represented by Usher Fogel, Counsel. More information can be found at www.resausa.org.

¹⁰ IEC was formed in 2015 and represents small-to-medium sized licensed ESCOs, many of whom have their primary business in NYS. IEC is represented by Feller Energy Law Group, PLLC.

The letter further stated “Additionally, it should be noted that Staff is seeking that the information released will tie each ESCOs to its specific customer data, Staff is not seeking to release customer counts. I hope this information clarifies the intention of Staff in this regard.” The RAO also extended the receipt date to January 11, 2016, applicable to all ESCOs. Thereafter, no further requests for clarification of the RAO’s intention to proceed to a Determination were received from the ESCOs or their representatives by the RAO.¹¹

Of the 250 ESCOs eligible to do business in New York State,¹² the RAO received written Statements of Necessity from eight companies - American Power & Gas, LLC (AP&G); Crown Energy Services, Inc. (Crown); Direct Energy Services, LLC, Direct Energy Business, LLC, Direct Energy Business Marketing, LLC, and Direct Energy Solar (Direct Energy); Energy Technology Savings (ETS); Customized Energy Solutions d/b/a/ Ethical Electric (Ethical) Verde Energy USA (Verde); U.S. Energy Partners LLC (USEP);¹³ and Xoom Energy New York LLC (XOOM); and three trade associations¹⁴ - IEC, NEM,¹⁵ and RESA. Four of the Statements were supplemented with an affidavit of an employee, officer or director of the company.¹⁶

STATEMENTS OF NECESSITY

There is no need to detail all the arguments in the 11 submissions of the individual ESCOs and trade associations or the four affidavits submitted in support of the Statements of Necessity as the parties raised many of the same issues and cited the same authorities. All of the submissions are available on the Department’s website at www.dps.ny.gov. To the extent that

¹¹ RESA argues, in its Statement of Necessity, that the RAO needs to further clarify the December 16, 2015 letter; specifically, “how customer count information will be separated from the template and protected from disclosure.” at 4. The method of disclosure is not within the purview of the POL or the RAO - it is a matter for staff. The Commission Order makes no reference to a template; only the specific information that it intends to publish. No further clarification is needed.

¹² There are 250 ESCOs that are eligible to do business in New York State; 207 are active, in that they have customers, and 43 are not active at this time. As of the third quarter of 2015, approximately 75 percent of the ESCOs that are filing historic pricing information in accordance with the Retail Markets Order are seeking protection from disclosure under POL §87(2)(d).

¹³ USEP is an energy service company, operating as an energy service company ("ESCO") under New York State Law. USEP is a qualified electric supplier and sells electricity to industrial, commercial and residential customers of National Grid, New York State Electric and Gas Corporation and Rochester Gas & Electric Corporation.

¹⁴ The three trade associations do not identify their members.

¹⁵ NEM is a trade association representing both suppliers and major consumers of natural gas and electricity as well as energy-related products, services, information and advanced technologies in the U.S., Canada and Europe.

¹⁶ Verde; USEP; Xoom; and RESA submitted affidavits.

they raise original questions regarding confidentiality, those issues will be addressed individually. Further, the parties raised arguments previously aired during the Retail Markets proceeding. These arguments were heard, considered, and either dismissed or addressed by the PSC in the Retail Markets Order¹⁷ and will not be dealt with here.¹⁸ Such comments make up a significant portion of the Statements submitted in this proceeding.

IEC argues that this proceeding differs from previous decisions of the RAO and Secretary in that it is not pursuant to a FOIL request. FOIL requests are interpreted narrowly as a matter of public policy, in order to ensure that the public is afforded access to government records.¹⁹ As this disclosure is being requested pursuant to a PSC Order, and not a FOIL request, broader consideration should be given to the exemption requests.

NEM²⁰ also argues that previous precedent is not controlling. It argues that the disclosure of pricing information at this level of granularity and ESCO specificity subjects ESCOs to substantial competitive injury.

RESA argues the economic lifeblood of an ESCO rests upon the development of a marketing plan that enables it to obtain market share in a profitable manner and effectively compete against other ESCOs operating in the retail energy market. To this end, each ESCO carefully examines and determines what products are most suitable for it to market, the appropriate price for each product, the type of customers to whom the product will be directed, and in what geographic area marketing will be conducted. Disclosure of the Pricing Compilations will provide a competitor or prospective competitor with detailed information concerning the specific pricing patterns and behavior of existing ESCOs. This type of information can be extremely useful in determining how to price a product, how to compete against existing competitors, how to enter the market and potential margins that can be achieved in this market.

Most critically, public access of this pricing data will enable a competitor to track the historical data filed by each identified ESCO over time and compare it to the forward electric price curves in each period containing the reported data.

¹⁷ See Case 12-M-0476, Retail Markets Order, Attachment A, Comments of NEM, RESA and USEP pp. 1-84.

¹⁸ This is not the forum to redress those concerns. This Determination addresses only the entitlement to confidentiality of certain records submitted to the agency. See further statement herein.

¹⁹ Washington Post Co. v. New York State Ins. Dept., 61 N.Y.2d 557, 564 (1984).

²⁰ References to federal anti-trust, conspiracy, restraint of trade, and misappropriation of trade secret cases and statutes by NEM in its Statement of Necessity are misplaced in this context.

RESA compares the present situation to that discussed in the RAO's and Secretary's decisions regarding lightly regulated utilities (LRU) issued in 2014.²¹ There, the RAO and Secretary found that substantial harm would occur from the disclosure of the generators' financial information because it would allow competitors and potential market entrants to forecast a generator's marginal costs and pricing strategies.²² That information could then be exploited by a competitor to manipulate the market by, for example, increasing its prices to a level in excess of its own marginal costs, but below those of a generator who had filed its annual financial reports, resulting in reduced competition and higher overall costs to customers.

RESA also argues that over time, the disclosure of the information contained in the Pricing Compilation will allow a competitor, by matching the information to market-based supply costs and creating a trend, to track how the ESCO is procuring supply for load obligation and what short/long term margins the ESCO is targeting.

UPSEP argues that if the pricing data is allowed to be public, competitors would be able to 'backwards engineer' the prices to determine supplier margins and strategies. This gives competitors and new market entrants a leg up over current suppliers.

XOOM argues that the information sought to be published provides knowledge of its overall financial wherewithal, and reveals its overall pricing strategy over time.²³

DISCUSSION

Applicable Law

At the outset, it should be noted that the role of the RAO in this matter is very limited. Pursuant to POL §89(5)(b)(3), the RAO is required to issue a written Determination granting, continuing, or terminating such exception and stating the reasons therefor.²⁴ The RAO is neither authorized to determine allegedly outstanding issues in a PSC-issued Order nor offer an opportunity for re-hearing or re-litigation of issues from a matter already heard and decided upon by the PSC. This includes the format for reporting the information directed by the Retail Markets Order.²⁵ Therefore, the only issue before the RAO is the entitlement to confidentiality of certain records filed with the PSC, and it is the only issue that will be determined here in accordance with the applicable statutory and case law.

²¹ See Matter 13-01288, In the Matter of Financial Reports for Lightly Regulated Utility Companies, Determination of Trade Secret 14-02 (issued June 30, 2014); Determination of Appeal 14-02 (issued August 13, 2014); Determination of Trade Secret 15-09 (issued July 2, 2015); Determination of Appeal 15-09 (issued October 27, 2015).

²² *Id.*,

²³ While Xoom raises the issue of a technical conference in connection with the Retail Markets Order, this matter is outside the purview of the RAO.

²⁴ POL §89(5)(b)(3).

²⁵ See Case 12-M-0476, Retail Markets Order (issued February 25, 2014).

In this regard, on January 14, 2016, the Appellate Division, Third Department, issued its Opinion and Order in docket no. 52117, affirming Matter of Verizon N.Y. Inc. v. New York State Public Service Commission.²⁶

The lower court had reversed the PSC Secretary's Determination that DPS could not protect certain information that the RAO found to be trade secret from disclosure under FOIL because Verizon had not made a showing of a likelihood of substantial competitive injury. The Court concluded that Verizon need not make such a showing of competitive injury for trade secret material under POL §87(2)(d). In other words, if Verizon can make a showing that material is a "trade secret," it need not show that its disclosure will lead to a "likelihood of substantial competitive injury."²⁷

In upholding the lower court decision, the Appellate Division, Third Department set out a specific test for determining whether a record is a trade secret:

"First, it must be established that the information in question is a " "formula, pattern, device or compilation of information which is used in one's business, and which gives [one] an opportunity to obtain an advantage over competitors who do not know or use it" " (Matter of New York Tel. Co. v. Public Serv. Commn., 56 NY2d at 219 n 3, quoting Restatement of Torts § 757, Comment b; accord Ashland Mgt. v. Janien, 82 NY2d 395, 407 [1993]; Marietta Corp. v. Fairhurst, 301AD2d 734, 738 [2003]). Second, if the information fits this general definition, then an additional factual determination must be made

"concerning whether the alleged trade secret is truly secret by considering: (1) the extent to which the information is known outside of the business; (2) the extent to which it is known by employees and others involved in the business; (3) the extent of measures taken by the business to guard the secrecy of the information; (4) the value of the information to the business and its competitors; (5) the amount of effort or money expended by the business in developing the information; [and] (6) the ease or difficulty with which the information could be properly acquired or duplicated by others" (Marietta Corp. v. Fairhurst, 301 AD2d at 738 [internal quotation marks, brackets and citation omitted]).

Inasmuch as an entity seeking to establish the existence of a bona fide trade secret must make a sufficient showing with respect to each of these factors, we agree with Supreme Court that it is wholly unnecessary and overly burdensome to require the entity to then make a separate showing

²⁶ 46 Misc. 3d 858 (Albany County 2014).

²⁷ Id. at 877.

that FOIL disclosure of the trade secret would cause substantial injury to its competitive position.”²⁸

As to the balance of the POL §87(2)(d) exception, the Court said, “Significantly, when the two exemptions contained in Public Officers Law § 87 (2) (d) have been separately argued, we have had no trouble utilizing a two-part inquiry, which first addresses whether the information at issue is entitled to the trade secret exemption, and, upon answering that question in the negative, proceeds to analyze the information under the substantial competitive injury standard (see Matter of Sunset Energy Fleet v. New York State Dept. of Envntl. Conservation, 285 AD2d 865, 866-868 [2001]; see also Marietta Corp. v. Fairhurst, 301 AD2d at 738-739).”²⁹

In this case, only a few of the parties cite to the Verizon case. However, this is not a fatal flaw. In the last FOIL Determination and Secretary’s Appeal determination before the issuance of the Appellate Division’s decision in Verizon, it was determined that attempting to comply with the Supreme Court’s decision in Verizon was the best way of applying the policies behind the doctrine of *stare decisis*.³⁰ This is also consistent with the PSC Secretary’s Determination of Appeal, issued January 9, 2015, in Case 14-M-0183, wherein she applied the holding in the Verizon Decision in determining whether certain documents were entitled to protection under POL § 87(2)(d).³¹

The Secretary to the PSC addressed the impact of the Supreme Court’s Verizon Decision in the Determination of Appeal in Case 14-M-0183, stating that “the most rational interpretation of [the Verizon Decision] is that, in order to establish entitlement to an exemption of information from disclosure as trade secret, the entity seeking the exemption must present evidence relevant to both the definition and the related factors.”³² The Secretary further noted that, “[r]egardless of whether the requested information is alleged to be trade secret or confidential commercial information, the entity seeking the exemption must provide specific, persuasive evidence to support its position, and not merely assert that the advantage or danger of injury exists.”³³

²⁸ In the Matter of Verizon New York, Inc. v. New York State Public Service Commission, Opinion and Order in docket no. 52117, (January 14, 2016) at 6.

²⁹ Id. at 7-8.

³⁰ See Case 14-C-0370, In the Matter of a Study on the State of Telecommunications in New York State. Request for confidential documents. Determination of Request for Confidentiality Pursuant to Public Officers Law §87(2)(d), Determination 15-10 (issued December 18, 2015).

³¹ Case 14-M-0183, Joint Petition of Time Warner Cable Inc. and Comcast Corporation for Approval of a Holding Company Level Transfer of Control, Determination of Appeal (issued January 9, 2015).

³² Case 14-M-0183, supra, Determination of Appeal, p. 8.

³³ Id., citing Matter of Markowitz v. Serio, 11 N.Y.3d 43, 51 (2008).

However, contrary to the PSC's regulations, once information is established by specific and persuasive evidence to be a trade secret, it can be exempted from disclosure without requiring an additional showing of a "likelihood of substantial competitive injury."³⁴ If, however, material is not shown to be "trade secret" then it falls into a catchall category of "confidential commercial information" that can still be exempted from disclosure if a "likelihood of substantial competitive injury" is shown.

Therefore, the ESCOs have the burden of proving with specific and persuasive evidence that either (1) the information constitutes trade secrets by addressing not only the definition of "trade secret" but also the six relevant factors or (2) there is a likelihood the ESCO will suffer a substantial competitive injury if the information at issue is disclosed.³⁵

Before the Verizon cases, the RAO and Secretary read POL §87(2)(d) to require a showing of substantial competitive injury for trade secret and confidential commercial information, citing to Encore College Bookstores, Inc. v. Auxiliary Service Corporation of the State University of New York at Farmingdale.³⁶

The Appellate Court's holding in Verizon does not change the outcome here, although any party may argue that on Appeal to the Secretary.³⁷ Most parties argue the existence of trade secret based on application of the Restatement factors. In the alternative, they rely on Encore to argue that the disclosure of the purportedly confidential information will cause substantial injury to the competitive position of the subject enterprise.³⁸

As for the arguments that disclosure of the information at issue poses a substantial risk of competitive injury to the parties, the Encore test, as enunciated by the Court of Appeals,³⁹ will be applied. Therein, the Court established a two-prong test for determining whether records or portions thereof may be excepted from public disclosure pursuant to POL §87(2)(d).⁴⁰ The first prong requires the party seeking the exemption to establish the existence of competition to

³⁴ Matter of Verizon, 46 Misc.3d at 873-877.

³⁵ See Verizon at 6.

³⁶ Encore v. ASC SUNY Farmingdale, 87 NY2d 410 (1995).

³⁷ POL §89(5)(c)(1).

³⁸ Encore v. ASC SUNY Farmingdale, *supra*.

³⁹ *Id.*, at 421.

⁴⁰ Prior to the Verizon Decision, DPS had interpreted the Encore case as establishing a two-prong test for both trade secrets and confidential commercial information under POL §87(2)(d). The Verizon Decision, however, found that the Encore test does not apply to trade secrets which are not subject to a showing of "substantial competitive injury" for exemption. (Matter of Verizon, 46 Misc.3d at 874-875).

warrant an exception from disclosure. The ESCOs and associations have established the existence of competition in the electric and natural gas industry in New York State.⁴¹

Thereafter, in order to satisfy the second prong, the party must demonstrate that disclosure of the information would be likely to cause substantial competitive injury.⁴² In order to make this showing, the Company must demonstrate that disclosure of the information would be likely to cause substantial competitive injury,⁴³ by providing a causal link between the disclosure and the injury.⁴⁴

None of the 11 submitters prove the existence of a trade secret. Many of the parties rely on arguments from the underlying case that established the disclosure requirement for historic pricing information, stressing the unfair application, consumer misunderstanding and confusion, and publication of false data, etc. As noted earlier in this Determination, the RAO's role is limited to that outlined in POL Article 6. This is not a general opportunity to contest the PSC's decision to require publication of the aforementioned information.

The ESCOs, however, failed to either adequately address the six factors used in making a trade secret determination or to demonstrate that disclosure of the information would be likely to cause substantial injury to their competitive position and, therefore, have not met the burden of proof they bear pursuant to POL §89(5)(e).⁴⁵

One of the key factors here is that all ESCOs operating in New York will be subject to this Determination, just as they are currently subject to the Retail Markets Order. The argument that one competitor will be in a better position than another is misplaced since all ESCOs

⁴¹ The submitters cited Case 94-E-0952, In the Matter of Competitive Opportunities Regarding Electric Service, Opinion & Order Regarding Competitive Opportunities for Electric Service, Op. No. 96-12, confirmed 196 Misc.2d 924 (Albany County 1996), *aff'd*, 273 A.D.2d 708; 93-G-0932, Proceeding on Motion of the Commission to Address Issues Associated with the Restructuring of the Emerging Competitive Natural Gas Market; Case 98-M-1343, In the Matter of Retail Access Business Rules, Case 98-M-1343, Order Adopting Amendments to the Uniform Business Practices (issued October 27, 2008), p.10.

⁴² Encore v. ASC SUNY Farmingdale, *supra* at 421.

⁴³ *Id.* See also, Ashland Management v. Janien, 82 N.Y.2d 395, 407-408 (1993); New York State Electric & Gas Corp. v. New York State Energy Planning Board, 21 A.D. 2d 121, 124-125 (1996); Glens Falls Newspaper, Inc. v. Counties of Warren & Washington Indus. Dev. Agency, 257 A.D.2d 948 (1999); Troy Sand & Gravel Co. v. New York State DOT, 277 A.D.2d 782 (2000); Verizon N.Y., Inc. v. Bradbury, 40 A.D.3d 1113 (2007); Schenectady v. O'Keeffe, 50 A.D.3d 1384 (2008); New York Racing Assn. Inc. v. State of NY Racing & Wagering Bd., 21 Misc. 3d 379 (2008); Hearst Corp. v. State, 24 Misc. 3d 611 (2009).

⁴⁴ See Markowitz v. Serio, 11 N.Y.3d 43 (2008); Saratoga Harness Racing, Inc. v. Task Force on the Future of Off-Track Betting, 2010 N.Y. Misc. LEXIS 2531 (Sup. Ct. Albany County 2010).

⁴⁵ *Id.*

operating in New York State will be on the same, level playing field with respect to the disclosure of information required by the Retail Markets Order. Gas and electric utilities are also subject to price reporting with DPS and their prices are reported on the agency's Power to Choose website.

Further, the data that will be released will consist of an average, not a specific price associated with a specific ESCO. Even if prices were publicized, only the formula and thought process that went into the compilation of that price structure might arguably fit into a trade secret discussion. While several of the parties raised the issue of reverse engineering, it is simply not possible to reach that conclusion with annual average prices and the absence of customer counts.

The party seeking an exemption from disclosure must demonstrate that the [records in question fall squarely within a FOIL exemption and by articulating a particularized and specific justification for denying access.⁴⁶ The court continued: "Because the overall purpose of FOIL is to ensure that the public is afforded greater access to governmental records, FOIL exemptions are interpreted narrowly [citation omitted]. The ESCOs did not meet their burden here as mere conclusory allegations, without factual support, are insufficient to sustain non-disclosure.⁴⁷ Indeed, the entity resisting disclosure must demonstrate a particularized and specific justification for denying access.⁴⁸ It is only with more compelling facts – perhaps submitted in an affidavit by an economist or other expert– and stronger, more detailed arguments that the ESCOs can meet their burden of proof pursuant to POL §89(5)(e).⁴⁹

In closing, to the extent that those ESCOs challenging disclosure distinguished the 14-01 Determination of the RAO and Appeal by the Secretary from this case, I agree with their assessments that these decisions are not dispositive of the issue.⁵⁰ While the cited case shared some similarities with the present one, each Determination of the RAO, and appeal determination by the Secretary, is fact specific. As noted, in the cited case, the information was

⁴⁶ Bahnken v. NYC Fire Department, 17 AD3d 228 (2005); Fink v. Lefkowitz, 47 NY2d 567 (1979); Gould v. NYC Police Department, 89 NY2d 267 (1996); Farbman v. NYC Health and Hospitals Corp., 62 NY2d 75 (1984).

⁴⁷ See Church of Scientology of N.Y. v. State of New York, 46 N.Y.2d 906 (1979).

⁴⁸ Capital Newspapers Div. of Hearst Corp. v. Burns, 67 N.Y.2d 562, 566, (1986); Dilworth v Westchester County Dept. of Correction, 93 AD3d at 724; Washington Post Co. v New York State Ins. Dept., *supra*, at 567; Church of Scientology of N.Y. v State of New York, *supra*, at 907-908.

⁴⁹ While a number of ESCOs submitted affidavits along with their Statement of Necessity, the affidavits did not meet the standard that must be demonstrated.

⁵⁰ The Retail Markets Order was cited in a subsequent Determination of the RAO and upheld on Appeal by the Secretary to the PSC; both writings denied confidential treatment to historic pricing information. See Matter 11-01661 and Matter 12-00172, DPS Records Access Officer Determination 14-01 (issued March 27, 2014); and Appeal of Determination 14-01 (issued April 28, 2014).

provided to DPS by the utilities; it was more than 16 months old, and was not tied to any particular ESCO. Here, the information will be released attributing the pricing information to a particular ESCO, is more current, and will show the ESCO's pricing information over time. Thus, the cited decision of the RAO and Secretary are not dispositive of the issue.

Also, RESA's claim that the RAO's and Secretary's decisions in the LRU cases are applicable here is misplaced.⁵¹ The LRU decisions deal with annual reporting requirements and a different part of the industry that is subject to some amount of federal regulation. The information sought by the requester was of a sensitive nature and was extensively proven to be protected from disclosure as trade secrets and/or confidential commercial information by the affiants in that case.

Finally, IEC's argument - that since this disclosure is being requested pursuant to a PSC Order, and not a FOIL request, broader consideration should be given to the exemption requests - is completely without merit. The statute provides the same standard of review for the situation in which the agency sui sponte decides to determine the entitlement of specified portions of records as it does when such determination is prompted by a FOIL request from a member of the public.⁵²

CONCLUSION

Eight ESCOs and three trade associations argued for protection from disclosure under POL §87(2)(d) as trade secrets and/or confidential commercial information of historic pricing information filed with the PSC. None of the parties presented convincing arguments for trade secret status, failing to adequately address the six factors described in the Restatement of Torts and further stated in Verizon v. PSC.⁵³ Nor did they carry their burden of proof with respect to the second part of POL §87(2)(d) demonstrating the likelihood of substantial competitive injury resulting from disclosure of the documents claimed to be confidential commercial information.⁵⁴

In light of the forgoing, the information claimed to be trade secrets or confidential commercial information does not warrant an exception from disclosure and the request for continued protection from disclosure is denied.

Review of my Determination may be sought, pursuant to POL §89(5)(c)(1), by filing a written appeal with Kathleen H. Burgess, Secretary to the Commission, at the address given above, within seven business days of receipt of this Determination. Receipt will be presumed to have occurred on February 1, 2016, accordingly, the deadline for the receipt of any such written appeal by the Secretary is February 10, 2016. Any requests for an extension of time in which to file a written appeal of this Determination should be directed to Secretary Burgess.

⁵¹ See Matter 13-01288, supra.

⁵² See POL §89(5)(b).

⁵³ Matter of Verizon, supra at 6.

⁵⁴ Id.

Sincerely,

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Service List