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October 27, 2015

The Honorable James F. Brennan
New York State Assembly
Legislative Office Building, Room 422
Albany, New York 12248

Re: Matter 13-01288 – In the Matter of Financial Reports for Lightly Regulated Utility Companies

Case 11-M-0294 – In the Matter of the Filing of Annual Reports by Electric and Gas Corporations Subject to Lightened Ratemaking Regulation

Dear Assemblymember Brennan:

Attached please find the Determination of Appeal of Trade Secret Determination, pursuant to Public Officers Law Article 6, which upholds the Records Access Officer's Determination granting an exception of certain portions of the annual reports from disclosure.

For your information, I am asking staff to share this Determination with the Federal Energy Regulatory Commission and the New York Independent System Operator Independent Market Monitor and request their respective opinions as to whether release of the information at issue in this Determination would result in substantial competitive injury to the market participants. Staff will share any responses from these entities.

Very truly yours,

Kathleen H. Burgess
Secretary

Attachment

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

Matter 13-01288 – In the Matter of Financial Reports for Lightly Regulated Utility Companies;
Case 11-M-0294 – In the Matter of the Filing of Annual Reports by Electric and Gas Corporations Subject to Lightened Ratemaking Regulation.
(Trade Secret 15-09)

DETERMINATION OF APPEAL OF TRADE SECRET DETERMINATION

(Issued October 27, 2015)

Assemblymember James F. Brennan appeals a Determination of the Records Access Officer (RAO) of the Department of Public Service (Department) that certain portions of annual reports, submitted by electric and gas entities subject to lightened ratemaking regulation, are entitled to protection from disclosure under the Freedom of Information Law (FOIL), Public Officers Law (POL) Article 6. Assemblymember Brennan protests, *inter alia*, that the material in the reports is available from other public sources and its disclosure would not result in competitive harm to the entities, but rather would ensure that the energy markets function competitively and for the benefit of customers.

This Determination of Appeal upholds the RAO's Determination granting an exception of certain portions of the annual reports from disclosure. Affidavits submitted by the lightly regulated utilities and the New York Independent System Operator, Inc. (NYISO) show that 1) the information in the reports is not readily available from public sources, 2) the New York wholesale generation market operates through a competitive bidding process, and 3) disclosure of the information at issue in the reports would cause substantial competitive injury to the entities subject to lightened regulation.

INTRODUCTION AND BACKGROUND

As an initial matter, this is not Assemblymember Brennan's first request for access to the confidential annual reports filed by lightly regulated utilities.[1] On March 31, 2014, the RAO

[1] In 2012, the Commission reexamined the reporting requirements applicable to lightly regulated entities under PSL § 66(6). In the past, the Commission had permitted such entities to satisfy the PSL § 66(6) reporting requirements by referencing annual reports filed with the Federal Energy Regulatory Commission (FERC). Inasmuch as FERC's annual reporting requirements were reduced over the years, the Commission directed lightly regulated utilities to file annual reports to allow for review of the reliability and market power of such entities. Case 11-M-0294, In the Matter of the Filing of Annual Reports by Electric and Gas Corporations Subject to Lightened

received a FOIL request from Assemblymember Brennan for complete copies of annual reports filed on or after July 1, 2013.[2] Upon review of the request, and the affidavits and statements of necessity filed by the electric and gas utilities, the RAO determined that certain information in the reports should remain protected from disclosure as trade secrets.[3] Thereafter, on August 13, 2014, I upheld the RAO's Determination affording protection to those portions of the annual reports at issue.[4] Specifically, the Determination on Appeal found that, despite Assemblymember Brennan's claims otherwise, the information was not publicly available, the NYISO markets are explicitly constructed as competitive market exchanges and, as a result, the competitive positions of the lightly regulated utilities would be harmed if certain information in the reports was disclosed.[5]

On May 4, 2015, the RAO received another FOIL request from Assemblyman Brennan for, among other things, a copy of the complete annual reports for the calendar year ending December 31, 2013,[6] submitted by all gas or electric corporations and entities subject to the Commission's lightened ratemaking regulation.[7] The request included an affidavit of Robert

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Ratemaking Regulation, Order Adopting Annual Reporting Requirements Under Lightened Ratemaking Regulation (filed January 23, 2013) (Annual Reporting Order).

[2] The deadline for filing the 2012 annual reports was July 1, 2013. Annual Reporting Order, p. 23.

[3] Specifically, the RAO determined that "the information claimed by the companies redacted from Annual Reports of Lightly Regulated Utilities for the year ending December 31, 2012, on pages four, five and six, should remain protected from disclosure as trade secrets – for the private companies only . . . for page seven, lines four through and including 10 shall remain protected from disclosure as trade secrets; page eight, with the exception of property tax information which is available to the public through various means, shall remain protected from disclosure as trade secrets. Additionally, pages seven and eight . . . are also protected from disclosure pursuant to the requirements of the NYISO." Matter 13-01288, In the Matter of Financial Reports for Lightly Regulated Utilities Companies, Determination – Trade Secret 14-02 (issued June 30, 2014) (2014 RAO Determination), p. 23.

[4] Matter 13-01288, supra, Determination of Appeal of Trade Secret Determination (issued August 13, 2014) (2014 Secretary Determination).

[5] 2014 Secretary Determination, pp.11-15.

[6] In Assemblymember Brennan's previous FOIL request, he sought annual reports filed "on or after" the deadline of July 1, 2013. Accordingly, the annual reports for calendar year 2012 filed before July 1, 2013, were not included in the 2014 RAO Determination. Here, Assemblymember Brennan seeks access to all annual reports for calendar year 2013.

[7] The request had nine parts; however, Assemblymember Brennan only appeals from the RAO's denial of access to certain portions of the annual reports.

McCullough supporting Assemblymember Brennan's claim that the annual reports should be made public. All but two entities[8] submitted statements of necessity, and, of those, 24 also submitted affidavits of experts in support of their statements. In addition, the NYISO submitted a statement of necessity in support of the request for a number of its market participants, with a request that the RAO take notice of an expert affidavit relied upon in denying the 2014 request.[9] The Independent Power Producers of New York, Inc. (IPPNY) submitted a statement with an affidavit on behalf of its members.[10]

The RAO's Determination

On July 2, 2015, the RAO issued a determination relying largely on the 2014 RAO Determination.[11] The RAO noted that, given Assemblymember Brennan sought the same information contained in the annual reports as in his 2014 FOIL request, the same law and reasoning applied as in the 2014 RAO Determination. There were two issues that required analysis; however, their resolution did not alter the outcome of the Determination. The first was a change in law as a result of an Albany County Supreme Court case,[12] and the second was the allegation in Mr. McCullough's affidavit that the heat rate information contained in the annual

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[8] National Grid Generation LLC, et al. and TC Ravenswood, LLC, TransCanada Services USA Inc. did not submit statements of necessity.

[9] The NYISO observed that its tariff required it to keep certain information in its possession confidential. It also recited that the 2014 affidavit of Dr. Nicole Bouchez explained that releasing data which can be used to determine marginal cost will disadvantage generators in bidding against other generators and negotiating bilateral contracts. The NYISO further observed that making such information public can encourage predatory pricing and allow generators to beat competitors' prices.

[10] IPPNY is a not-for-profit trade association representing the independent power industry in New York State. Its members include nearly 100 companies involved in the development and operation of electric generating facilities and the marketing and sale of electric power in the State.

[11] Matter 13-01288 and Case 11-M-0294, supra, Determination – Trade Secret 15-09 (issued July 2, 2015) (2015 RAO Determination).

[12] Matter of Verizon N.Y., Inc. v New York State Pub. Serv. Commn., 46 Misc 3d 858 (Albany County Sup. Ct. 2014). This decision, however, was addressed in the Secretary's 2014 Determination and, thus, the RAO found no reason to revisit the matter. Specifically, it was noted that, "[b]ecause the entities seeking to prevent disclosure have met their burden by showing that they would be likely to suffer substantial competitive injury if the information were disclosed, the question of whether the information is only 'trade secret' need not be reached." 2014 Secretary Determination, p. 12.

reports is published in the Environmental Protection Agency's (EPA) National Electric Energy Data System (NEEDS) database, which is publicly available.[13] The RAO cited the affidavit of Mark D. Younger, submitted by IPPNY, which clarifies that the heat rates published in the EPA's NEEDS database are estimates of heat rates and not the average full load tested heat rates provided in the annual reports filed with the Commission.[14]

Inasmuch as the McCullough affidavit raises the same issues that were determined by the RAO, and upheld in the 2014 Determination of Appeal, the RAO found no reason to depart from her prior decision to afford protection to certain portions of the annual reports. In that Determination, the RAO concluded that the lightly regulated entities decisively proved that the trade secret test had been met based on the factors set forth in 16 NYCRR § 6-1.3(b)(2).[15] Moreover, the RAO found that the entities had shown that public disclosure of the information would be likely to cause substantial injury to their competitive positions.[16] Neither Assemblymember Brennan's appeal nor Mr. McCullough's affidavit offered in support provide a basis for departing from either the 2014 Secretary Determination or the 2015 RAO Determination.

Assemblymember Brennan's Appeal

On August 27, 2015, Assemblymember Brennan appealed the RAO's Determination,[17] arguing that the information at issue should be disclosed to the public. In support of the appeal, Assemblyman Brennan filed a 190-page affidavit by Mr. McCullough. Assemblymember Brennan claims that the statements of necessity and requests for exemption failed to meet the statutory and regulatory definitions of "trade secret" or competitive harm, and that the RAO failed to provide specific justification for granting the exceptions. He argues that the RAO, instead, "grant[ed] a virtual blanket approval to each and every request that was submitted in

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[13] 2015 RAO Determination, pp. 4-5.

[14] 2015 RAO Determination, p. 5.

[15] 2014 RAO Determination, p. 22.

[16] Id.

[17] Public Officers Law § 89(5)(c)(1) requires an appeal of a FOIL determination by the RAO within seven business days of the determination. Assemblymember Brennan, however, was given an additional 33 business days to appeal, from July 13, 2015, to August 27, 2015, via two requested extensions.

connection with the 2013 annual report."[18] Assemblymember Brennan asserts that nothing in the requests show either the worth or value of the redacted information or the degree of difficulty and cost of developing such information. Additionally, he argues that the information sought "may be more than two years old" and, as such, "[t]he passage of time reduces or eliminates the harm that might arise when a disclosure involves more current information."[19]

Assemblymember Brennan further argues that the entities requesting confidentiality failed to prove that disclosure of the information at issue would cause competitive harm, and that, due to the nature of the NYISO's bid auction process, release of the information would not give competitors a cognizable competitive advantage. He also believes that the RAO erred in treating affidavits submitted by nuclear, wind and solar generators the same as those submitted by other companies in the industry "since their concern of competitive injury is not valid."[20] He further maintains that the NYISO's Code of Conduct cannot serve as a legal basis for confidentiality.

Assemblymember Brennan maintains that much of the redacted information is "widely available" from other public sources.[21] Specifically, he asserts that "significant operational details are already available at the [EPA], the U.S. Energy Information Administration [EIA], the U.S. Nuclear Regulatory Agency, and [FERC]."[22] Assemblymember Brennan also claims that "either purposefully or by inadvertence, much of the information claimed as secret by the affiants' companies is available on the internet."[23]

Lastly, Assemblymember Brennan argues that the Commission did not have the authority to create a lightened ratemaking regulation scheme and that all entities currently subject to such regulation should be required to comply with the requirements of PSL § 66.[24]

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[18] Appeal, p. 4.

[19] Id. at 9.

[20] Appeal, p. 7.

[21] Id. at 11.

[22] Id.

[23] Id.

[24] On September 10, 2015, Citizens' Environmental Coalition (CEC) filed a letter in support of Assemblymember Brennan's FOIL request and instant appeal of the RAO's Determination. The letter does not address the merits of the appeal, but rather asserts that, as a result of deregulation and restructuring, generators receive "numerous protections." CEC asserts that the Commission must "provide the information requested immediately" in order to "comply with state law." It

IPPNY'S Response

IPPNY filed a response in opposition to Assemblymember Brennan's appeal on September 3, 2015.[25] IPPNY's Response also contained an affidavit by Mark D. Younger contradicting Assemblymember Brennan's claims that the information in the annual reports is publicly available and attesting to the competitive injury the lightly regulated utilities would suffer if the information were disclosed. IPPNY requests that the appeal be denied under the doctrines of *res judicata* and collateral estoppel or, in the alternative, pursuant to the reasoning provided in the 2014 Secretary Determination given that Assemblymember Brennan seeks access to the same reports that were found to be entitled to protection from disclosure last year.[26]

IPPNY next argues that the Commission should reject Assemblymember Brennan's claims that the full confidential annual reports "are readily available on the Internet."[27] Public disclosure of trade secrets through inadvertent electronic filing, IPPNY argues, does not *per se* destroy the legal protection of such information. In support of its position, IPPNY cites case law stating that "the ultimate focus must be on whether the alleged trade secrets have become generally known or readily ascertainable through proper means."[28] IPPNY opines that finding the confidential reports without having the links included in Mr. McCullough's affidavit would be extremely difficult if not impossible.[29] IPPNY further asserts that Assemblymember Brennan "purposefully accessed 'hidden' information and beyond that disseminated the information

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can only be presumed that CEC is referring to state FOIL law; however, as discussed herein, the law provides that the information at issue should remain protected as trade secrets or confidential commercial information. CEC also complains about its difficulty accessing "full financial information . . . at the beginning of a case involving the Ginna nuclear reactor;" however, this protest is inapposite here. The case herein involves access to confidential information pursuant to FOIL, not access to information in the context of a Commission proceeding. Matter 13-01288, supra, Letter in Support of Assemblyman Brennan's FOIL Request and Appeal (filed September 10, 2015).

[25] Matter 13-01288, supra, IPPNY Response (filed September 3, 2015) (IPPNY Response).

[26] IPPNY Response, p. 2. Last year, Assemblymember Brennan sought access to the 2012 annual reports. The current request is for the 2013 annual reports; however, as IPPNY points out, he seeks access to the same categories of information that were granted protection from disclosure by the RAO and affirmed in the 2014 Secretary Determination.

[27] Id. at 6.

[28] Id. at 7 (quotation marks and citations omitted).

[29] Id.

publicly" in order to "further his arguments on appeal," and, in doing so, "flouted ethical considerations and the Commission's past trade secret determinations" with respect to the annual reports.[30]

IPPNY points to the affidavit of Mr. Younger to show that the information at issue is not publicly available. Specifically, Mr. Younger explains that the average "full load heat rate" that the Commission requires in the annual report is the same information contained in Form EIA-860, which is protected from disclosure to the extent that it satisfies the criteria for exemption under FOIA.[31] This, however, is not the same information that is published by the EPA in its NEEDS database. That information is derived from generator operating information published in Form EIA-923, and does not rely on the confidential average full load heat rates provided in Form EIA-860.[32]

In his appeal, Assemblymember Brennan focuses on bidding information; however, IPPNY notes that "the financial data excepted from disclosure is much more extensive, providing the overall financial standing of the individual generators."[33] IPPNY goes on to explain that "[e]ach of the categories of information that the RAO and Secretary determined to be trade secrets and confidential commercial information provide a piece of the puzzle to determine a company's financial profile."[34] Accordingly, IPPNY argues that the release of each piece of information increases the risk that a competitor will be able to accurately estimate a generator's financial profile.[35]

The Younger Affidavit supports each of the claims made by IPPNY with respect to the unavailability of the information at issue. It states that generator owners must provide their units' average full load heat rates in the annual reports to the Commission, as well as in Form EIA-860. Mr. Younger points out, however, that while there are other sources one could use to obtain estimates of a unit's heat rate, such as fuel consumption and generation data from Form

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[30] Id. at 7-8.

[31] Id. at 9.

[32] Id.

[33] Id. at 11.

[34] Id.

[35] Lastly, IPPNY argues that Assemblymember Brennan's claim that there is no true competition under the NYISO's uniform clearing price auction is baseless and should be rejected. Id.

EIA-923, those sources do not provide the full load heat rate, unless the generator coincidentally ran at full load the entire time, which is highly unlikely.[36]

Moreover, Mr. Younger notes that Mr. McCullough provides heat rate data from the Eastern Regional Technical Advisory Committee (ERTAC) and the NEEDS database. That information shows that the estimates of heat rates provided by these two sources vary drastically and, thus, is not the equivalent of the average full load heat rate data provided to the Commission in the annual report.[37] Mr. Younger also clarifies that the data in the NEEDS database and the EIA-923 filing is not the same as the average full load heat rate data that the generators provide to the Commission in their annual reports. Indeed, the Commission has tightly defined requirements as to how to measure the average full load heat rate for the annual report; in other words, the Commission requires the heat rate to be calculated while the unit is running at full load.[38] In contrast, EIA-923 contains the monthly and annual information on fuel consumption and generation, or the monthly or annual average heat rate. The affidavit notes that the EIA protects the full load heat rate data that generators submit as part of their EIA-860 filings.[39]

The Younger Affidavit also addresses Mr. McCullough's reference to bid costs, largely in terms of heat rates and fuel costs. Mr. Younger, however, explains that bids also include variable operations and maintenance costs, pollution allowance costs, opportunity costs and risk adders.[40] Opportunity costs apply when generators are limited to a certain number of hours of operation due to either fuel or environmental limitations. As a result, the bid can represent the value of operating during the limited number of hours when the generation is more valuable to the generator and the NYISO.[41] An example of a risk adder would be the risk that a unit could be forced out of operation, due to maintenance issues resulting from the unit's operation at a higher output level.[42] For some units, such a risk could add significantly to the bid costs at those high levels.[43]

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[36] Younger Affidavit ¶ 7.

[37] Younger Affidavit ¶¶ 9-10.

[38] Younger Affidavit ¶ 12.

[39] Younger Affidavit ¶ 13.

[40] Younger Affidavit ¶ 16.

[41] Younger Affidavit ¶ 17.

[42] Younger Affidavit ¶ 18.

[43] Younger Affidavit ¶ 18.

The Younger Affidavit states that the scope of the operating and financial data Assemblymember Brennan seeks goes to the overall financial standing of individual generators, which is well beyond factors related to energy bids.[44] Mr. Younger asserts that disclosure of companies' financial information would allow competitors to assess the financial standing and overall competitiveness of generators. He further explains that disclosing such information would allow a competitor to confirm when a unit is incurring losses and assess whether, and for how long, it can continue to sustain such losses, which could harm a generator that might have tried to hold out with the hope that another generator would exit the market first.[45]

Lastly, the Younger Affidavit responds to two misperceptions of Assemblymember Brennan and Mr. McCullough. First, he dispels Mr. McCullough's assertion that knowing whether units are making a significant return would enable the public to evaluate whether the market is competitive. Mr. Younger clarifies that the ability of some units to be more efficient than others and, thus, to earn a higher return, is in no way an indication that the market is not competitive; rather, the ability for more efficient units to make larger returns is part of the fundamental incentive for efficiency in a market economy.[46] Second, Mr. Younger dismisses Assemblymember Brennan's characterizations of the NYISO's uniform clearing price auction. He explains that, if a generator knew the cost profile for all its competitors, it would reduce the incentive to be as economic as possible and, instead, encourage the generator only to be economic enough to beat the other units.[47]

Entergy Entities' Response

On September 3, 2015, the Entergy Entities[48] filed a response in opposition to Assemblymember Brennan's appeal. Initially, the Entergy Entities note that they fully support

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[44] Younger Affidavit ¶ 21.

[45] Younger Affidavit ¶ 21.

[46] Younger Affidavit ¶ 22.

[47] Younger Affidavit ¶¶ 26-27.

[48] Matter 13-01288, supra, Response of the Entergy Entities in Opposition to Brennan Appeal (filed September 3, 2015) (Response of Entergy Entities). The Entergy Entities are comprised of Entergy Nuclear Indian Point 2, LLC, Entergy Nuclear Indian Point 3, LLC, Entergy Nuclear FitzPatrick, LLC and Entergy Nuclear Operations, Inc. The Entergy Entities filed a statement of necessity in this proceeding on June 19, 2015, along with the affidavit of Marc L. Potkin in support. Matter 13-01288, supra, Statement of Necessity of the Entergy Entities (filed June 19, 2015) (Entergy Entities Statement of Necessity).

IPPNY's Response, urging *res judicata* and collateral estoppel bases to deny the appeal, and establishing that inadvertent failure to adequately safeguard confidential information does not strip the information of its trade secret or confidential commercial information status.[49]

The Entergy Entities argue that Assemblymember Brennan erroneously focuses exclusively on the bids of nuclear units, whereas the Potkin Affidavit establishes that access to the information at issue "could provide competitors with the overall financial wherewithal of the generators owned and operated by the Entergy Entities."[50] This access, the Entergy Entities argue, could cause a generator to delay or forego entirely a decision to retire or mothball if it learns that a competitor is experiencing financial distress. Moreover, the Entergy Entities point out that it could allow vendors to gain an upper hand in negotiations for necessary goods and services.

The Entergy Entities further argue that they did not voluntarily disclose confidential annual reports nor is the information contained within the reports "'a subject of general knowledge in the trade.'"[51] Indeed, they assert that where, as here, confidential data is inadvertently released on the Internet, without the knowledge of the entity, for a very brief period of time, and was accessible only through extensive and time-consuming data-mining efforts to unearth the "cached" version, the data cannot be considered to be generally known or readily ascertainable through proper means.

The Entergy Entities also point out that published reports and data by federal agencies, including the Nuclear Regulatory Commission (NRC) and FERC, and references to credit ratings, do not equate to the financial data contained within the annual reports. For instance, the site-specific revenue and expense data reported on page eight of the annual report goes well beyond the categories of information reported in the Electric Quarterly Reports filed with FERC.[52]

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[49] Response of Entergy Entities, p. 2.

[50] Id. at 2-3.

[51] Id. at 3. Moreover, the Entergy Entities argue that Ruckelhaus v Monsanto Co., 476 U.S.986 (1984), a takings case cited by Assemblymember Brennan, is inapposite here on the issue of whether the information contained in the reports constitute trade secrets or confidential commercial information.

[52] Id. at 4, citing Entergy Entities Statement of Necessity, Potkin Affidavit ¶ 33.

Lastly, the Entergy Entities note that this appeal represents the second time in two years that Assemblymember Brennan has sought the same categories of information contained in the annual reports of lightly regulated utilities. They argue that no new facts or circumstances have developed over the past year that warrant a different result now and, as such, the RAO's Determination should again be upheld.[53]

DISCUSSION

The issue in this appeal is whether certain portions of required annual report filings of lightly rate-regulated entities, pursuant to PSL § 66(6), are entitled to an exception from disclosure under FOIL as trade secrets or confidential commercial information.[54] As noted by IPPNY and the Entergy Entities, Assemblymember Brennan sought access to the same categories of information in the annual reports last year. At that time, the RAO conducted a comprehensive analysis of the parties' arguments and determined that the companies had conclusively proven, through detailed statements of necessity and expert affidavits, that the trade secret test had been met on the basis of the factors set forth in 16 NYCRR §6-1.3(b)(2), and that disclosure of the information would be likely to cause substantial injury to the competitive positions of the companies.[55]

In the previous appeal, I determined that, based on the proof provided by the lightly regulated utilities, the RAO had properly found that those entities seeking to prevent disclosure

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[53] On October 14, 2015, Assemblymember Brennan filed a reply letter in support of his appeal. The reply states, among other things, that despite the September 3, 2015 RAO letter directing the utilities to resubmit correctly redacted reports, "seventeen have reposted their old un-redacted reports . . . and several others filed partially un-redacted reports." Brennan Reply, p. 1. Assemblymember Brennan asserts that "this demonstrates that many companies do not consider the reported information harmful and not trade secrets." *Id.* In its October 16, 2015 response to Assemblymember Brennan's letter, IPPNY points out that all, except three, of the annual reports of the lightly regulated companies publicly available on the Department's website have been partially redacted to protect the confidential portions therein. IPPNY explains that two of the three un-redacted reports were posted by a company that is subject to cost-based regulation and does not participate in the competitive market. IPPNY's Response to Brennan Reply, p. 2.

[54] Inasmuch as there is one annual report format for all the lightly regulated utilities, there should be one set of rules that applies to disclosure of such reports. Accordingly, the determination herein applies to all annual reports filed with the Commission by lightly regulated utilities requesting protection from disclosure.

[55] 2014 RAO Determination, p. 22.

had met their burden.[56] Assemblymember Brennan now appeals the 2015 RAO Determination, which found that those same portions of the annual reports should remain protected from disclosure as trade secrets, as provided in the 2014 RAO Determination. Assemblymember Brennan, however, fails to point to any new facts or circumstances that have developed over the past year which would warrant a departure from the 2014 Appeal Determination.

The RAO Properly Determined that Certain Portions of the Annual Reports are Entitled to Protection under Public Officers Law § 87(2)(d).

Public Officers Law (POL) § 87(2)(d) allows agencies to 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." The Court of Appeals established a two-part test for determining whether records, or portions thereof, may be excepted from public disclosure under POL § 87(2)(d).[57] The first part of the test requires the party seeking the exemption to establish the existence of "actual" competition.[58] Thereafter, the second part is met if the party demonstrates that disclosure of the information would be likely to cause substantial competitive injury.[59] The burden is on the party seeking the exemption and, in order to meet its burden, that entity must offer specific, persuasive evidence that disclosure will likely cause it, or another affected enterprise, to suffer competitive injury.[60]

As an initial matter, Assemblymember Brennan incorrectly asserts that the "RAO took the various assertions made by the requesting entities at face value in relation to claims that the industry was competitive and that disclosure of certain information is likely to cause substantial competitive injury."[61] The RAO properly considered the numerous statements of necessity and accompanying expert affidavits submitted by the lightly regulated utilities, IPPNY and the NYISO. To the extent that Assemblymember Brennan suggests that an "independent proceeding where the facts can be developed by parties with views or positions inconsistent with these claims" should be conducted, FOIL law does not provide for such a process. Public Officers

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[56] 2014 Secretary Determination, p. 12.

[57] Encore Coll. Bookstores v Auxiliary Serv. Corp. of State Univ. of N.Y., 87 NY2d 410 (1995).

[58] Id. at 420.

[59] Id. at 421.

[60] Matter of Markowitz v Serio, 11 NY3d 43, 51 (2008).

[61] Appeal, p. 6.

Law § 89 provides the process an agency must follow in responding to FOIL requests and subsequent appeals, and nowhere therein is any requirement for a trial type "proceeding" using evidentiary hearings to develop facts and evidence. The affected parties, including Assemblymember Brennan, submitted substantial evidence in the form of statements and affidavits, which detailed their various positions on the issues.[62] A thorough review of those documents shows that the entities proved the existence of competition in the wholesale energy markets and that disclosure of the information at issue would cause substantial competitive injury to the entities participating in those markets.

As explained in the 2014 Secretary Determination, the RAO properly found that the entities seeking to prevent disclosure of the annual reports had met their burden.[63] In addition to providing statements of necessity, most of the companies provided detailed affidavits explaining the harms that would occur if the specific information at issue were disclosed. The lightly regulated utilities, IPPNY and the NYISO have, again, provided comprehensive statements of necessity and affidavits, explaining, in great detail, the harm that would occur in the event that the information were disclosed.[64] Moreover, IPPNY filed a response, and supporting affidavit by Mr. Younger, opposing the appeal.[65]

In support of his appeal, Assemblymember Brennan submitted the 190-page affidavit of Mr. McCullough, which purports to dispel the claims of substantial competitive injury by the lightly regulated utilities. The appeal and affidavit, however, are insufficient to establish that the

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[62] Although Assemblymember Brennan suggests that an independent proceeding would be appropriate, he did not pursue an Article 78 proceeding to challenge the 2014 Secretary Determination upholding the RAO's denial of access to the same categories of information at issue here.

[63] 2014 Secretary Determination, p. 12.

[64] As noted by the RAO, 24 expert affidavits were submitted by the lightly regulated utilities, and both IPPNY and the NYISO filed affidavits (2015 RAO Determination, p. 3). Moreover, IPPNY submitted the affidavit of Mr. Younger in response to Mr. McCullough's affidavit.

[65] IPPNY argues that, inasmuch as Assemblymember Brennan seeks access to the same categories of information he was denied last year, the appeal is barred, with respect to the same arguments raised last year, by the doctrines of *res judicata* and collateral estoppel. Although IPPNY cites convincing case law to support its arguments, such arguments belong more appropriately before a court of law. Allied Chemical v Niagara Mohawk Power Corp., 72 NY2d 271, 276-277 (1988) (applying elements for issue preclusion, the Court found that a preclusive effect was properly accorded to the Commission's determination). Accordingly, I will entertain Assemblymember Brennan's appeal.

entities seeking exemption from disclosure failed to meet their burden through their affidavits and statements of necessity.

Under the NYISO's electric markets, merchant generators do not recover costs through regulated rates; instead, they must compete against other generators to serve a limited amount of demand. Merchant generators rely on "margins," the difference between the market price and their energy bids, to recover most of their fixed costs, including investment costs, labor costs, and property taxes (a portion of suppliers' fixed costs are covered by a separate "capacity" market). Given this reality, generators seek to operate their facilities as efficiently as possible in order to attempt to cover their costs and earn a profit. The RAO's 2014 Determination outlines the support for finding the existence of actual competition in the wholesale energy markets in affidavits and in case law and Commission proceedings.[66] Assemblymember Brennan failed to provide any convincing factual support for his claims to the contrary.

Assemblymember Brennan asserts that, "[u]nder a uniform-price auction [such as those run by the NYISO], there is no true competition between the suppliers. Each supplier can bid its marginal cost; bids are not based on a supplier's actual costs."[67] Contrary to Assemblymember Brennan's apparent inference, the NYISO bidding process matches costs and supply. The NYISO energy markets are structured to select suppliers based on competitive marginal cost-based bids in order to serve demand (load) reliably and at least cost. The energy markets reflect the unique features of electricity, which cannot be easily stored but must be generated at the instant of demand. At the time of system peak demand, sufficient supply must be available to meet that demand. At other times, the potential supply of energy that could be produced by generators exceeds the demand of the markets. As such, the energy market is designed to allow suppliers to compete to serve demand at each instant. The NYISO accomplishes this by accepting bids from suppliers ahead of time and stacking the bids from lowest to highest in order to create a "supply curve."[68] The NYISO determines the market-clearing price where supply meets demand, and pays suppliers that market-clearing price at that moment; thus prices rise or fall over time as demand rises or falls. This structure encourages suppliers to base their bids on

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[66] 2014 RAO Determination, p. 8.

[67] Appeal, p. 8.

[68] *Clearing Price Auctions*, THE NYISO, http://www.nyiso.com/public/about_nyiso/understanding_the_markets/clearing_price_auctions/index.jsp (last visited October 5, 2015).

their "marginal" (variable) costs to supply energy, in order to be selected to serve, rather than adding in average fixed costs and profit margins, so that the NYISO can meet demand at the lowest variable cost. It also encourages suppliers to be efficient and cost effective in order to maximize their chances of profitably supplying energy, based on their bids in the wholesale auctions.[69]

Mr. McCullough makes much of what he calls "hockey stick bids", and suggests these are efforts to profit by withholding supply. For example, regarding the Northport plant on Long Island, he complains that "this relatively old, inefficient plant has not been driven from the market by predatory pricing."[70] He adds: "Northport has a low bid for most of its possible outputs. It also bids a very high level for the last MWh of generation. Such bids, if widespread, are often a concern since it might show a level of economic withholding."[71] In fact, the Northport plant sells its output to LIPA at contractual rates,[72] so it would not profit from economic withholding. Moreover, Northport is needed to maintain local reliability on Long Island,[73] which helps explains why it is under contract and has not been driven from the market.

As for the "hockey stick bid", Mr. McCullough fails to account for the costs and risks involved when a unit operates at a higher output (i.e. the last few MWs). As Mr. Younger points out, while Mr. McCullough "refers to the bids largely in terms of heat rates and fuel costs," bids also include variable operations and maintenance costs, opportunity costs and risk adders.[74] These additional costs and risk adders become important when the unit is operating closer to its maximum output, where problems could arise due to the work a unit must put in to operate at a

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[69] Susan Tierney et al., *Uniform-Pricing versus Pay-as-Bid in Wholesale Electricity Markets: Does it Make a Difference?* THE NYISO (2009), *available at* http://www.nyiso.com/public/about_nyiso/understanding_the_markets/clearing_price_auctions/index.jsp.

[70] McCullough Affidavit ¶ 24.

[71] McCullough Affidavit ¶ 25.

[72] Amended & Restated Power Supply Agreement Between Long Island Lighting Company & National Grid Generation Llc (Oct. 10, 2012), *available at* http://www.lipower.org/papers/A%20and%20R%20PSA%20effective%2028%20May%2013.pdf.

[73] *See, eg.,* NYISO Operational Announcements for July 7, 2015, THE NYISO, http://www.nyiso.com/public/markets_operations/market_data/reports_info/index.jsp (accessed by searching for operational announcements in archived files).

[74] Younger Affidavit ¶ 16.

high output level.[75] For instance, a unit that is operating close to its maximum output must put in more effort (e.g. add more burners), which could result in maintenance issues it likely would not have otherwise experienced had it operated at a lower output level. Accordingly, that unit will incorporate those risks and other costs into its bid, which, in turn, results in a higher bid at the higher output, or a "hockey stick bid."

The Department recognizes that high bids could, under some circumstances, represent economic withholding; and the NYISO reviews these routinely. However, it is also important to recognize that operations and maintenance costs, opportunity costs and risks represent real costs.[76] If suppliers were never allowed to factor such costs into their bids for those last few megawatts, they would simply not offer those last few megawatts at all, thereby avoiding the attendant costs and risks. This would deprive the NYISO of valuable potential supply and would actually increase market prices, as the NYISO would have to take even more costly actions during emergency conditions.[77] Mr. McCullough's allegation of market power at these high output levels is thus unavailing.

Regarding the potential for economic withholding via excessive bids, one of the NYISO's mitigation tools is to withhold publishing individual unit bids, to prevent one supplier from altering its bids to take advantage of its competitor's bids, as explained previously by the NYISO.[78] Individual unit marginal heat rates (incremental fuel input per additional MWh of output) are one factor in determining energy bids; therefore, publishing unit heat rates could make it easier for suppliers to estimate their competitor's bids. It should be noted that a unit's marginal heat rate varies by level of output, which is one reason bids vary by level of output. Thus the heat rate for the last few megawatts of supply may be greater than the average heat rate (which is total MWh divided by total fuel input).

Assemblymember Brennan and Mr. McCullough claim that "the information [at issue] is widely available."[79] While some price, cost and fuel information may be publicly available, the average full load heat rate and financial and operational information at issue is not. Specifically,

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[75] Younger Affidavit ¶¶ 16, 18.

[76] Younger Affidavit ¶ 16.

[77] Younger Affidavit ¶ 18.

[78] Case 12-05-77 Affidavit of Dr. Nicole Bouchez in Support of NYISO's Statement of Necessity ¶ 9 (April 24, 2014); *see* June 17, 2015, Younger Affidavit ¶ 16.

[79] Appeal, p. 11; McCullough Affidavit ¶ 7.

Mr. McCullough states that it is possible to obtain "detailed estimates of thermal plant heat rates" from the EIA, in Form-923, and the EPA's NEEDS database.[80] Mr. Younger points out, however, that the heat rate data published by the EPA in its NEEDS database is derived from the generator operating information published in Form EIA-923.[81] EIA-923 includes monthly and annual information on fuel consumption and generation from which it is possible to estimate heat rates calculated during all hours when the generator ran, or the average heat rate.[82] This data, however, is not the same as the average full load heat rate data that generators provide in their annual reports to the Commission, and in Form-860 to the EIA.[83] As an initial matter, the EPA data is not a reported heat rate; rather, it is derived from operating information published in Form 923.[84] Moreover, the average full load heat rate is more valuable in understanding a unit's bidding behavior because it is measured at a specific operating parameter and, thus, is a more precise estimate. The confidential-nature of the full load tested heat rate data is further underscored by the fact that Form EIA-860 states that "[t]his [heat rate] information will be protected and not disclosed to the extent that it satisfies the criteria for exemption under the Freedom of Information Act (FOIA)."[85] No such protection is given to the data included in Form EIA-923.

If a generator knows the average heat rate, as derived from EIA Form-923, and the average full load tested heat rate, as disclosed in the annual report, that generator could determine the competitor's heat rate and cost of the last few megawatts of energy (the "hockey stick bid"), or essentially "back in" to the competitor's bid.[86] This is the most sensitive portion of a company's bid, both because there are fewer generators vying to operate at the high output level, and the bids incorporate risks and costs that are not present in normal operating level

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[80] McCullough Affidavit ¶¶ 20, 33, 58.

[81] Younger Affidavit ¶ 13.

[82] Id.

[83] Id.

[84] June 17, 2015 Younger Affidavit ¶ 23; Younger Affidavit ¶ 13

[85] U.S. EIA, Form EIA-860 Instructions Annual Electric Generator Report, p. 12, www.eia.gov/survey/form/eia_860/instructions.pdf. Generators disclose their "tested heat rate under full load conditions" in EIA-860. This is the same information required by the Commission in the annual reports.

[86] Bouchez Affidavit ¶ 7-8.

bids.[87] Without access to the full load heat rate, it would be much harder to estimate a unit's bids for the last few megawatts.[88] Accordingly, not only is the full load tested heat rate data not "widely available,"[89] disclosure of this information would, despite Assemblymember Brennan's claims to the contrary, likely cause substantial competitive injury to the lightly regulated utilities.

Second, as noted by Mr. Younger, although Assemblymember Brennan focuses on the bidding information, "the scope of the operating and financial data [he] seeks goes well beyond those limited sub-categories associated with factors driving energy bids and spreads to the overall financial standing of the individual generators."[90] Indeed, the information includes site-specific revenues and expenses, as well as generator unit-specific annual operational data; these are of the most highly sensitive types of information available regarding an electric generator's operation in the New York electricity markets. This type of information is much more specific than that which is filed publicly with entities such as the FEIA, FERC[91] and NRC, and released in market analyst reports and credit ratings. Moreover, information of this nature cannot be replicated because parties do not have access to all necessary inputs to be able to develop it for themselves.

In his affidavit, Mr. Younger detailed numerous harmful situations that could result from the release of such detailed financial and operational information. For instance, if a generator knew the cost profile for all its competitors, it could determine how much it could raise its bid and still remain below the costs of its next most economic competitor, which could result in higher prices when that generator was on the margin.[92] Moreover, a generator that has access to

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[87] *See* Younger Affidavit ¶ 16-18.

[88] *See* Younger Affidavit ¶ 16-18.

[89] The fact that the bids are eventually published by the NYISO does not change the outcome. The NYISO publishes bids six months after the auction and protects the identity of the bidders. Moreover, Mr. McCullough's claim that Massachusetts publishes heat rates for New York generators is misleading. The link provided to support his claim merely shows aggregate heat rates by fuel type in New York based on the data provided by generators in EIA-923 forms.

[90] Younger Affidavit ¶ 21; IPPNY Response, p. 11.

[91] 2014 Secretary Determination, p. 13. "Moreover, the Younger Affidavit filed on appeal refutes Assemblyman Brennan's claims that the FERC or FEIA websites release the information in the reports to the public. The FERC website does not provide the same information as sought in the annual reports; indeed, the Commission adopted the Lightened Ratemaking Reporting Order precisely because FERC does not require the information now provided by the reports." See also Response of Entergy Entities, p. 4.

[92] Younger Affidavit ¶ 26.

a struggling competitor's operational data can behave in such a way as to force that competitor out of the market. For example, if a generator knows that a competitor is not profitable and will likely mothball, that generator can lower its bid to below that of the competitor, which could result in the competitor not clearing the auction.[93] Conversely, if a generator considering to mothball its facility because of inadequate revenues had access to detailed financial information that revealed another generator was also facing financial distress, that generator may delay its retirement decision, hoping that its competitor will exit the market first. Another possibility is that rivals could use this financial information to identify the least cost improvements to their facilities to reduce operating costs and heat rates to levels that would permit them to undercut competitors' bids in the future.[94] Accordingly, disclosure of the detailed financial and operational information would likely result in substantial competitive injury to the generators participating in the NYISO markets, which could result in decreased competition among suppliers, creating higher wholesale costs and, therefore, higher retail prices for consumers.[95]

Mr. Younger also dispels Mr. McCullough's claim that knowing whether one or more units is making a significant return would enable the public to determine whether the market is competitive. The ability of some units to be more efficient than others, Mr. Younger explains, "is in no way an indication that the market is not competitive."[96] Rather, the ability of more efficient units to realize larger returns "is part of the fundamental incentive for efficiency in a market economy." Mr. Younger also notes that forces beyond the control of the generators can impact their returns. For example, coal generators were making significant returns when natural gas prices were high; however, those facilities have seen a substantial decrease in revenues due

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[93] Younger Affidavit ¶ 21.

[94] 2014 RAO Determination, p. 9.

[95] Assemblymember Brennan attempts to distinguish the financial information of nuclear, wind and hydro generators (non-dispatchable generators) from the other generators participating in the NYISO markets. However, as explained in the Response of Entergy Entities (pp. 2-3), the release of the financial information of the non-dispatchable generators will result in a likelihood of substantial competitive harm for those generators, inasmuch as competing generators will be able to make decisions based on access to that information. Insofar as all generators compete against one another, the release of the non-dispatchable generators' information would put that entire class at a competitive disadvantage.

[96] Younger Affidavit ¶ 22.

to lower gas prices.[97] As a result, a number of coal generators have announced plans to mothball or retire their facilities in the short-term.

Assemblymember Brennan incorrectly claims that the RAO granted "blanket exemptions" to the information at issue. While courts disfavor "blanket exemptions" of documents under FOIL, the RAO did not grant such an exemption for the annual reports.[98] Rather, the 2014 RAO Determination went through the annual reports and granted protection to only those portions of information for which the lightly regulated utilities had established that disclosure would cause substantial competitive harm.[99] Inasmuch as the companies provided specific, persuasive evidence that disclosure of the portions of information at issue herein would cause substantial competitive injury, the RAO properly found that those particular portions were entitled to protection under POL § 87(2)(d).[100]

Lastly, Assemblymember Brennan's argument that the information at issue should be disclosed because it "may be more than two years old" and "[t]he passage of time reduces or eliminates the harm that might arise when a disclosure involves more current information" does not alter the outcome of this appeal.[101] As noted in the 2014 RAO Determination, "[t]he redacted information either is fixed, or typically changes over time in a predictable manner. It

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[97] Younger Affidavit ¶ 23.

[98] The Court of Appeals has noted that "blanket exemptions for **particular types of documents** are inimical to FOIL's policy of open government" (Matter of Gould v New York City Police Dept., 89 NY2d 267, 275 [1996]) (emphasis added). Here, there was no exemption of the annual reports in their entirety. Given that the annual reports contain the same categories of information, it is logical to uniformly protect the information within the reports that qualifies as trade secret or confidential commercial information. That, however, does not constitute a "blanket exemption."

[99] 2014 RAO Determination, pp. 18-22.

[100] Assemblymember Brennan also claims that "[t]he RAO's reliance on NYISO's code of conduct for the basis for confidentiality is erroneous and without legal foundation" (Appeal, p. 9). The RAO, however, did not rely on the NYISO's Code of Conduct. Rather, she relied on Commission precedent that afforded protection to similar data. Case 00-E-1380, The Provision by the NYISO of Information and Data to Department Staff, Order Clarifying Information and Data to be Provided and Measures Regarding Protection of Confidential Information (issued August 23, 2000). In any event, the RAO found that "[t]he companies have shown that the information in question fits within the definition of trade secret, and, by the sum of submittals, they have shown that release of the information at issue, would put generators and other companies owning delivery facilities in competitive markets at a competitive disadvantage if their competitors had access to the information" (2014 RAO Determination, p. 21).

[101] Appeal, p. 9.

will remain relevant over time and, if disclosed, the information could be used against [units] in future transactions."[102] As such, a competitor could use data from successive annual reports to develop a profile of a generator and model its strategies from that profile. While in some circumstances, the value of data and likelihood of harm from disclosure may diminish over time, this is not the case with respect to the information at issue.[103]

Disclosure of the Confidential Information in the Annual Reports Did Not Negate The Lightly Regulated Utilities' Entitlement to FOIL exemption or the Commission's Responsibility to Protect That Confidential Information from Disclosure.

Shortly after Assemblymember Brennan filed his appeal, it was discovered that Mr. McCullough's affidavit included links to annual reports of seven lightly regulated companies which contained the confidential information for which those companies had requested protection. The companies followed the process for requesting protection of confidential documents by filing a complete version of the report confidentially through the Department database, which was locked from public view, and a redacted version of the report that was accessible to the public. The companies, however, did not redact the confidential information properly prior to filing the publicly available redacted reports. The redacted reports filed in Portable Document Format (PDF) appeared to contain the intended redactions by the companies. As argued by IPPNY, the links in the affidavit, however, led to a Google Cache webpage that rendered the PDF reports in a HyperText Markup Language (HTML) format.[104] Given that the redactions were done improperly, the Google Cache Webpage HTML reader displayed the documents without the companies' intended redactions, thereby revealing the confidential

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[102] RAO Determination, p. 11.

[103] Inasmuch as the utilities have met their burden by showing that they would be likely to suffer substantial competitive injury if the information were disclosed, as in 2014, the question of whether the information is "trade secret" need not be reached. *See* supra, note 11.

[104] According to Google:

> Google Cache is normally referred as the copies of the web pages cached by Google. Google crawls the web and takes snapshots of each page as a backup just in case the current page is not available. These pages then become part of Google's cache. These Google cached pages can be extremely useful if a site is temporary down, you can always access these page[s] by visiting Google's cached version.

Google Cached Page, http:cachedview.com (last visited Oct. 5, 2015).

information in the reports.[105] In his appeal, Assemblymember Brennan claims that these full reports "are readily available on the Internet" and "voluntary disclosure" eliminates any right to confidentiality.[106]

Initially, the manner in which the confidential information contained in the reports was published must be addressed. Despite the characterization by Assemblymember Brennan and Mr. McCullough that these reports are "readily available," the reports containing the confidential information were not intentionally published by the companies; at most, any disclosure was inadvertent.[107] Rather, Mr. McCullough was able to access the confidential material contained in the annual reports due to the incorrect redaction of the reports by the seven lightly regulated companies. To be clear, the companies intended to redact the annual reports and for that information to remain confidential; however, as a result of the companies' use of incorrect redaction methods, Mr. McCullough was able to view the confidential information in the reports through Google Cache Webpage.[108] The McCullough Affidavit, as filed, contained information known or that should have been known to be confidential.

I do not condone the way in which this appeal disseminated the very same information the RAO found to be entitled to protection pursuant to POL §87(2)(d).[109] Indeed, the filing of

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[105] Upon receiving notice of this issue, the appeal and supporting documents were immediately locked from public view on the Department's database. Upon review, it was determined that neither the appeal nor the resume of Mr. McCullough contained confidential information and, thus, both were unlocked for public access. Subsequently, the RAO redacted the portions of allegedly confidential information at issue in this appeal from the McCullough Affidavit, as originally filed by Assemblymember Brennan, and the redacted McCullough Affidavit was reposted for public access. The Department will continue to treat the un-redacted version of the McCullough Affidavit as confidential.

[106] Appeal, p. 12.

[107] IPPNY Response, pp. 5-7.

[108] Matter 13-01288, supra, Letter to Lightly Regulated Utilities (issued September 3, 2015) (Letter to Lightly Regulated Utilities). The Office of Information Technology Services determined that the confidential store on the Department's database (DMM) was not accessed by external actors; rather, Mr. McCullough was able to view the confidential information in the reports through Google Cache webpage because those reports were not redacted properly. As explained by the RAO, "[p]roper use of industry-standard redaction software, like Adobe Acrobat Pro, on a PDF document will ensure redaction of all metadata and that hidden information, overlapping data, etc. are removed from the document – not simply 'blacked out' from public view."

[109] 2015 RAO Determination, p. 5. Moreover, the same categories of information were found to be entitled to protection in the 2014 RAO Determination and 2014 Secretary Determination.

this appeal and the confidential information in the affidavit publicly subverted FOIL law and the RAO's Determination.[110] Instead, this appeal ought to have been filed in the same manner as any document filed with the Secretary containing confidential information: by filing a confidential appeal with the RAO and a redacted appeal with the Secretary. In this way, the filing could have maintained the integrity of the confidential information that is protected by the Department while this appeal was being considered. As a consequence, all of the lightly regulated companies that submitted annual reports were given the opportunity to resubmit correctly redacted documents so as not to contain confidential information that would be available through an HTML reader or otherwise. These companies are now on notice of the need for proper redaction, and are expected to submit properly redacted documents when seeking protection from disclosure under FOIL. [111] As such, there should not be similar opportunities in the future for companies to resubmit improperly redacted documents.[112]

As IPPNY noted, the "redacted information in these reports was intended to be kept confidential and . . . were disclosed inadvertently and without the knowledge of the affected companies."[113] When IPPNY discovered that the complete confidential annual reports were

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[110] IPPNY argues that Assemblymember Brennan's decision to publish the confidential information may be a violation of the Lawyer's Rules of Professional Conduct. IPPNY Response, pp. 7-8. I do not enforce the Lawyer's Rules of Professional Conduct, and therefore do not address this point.

[111] The RAO Letter to Lightly Regulated Utilities explained the need to use proper software when redacting confidential information. Additionally, the "Guidelines for Filing Documents with the Secretary" address the filing of redacted documents in the Department's database: http://www3.dps.ny.gov/W/PSCWeb.nsf/All/4BDF59B70BABE01585257687006F3A57?Open Document.

[112] Assemblymember Brennan further claims in his October 14, 2015 reply letter in support of his appeal that the confidential portions of the annual reports are not entitled to exemption from disclosure because many companies do not consider the information to be harmful or trade secrets. He explains that, despite the September 3, 2015 RAO letter directing the utilities to resubmit correctly redacted reports, "seventeen have reposted their old un-redacted reports . . . and several others filed partially un-redacted reports." Brennan Reply, p. 1. The companies, however, redacted the confidential portions of the annual reports publicly available of the Department's website. IPPNY's Response to Brennan Reply, p. 2. Assemblymember Brennan's October 14, 2015 reply contains no evidence that the utilities failed to properly redact any of the resubmitted reports. In any event, inasmuch as waiver of FOIL exemption must be voluntary and intentional, see infra, a company's disclosure of its confidential materials, even if intentional, is insufficient to waive other companies' entitlement to FOIL exemption.

[113] IPPNY Response, p. 6.

available through links contained in Mr. McCullough's affidavit, it immediately notified the RAO and requested the information be removed from the Department's database. As discussed herein, despite Assemblymember Brennan's claims to the contrary, the information at issue should not be considered publicly available. Moreover, IPPNY explains that, finding the confidential reports without the links provided in Mr. McCullough's affidavit would be extremely difficult.[114] For these reasons, the availability of this information to Mr. McCullough does not constitute a "voluntary disclosure" by the lightly regulated companies such that they lose the right to confidentiality.[115] Further, inadvertent disclosure of documents does not, as a matter of law, terminate exemptions under FOIL.[116] Here, the RAO properly determined that the information at issue was entitled to protection under POL § 87(2)(d), and the unauthorized disclosure of that information does not form a basis for overturning that decision.[117] Given that this information is entitled to protection under POL § 87(2)(d), Assemblymember Brennan should refrain from further disseminating the McCullough Affidavit, or the links to the confidential annual reports contained therein. Moreover, the companies that received the McCullough Affidavit, and the links to the confidential annual reports, should delete the affidavit in order to prevent further access to, or dissemination of, this confidential information.[118]

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[114] Id. at 7.

[115] Albany County Supreme Court expressly rejected a similar argument in McGraw-Edison Co. v Williams (133 Misc 2d 1053, 1055 [Sup Ct Albany County 1986]), where an agency had inadvertently disclosed information entitled to an exemption under FOIL. The Court noted that "[i]n this jurisdiction, waiver of a statutory privilege 'has long been recognized as acceptable practice so long as it is done intelligently and voluntarily'" and, as such, "decline[d] . . . to adopt a restrictive view of the doctrine of waiver, as it applies to FOIL requests" (internal citation omitted). See also Matter of Mazzone v New York State Dept. of Transp., 95 AD3d 1423 (3d Dept 2012) (holding that the inadvertent disclosure of documents does not waive an agency's right to claim an exemption under FOIL).

[116] HMS Holdings Corp. v Arendt, 48 Misc 3d 1210(A) (Sup Ct Albany County 2015) (rejecting the contention that the inadvertent e-filing of documents containing trade secrets necessarily 'terminate[s] any possible trade secret protection by operation of law'").

[117] Assemblymember Brennan's argument that the Commission does not have the statutory authority to approve lightened ratemaking regulation is not within the scope of FOIL and, as such, I decline to address it.

[118] In an October 23, 2015 letter, IPNNY requested that the utilities destroy any un-redacted copy of Mr. McCullough's affidavit in the utilities' possession.

CONCLUSION

The lightly rate-regulated entities have met their burden of showing that certain portions of the required annual report filings are entitled to an exception from disclosure under FOIL, as provided in POL §§ 87(2)(d) and 89(5)(e). For the reasons discussed herein, Assemblymember Brennan's appeal of the RAO's July 2, 2015 Determination is denied in its entirety.

KATHLEEN H. BURGESS
Secretary