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The Honorable Kathleen H. Burgess
Secretary
New York Public Service Commission
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**RE: Appeal of Records Access Officer Determination 16-01 – ESCO Historic Pricing Data for Residential Customers for 2014 and 2015
Case 12-M-0476 and Matters 14-02555 and 14-02554**

Dear Secretary Burgess:

The National Energy Marketers Association (NEM)¹ hereby respectfully submits this written Appeal of Determination 16-01 by the Records Access Officer (RAO). This Written Appeal is submitted pursuant to POL § 89(5)(c)(1). In Determination 16-01, the RAO found that certain ESCO historic pricing data for residential customers for 2014 and 2015 that has been confidentially filed with the Commission is not entitled to an exception from disclosure as trade secret or confidential commercial information under the Freedom of Information Law (FOIL).

NEM submits that Determination 16-01, in denying the Statements of Necessity for exception of disclosure, misapplied the applicable standard established in Verizon² with respect to establishing whether a record is trade secret and also the standard established in Encore³ with respect to whether the disclosure of information poses a substantial risk of competitive injury. In so doing, the Determination established a legal hurdle to information protection that is so high that it is nearly impossible to meet. Indeed, the Statements of Necessity filed by NEM and other parties provided an ample record upon which the RAO should have found that the tests

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

² Matter of Verizon N.Y. Inc. v. New York State Public Service Commission, Opinion and Order in Docket No. 52117, Supreme Court, Appellate Division, Third Department, New York (January 14, 2016).

³ Encore College Bookstores, Inc. v. Auxiliary Service Corporation, 87 N.Y.2d 410 (1995).

established by Verizon and Encore were satisfied and ESCO residential pricing information should be protected from disclosure.

I. Background

ESCOs were required by the Commission's Retail Market Investigation Order of February 25, 2014, to file historic pricing information on a quarterly basis with the Secretary.⁴ The reporting includes a separate average unit price for residential fixed price products for a minimum twelve month period as well as residential variable price products, that include no energy-related value-added services, and by geographic area. It was clarified in the RAO's December 9th letter in this matter that staff is not seeking to release customer counts.

NEM filed a Statement of Necessity for exception from disclosure. Eight ESCOs and other trade groups also filed Statements, four of which were accompanied by company affidavits. The RAO in Determination 16-01 found that none of the parties that had filed Statements of Necessity for Exception from Disclosure presented sufficient evidence to prove the information was entitled to trade secret status and also did not prove a sufficient likelihood of substantial competitive injury resulting from disclosure of the documents claimed to be confidential commercial information.

In Determination 16-01, the RAO discussed the January 14, 2016, Verizon v. NYPSC decision of the New York Appellate Division and its application to the instant matter. The Court held in Verizon that the law provides for two separate FOIL exemptions from disclosure: 1) bona fide trade secrets; and 2) non-trade secret confidential commercial information that would cause substantial competitive injury if disclosed. If the information constitutes trade secret, a showing of substantial competitive injury is not required. The entity seeking exception from disclosure must prove they are entitled to the exemption with "specific and persuasive evidence."

II. ESCO Residential Pricing Information is Trade Secret

With respect to establishing whether a record is trade secret, the RAO cited the two part test enunciated in Verizon:

- 1) Establish 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 a competitive advantage over competitors who do not know or use it";
- 2) A factual determination "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."

⁴ Case 12-M-0476 et. al. Order Taking Actions to Improve the Residential and Small Nonresidential Retail Access Markets, at 16-18.

Contrary to the finding in Determination 16-01, the ESCO residential pricing information sought to be disclosed are closely guarded trade secrets that would reveal confidential proprietary business practices and risk management techniques as well as supply sources. The RAO stated that, “the formula and thought process that went into the compilation of that price structure might arguably fit into a trade secret discussion.” An ESCO’s pricing formula and thought process is inarguably a trade secret and form the basis for the pricing information at issue here. ESCO pricing formulas are closely guarded, confidential information known only to select employees within a company and are not known outside of the business. Pricing formulas, and the related thought process, are developed by specialized employees with specialized skill sets. The development of the pricing formula, including the associated underlying risk management, market analysis, business strategy, resource utilization and execution plan, is costly to develop. The pricing formulas are reflective of the individual ESCO’s cost structure and margin structure. It is valuable to the ESCO itself in developing products to differentiate itself to consumers in the marketplace. Knowledge of the pricing formula would likewise be valuable to competitors, including utilities and private companies. Because this information is so competitively sensitive and valuable to each individual ESCO, it is closely maintained to prevent its acquisition and duplication by others.

III. Disclosure of Residential Pricing Information Poses a Substantial Risk of Competitive Injury to ESCOs

As to the whether the disclosure of information poses a substantial risk of competitive injury, Determination 16-01 applied the two-prong test set forth in the Encore case. First, the party seeking the exemption must establish the existence of competition to warrant an exception from disclosure. Determination 16-01 found that this first prong was satisfied because, “[t]he ESCOs and associations have established the existence of competition in the electric and natural gas industry in New York State.” Second, the party must show that disclosure of the information would be likely to cause substantial competitive injury, “by providing a causal link between the disclosure and the injury.”

The Statements of Necessity proved in detail that the disclosure of ESCO residential pricing information would cause substantial competitive injury. Determination 16-01 significantly understated the extent of the injury by assuming that “all ESCOs operating in New York State will be on the same, level playing field with respect to the disclosure of information” thereby presumptively mitigating the competitive injury. Just because all ESCOs will incur the injury does not mean that it is not substantial. Moreover, the extent of the injury for smaller ESCOs, with fewer product offerings and smaller customer bases, would be even more significant. Small ESCOs are more susceptible to competitive injury because their pricing structures and strategies for serving customers in particular service areas will be more transparent when the pricing information is disclosed.

The Determination appears to find that ESCOs will not be competitively disadvantaged by the disclosure vis a vis the utilities because, “[g]as and electric utilities are also subject to price reporting with DPS and their prices are reporting on the agency’s Power to Choose website.” NEM agrees that the utilities should be required to transparently report their prices. However, to date, the derivation of utility commodity pricing continues to be a virtual black box that bears little resemblance to current market conditions, is artificially subsidized by delivery service rates

and is further distorted by out-of-period adjustments. Utility price reporting under these circumstances does little to ensure a “level playing field.”

As to the establishment of a causal link between the information disclosure and the injury to ESCOs, NEM submits that this is clear. But for the disclosure of the information, this data would not be publicly available thereby causing the resultant injury to ESCOs.

IV. The Requirement to Retain Outside Experts is Excessive and Unnecessary

The Determination also incorrectly found that the ESCOs had not provided sufficient factual support to sustain non-disclosure. The Determination said, “[i]t 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).” The record provided to the RAO provided detailed explanations of the nature of the ESCO residential pricing information as trade secret as well as the substantial competitive injury that would result from its disclosure. Indeed, the record includes ESCO affidavits detailing the individualized impacts of the disclosure on respective ESCO businesses. In discounting those affidavits, the Determination effectively decided that ESCOs are not expert in the conduct of their own business and that only “an economist or other expert” could meet the factual burden. This result is contrary to reason, and again, establishes a legal hurdle in excess of what is required by caselaw. There is no one more expert in the character of the information as trade secret as well as the extent of the competitive injury that will be realized by disclosure of the information than the competitive entities themselves.

V. Determination 16-01 Correctly Distinguished Prior Determinations and Should Have Protected the Information from Disclosure

The RAO agreed with NEM’s arguments that the prior Determination 14-01 and Appeal by the Secretary was not dispositive of the issue. The Determination correctly noted that, “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.” Despite the fact that the RAO correctly found the facts in this case distinguishable from Determination 14-01, the RAO still did not protect the information from disclosure. In other words, the Determination recognized that the release of ESCO residential pricing information in the instant case would be more injurious because each ESCO will be separately identifiable with a price; the pricing data is current data; and it will show ESCO pricing information over time. Given this recognition, Determination 16-01 should have consistently applied this logic and found that the pricing is entitled to be protected from disclosure.

VI. Conclusion

For the foregoing reasons, NEM files this Appeal to urge the reversal of Determination 16-01. ESCO residential pricing information should be excepted from disclosure as trade secret. ESCO residential pricing information should also be excepted from disclosure because of the substantial competitive injury that disclosure of the information would impose on ESCOs in the New York market.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Craig Goodman", with a long horizontal flourish extending to the right.

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