STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

Proceeding on Motion of the Commission to Assess Certain Aspects of the Residential and Small Non-residential Retail Energy Markets in New York State.

Case 12-M-0476

THE RETAIL ENERGY SUPPLY ASSOCIATION'S APPEAL OF THE RECORDS ACCESS OFFICER'S DETERMINATION

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The Retail Energy Supply Association ("RESA")[1] hereby appeals from the Records Access Officer's ("RAO") February 1, 2016 determination, which concludes that certain pricing information submitted to the Public Service Commission (the "Commission") by energy service companies ("ESCOs") is not entitled to continued exception from disclosure under Public Officers Law ("POL") § 87 (2) (d) and 16 NYCRR § 6-1.3 (the "Determination").[2] In holding that this pricing information does not qualify as either a trade secret or as confidential commercial information, the Determination misapplies the standards that govern requests for confidential treatment under POL § 87 (2) (d) and 16 NYCRR § 6-1.3 (b), erroneously fails to follow the Secretary's and RAO's recent rationale in an analogous matter, and incorrectly disregards evidence submitted by RESA in support of its statement of necessity (the "Statement").

As discussed in detail below, RESA's Statement clearly demonstrates that the records at issue here meet both the test for trade secret status and the test for confidential commercial

[1] The comments expressed in this filing represent RESA's position as an organization and may not represent the views of all of its members. Founded in 1990, RESA is a broad and diverse group of more than 20 retail energy suppliers dedicated to promoting efficient, sustainable, and customer-oriented competitive retail energy markets. RESA members operate throughout the United States delivering value-added electricity and natural gas service at retail to residential, commercial, and industrial energy customers. Additional information on RESA may be found at www.resausa.org.

[2] Case 12-M-0476, *et al.*: *Proceeding on Motion of the Commission to Assess Certain Aspects of the Residential and Small Non-residential Retail Energy Markets in New York State*, Trade Secret Determination 16-01 (Issued Feb. 1, 2016).

information. Therefore, the Determination should be reversed, and the ESCOs' pricing information should be afforded continued confidential treatment under the POL.

I. BACKGROUND

A. The Commission's February 25, 2014 Retail Markets Order

The Commission instituted this proceeding to review and assess the performance of the retail energy market for residential and small non-residential customers.[3] As part of the review process, Department of Public Service Staff ("Staff") met with ESCOs, trade associations, industry stakeholders, and other interested parties.[4] After considering the comments submitted by the numerous parties to the proceeding, the Commission issued an order directing ESCOs to, among other things, file certain historic pricing information, which the Commission planned to make available to the public (the "Retail Markets Order").[5]

Specifically, the Retail Markets Order requires ESCOs to provide the Commission Secretary ("Secretary") with "a separate average unit price for products with no energy-related value-added services for each of four groups of customers and by geographic area: 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."[6] The Retail Markets Order further requires ESCOs to "file the number of customers purchasing products in those categories."[7]

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[3] Case 12-M-0476, *et al.*: *Proceeding on Motion of the Commission to Assess Certain Aspects of the Residential and Small Non-residential Retail Energy Markets in New York State*, Order Instituting Proceeding and Seeking Comments Regarding the Operation of the Retail Energy Markets in New York State (Issued Oct. 19, 2012).
[4] *Id.* at 5-6.
[5] Case 12-M-0476, *et al.*: *Proceeding on Motion of the Commission to Assess Certain Aspects of the Residential and Small Non-residential Retail Energy Markets in New York State*, Order Taking Actions to Improve the Residential and Small Non-residential Retail Access Markets (Issued Feb. 25, 2014), at 16.
[6] *Id.* at 17. After several parties filed requests for rehearing of the Retail Markets Order, including RESA, the Commission stayed that portion of the order which required ESCOs to file historic pricing information for non-residential customers. Case 12-M-0476, *et al.*: *Proceeding on Motion of the Commission to Assess Certain Aspects*

The Commission intended that this information would be compiled into a master list ranking ESCOs by average price offered in specific geographic regions within each utility's service territory.[8] The list would then be published on the Commission's *Power to Choose* website to help customers assess "whether their current energy supplier meets their needs."[9]

In order to compile the information in the list, the Commission ordered Staff to develop a format for ESCOs to report the required information to the Secretary.[10] To that end, Staff created a template that included the following data fields:

1. ESCO Name,
2. Quarter,
3. Service Class,
4. Utility,
5. Service Type,
6. Zone,
7. Number of Customers,
8. Term Length,
9. Electric Fixed Price,
10. Electric Variable Price,
11. Gas Fixed Price,
12. Gas Variable Price, and
13. Gas Unit of Measure (collectively, the "Pricing Compilation").[11]

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of the Residential and Small Non-residential Retail Energy Markets in New York State, Order Granting Requests for Rehearing and Issuing a Stay (Issued Apr. 25, 2014), at 5.

[7] *Id.*

[8] *Id.*

[9] *Id.* at 18.

[10] *Id.* at 18.

Consistent with the Retail Markets Order, most ESCOs have been submitting this Pricing Compilation to the Secretary on a quarterly basis with a request for protection from disclosure under POL § 87 (2) (d) and 16 NYCRR § 6-1.3.[12]

B. The RAO's December 4th And 16th Correspondence

By letter dated December 4, 2015, the RAO advised ESCOs that it was "Staff's intention to make the historic pricing information [in their Pricing Compilations] for 2014 and 2015 public as outlined in and directed by the [Retail Markets] Order" (the "December 4 Letter").[13] Since ESCOs were submitting their Pricing Compilations with a request for confidential protection, the correspondence notified ESCOs that the RAO would make a determination "pursuant to POL § 89 (5) regarding all requests for protection from disclosure."[14] The December 4 Letter asked any ESCO who objected to disclosing the Pricing Compilation to file a statement of necessity describing why the Pricing Compilation was entitled to protection under POL § 87 (2) (d).[15]

Shortly after the December 4 Letter was issued, the Impacted ESCO Coalition filed a request for an extension of the period in which to submit a statement of necessity and sought clarification of certain issues.[16] Specifically, the Impacted ESCO Coalition asked "(i) how and in what format will the historic pricing information be disclosed; (ii) will any data be aggregated; (iii) how will each ESCO be tied to its customer data; and (iv) will any data submitted by ESCOs

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[11] *See Industry & Energy Service Company (ESCO) Competitive Market Information*, DEPT. OF PUB. SERV., available at http://www3.dps.ny.gov/W/PSCWeb.nsf/All/3F6ED8DE50C6306185257687006F3A5F?OpenDocument (last visited Dec. 30, 2015).

[12] Determination, at 2.

[13] Case 12-M-0476, *et al.*: *Proceeding on Motion of the Commission to Assess Certain Aspects of the Residential and Small Non-residential Retail Energy Markets in New York State*, 2-Fold Letter as of December 4, 2015 (Filed Dec. 4, 2015), at 1.

[14] *Id.*

[15] *Id.*

[16] Case 12-M-0476, *et al.*: *Proceeding on Motion of the Commission to Assess Certain Aspects of the Residential and Small Non-residential Retail Energy Markets in New York State*, Impacted ESCO Coalition Request for Extension (Filed Dec. 15, 2015), at 1.

be exempted from disclosure."[17] In response, the RAO issued further correspondence granting the extension request and referring the Impacted ESCO Coalition to the Retail Markets Order, which explains the Commission's intent to publish the Pricing Compilations, for clarification of the issues raised in its correspondence (the "December 16 Letter").[18] The December 16 Letter further clarifies that "Staff is seeking that the information released will tie each ESCO[] to its specific customer data" but that "Staff is not seeking to release customer counts."[19] In other words, the December 16 Letter confirms that only some of the information in the Pricing Compilation is proposed for disclosure. Specifically, customer counts will continue to be exempt from disclosure, while the remaining information in the Pricing Compilation will be disclosed, pending the resolution of the instant appeal.

C. RESA's Statement Of Necessity

On January 11, 2016, RESA submitted its Statement, which sought continued confidential treatment of the ESCOs' Pricing Compilations pursuant to POL § 87 (2) (d) and 16

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[17] *Id.*

[18] Case 12-M-0476, *et al.*: *Proceeding on Motion of the Commission to Assess Certain Aspects of the Residential and Small Non-residential Retail Energy Markets in New York State*, Extension of Time Letter (Filed Dec. 16, 2015), at 1. The specific section of the Retail Markets Order referred to in the December 16 Letter states that

> "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. The utility information will be adjusted to account for differences between how ESCOs and utilities charge for bill processing and other charges in order charges in order facilitate a direct comparison. Publishing this comparative historic bill information will assist mass market consumers in assessing whether their current energy supplier meets their needs."

Id. at 1-2.

[19] *Id.* at 2 (emphasis in original).

NYCRR § 6-1.3.[20] The Statement presented factual evidence and legal arguments that the Pricing Compilation is both a trade secret and confidential commercial "information obtained from a 'commercial enterprise which if disclosed would cause substantial injury to the competitive position of the [individual ESCO].'"[21] For example, in support of its Statement, RESA submitted the Affidavit of Anthony Cusati III (the "Cusati Affidavit"), a Regulatory Affairs Director for IGS Energy with over 15 years of experience in the retail energy industry, including on the subject of ESCOs' product and pricing strategies.[22] Among other things, Mr. Cusati described how disclosure of the information in the Pricing Compilation would allow a competing ESCO to predict a disclosing ESCO's pricing, hedging, and margin strategies and use that information to undercut it in the marketplace.[23] Based on these facts, the Statement compared the disclosure of the Pricing Compilation to recent decisions by the Secretary and RAO to exclude from disclosure certain annual information submitted by lightly-regulated generators to the Commission pursuant to another order.[24] Finally, the Statement sought clarification of the December 16 Letter.[25] In particular, RESA asked the RAO to examine how customer count information would be separated and protected from disclosure since the Pricing Compilation includes customer count information, but the December 16 Letter states that Staff does not intend to release such information.[26]

[20] Case 12-M-0476, *et al.*: *Proceeding on Motion of the Commission to Assess Certain Aspects of the Residential and Small Non-residential Retail Energy Markets in New York State*, RESA Statement of Necessity (Filed Jan. 11, 2016).
[21] *Id.* at 3
[22] *Id.* at 2, Attachment A.
[23] *Id.* at 13, Attachment A.
[24] *Id.* at 13-14; *see also* Matter 13-01288: *In the Matter of Financial Reports for Lightly Regulated Utility Companies*, RAO Determination of Trade Secret Information 14-02 (Filed June 30, 2014); *id.*, Determination of Appeal of Trade Secret Determination (Issued Aug. 13, 2014); *id.*, RAO Determination of Trade Secret Information 15-09 (Filed July 2, 2015); *id.*, Determination of Appeal of Trade Secret Determination (Issued Oct. 27, 2015).
[25] Statement, at 3-4.
[26] *Id.*

D. The RAO's Determination

On February 1, 2016, the RAO issued the Determination, concluding that "certain information for which 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."[27] More specifically, the RAO found that none of the ESCOs submitting statements of necessity proved that the Pricing Compilation was entitled to trade secret or confidential commercial status because the ESCOs "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."[28]

Further, the RAO summarily dismissed several of the factual points and arguments RESA made in its Statement and the accompanying Cusati Affidavit. First, the RAO rejected RESA's argument that disclosure of the Pricing Compilation will provide competitors with an unfair advantage.[29] According to the RAO, all ESCOs "will be on the same level playing field" because every ESCO operating in New York will have to submit historical pricing information for disclosure.[30] Next, the RAO rejected RESA's claim, which was supported by the Cusati Affidavit, that disclosure of the Pricing Compilation would permit competitors to track and predict an ESCO's pricing, hedging, and margin strategies by stating "it is simply not possible to reach that conclusion with annual average prices and the absence of customer counts."[31] Lastly,

[27] Determination, at 1.
[28] *Id.* at 10.
[29] *Id.*
[30] *Id.* at 10-11.
[31] *Id.* at 11. The Determination refers specifically to "reverse engineering." In the Statement, RESA made a similar argument that disclosure would permit a competitor to use the information in the Pricing Compilation and knowledge of market trends to "determine the contours of the individual ESCO's proprietary pricing strategy, proprietary margin strategy, and proprietary hedging strategy." Statement, at 13.

the RAO cryptically rejected the Cusati Affidavit on the ground that it "did not meet the standard that must be demonstrated."[32]

The RAO also dismissed RESA's contention that the Pricing Compilation should be afforded similar treatment to the information in the lightly-regulated generators' annual reports, which the RAO and Secretary recently determined merited continued confidential protection under the POL.[33] The RAO conclusory attempted to distinguish that matter on the grounds that the lightly-regulated generators "decision deals 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."[34]

RESA now appeals the RAO's Determination to the Secretary pursuant to 16 NYCRR § 6-1.3 (g).

II. ARGUMENT

THE RAO'S DETERMINATION SHOULD BE REVERSED, AND THE PRICING COMPILATIONS SHOULD BE AFFORDED CONTINUED CONFIDENTIAL TREATMENT UNDER THE POL

A. The RAO Incorrectly Concluded That The Subject Information In The Pricing Compilation Is Not A Trade Secret

The RAO determined that the subject information in the Pricing Compilation is not a trade secret.[35] In reaching this conclusion, the Determination states that "none of the 11 submitters prove the existence of a trade secret" because those ESCOs that submitted statements

[32] Determination, at 11 (arguing that "[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]"). *Id.*
[33] Determination, at 12.
[34] *Id.*
[35] Determination, at 10.

of necessity "failed to . . . adequately address the six factors used in making a trade secret determination."[36] The Determination further dismisses RESA's arguments that disclosure of the Pricing Compilation will provide new market entrants and competing ESCOs with a competitive advantage by stating that all ESCOs operating in New York will have to provide the same comparative information for disclosure.[37] The Determination further finds that "the data that will be released will consist of an average, not a specific price," and that "[e]ven if [specific] 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."[38] The RAO's conclusion and supporting rationale in the Determination that the subject information in the Pricing Compilation is not a trade secret is erroneous.

Pursuant to POL § 87 (2) (d), an "agency may deny access to records or portions thereof that . . . are trade secrets."[39] The Department of Public Service's regulations define a trade secret as "any formula, pattern, device or compilation of information which is used in one's business, and which provides an opportunity to obtain an advantage over competitors who do not know or use it."[40] In determining whether certain information constitutes a trade secret, courts consider the following factors:

> "(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

[36] *Id.*
[37] *Id.* at 10-11.
[38] *Id.* at 11.
[39] POL § 87 (2) (d).
[40] 16 NYCRR § 6-1.3 (a).

> 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."[41]

A showing of substantial injury is not required to demonstrate that the information is subject to trade secret protection.[42] Contrary to the RAO's holding in the Determination, RESA's Statement addressed each of the factors outlined above and presented ample support to demonstrate that the information in the Pricing Compilation is a trade secret.[43]

The information in the Pricing Compilation is not known outside of each ESCO's business and not widely known by employees and others involved in the business, and ESCOs take significant measures to guard the secrecy of the information in the Pricing Compilation. As outlined in the Statement, ESCOs take great care to protect the information contained in the Pricing Compilation from disclosure to the public or other competitors.[44] For example, ESCOs do not publicize their pricing structures. Customers who are interested in switching providers may call and obtain a quote from an ESCO or use a website, but must provide certain qualifying

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[41] *Verizon New York, Inc. v New York State Pub. Serv. Commn.*, 2016 NY Slip Op 00239(U) (3d Dept 2016) (citations omitted). The Commission's regulations list similar factors to be considered when assessing whether information is protected from disclosure, including:

> "(i) the extent to which the disclosure would cause unfair economic or competitive damage;
> (ii) the extent to which the information is known by others and can involve similar activities;
> (iii) the worth or value of the information to the person and the person's competitors;
> (iv) the degree of difficulty and cost of developing the information;
> (v) the ease or difficulty associated with obtaining or duplicating the information by others without the person's consent; and
> (vi) other statute(s) or regulations specifically excepting the information from disclosure."

16 NYCRR § 6-1.3 (b) (2). Notably, the regulations require a party seeking protection from disclosure to demonstrate substantial competitive injury, regardless of whether the party is seeking trade secret or confidential commercial status. *Id.* The Appellate Division, Third Department's recent holding in *Verizon* clarified that parties seeking trade secret protection are not required to demonstrate substantial injury. *Verizon*, 2016 NY Slip Op 00239(U). As a result, subdivision (i) in the regulation no longer applies to a trade secret analysis.

[42] *Verizon*, 2016 NY Slip Op 00239(U).

[43] Statement, at 10-17.

[44] *Id.*, Attachment A.

information first, such as a valid address or zip code. Customer information, including the number of customers that receive service from an ESCO by service territory, is kept strictly confidential since ESCOs' marketing and pricing strategies are heavily influenced by this information.[45] Even internally, the information in the Pricing Compilation is not generally known by employees of an ESCO. Only those few individuals who are responsible for developing an ESCO's pricing and marketing strategies are privy to all of the information contained in that ESCO's Pricing Compilation.

The information included in the Pricing Compilation is of great value to ESCOs and their competitors. By reviewing the data in the Pricing Compilation, one can learn the specific products offered by an ESCO, the geographic area where those products are offered, by both utility service territory and load zone, and at what price the products are sold.[46] In addition, over time, an individual can track an ESCO's historic pricing information and compare that information to market trends to predict that ESCO's pricing, margin, and hedging strategies.[47] This information can then be used to directly compete against the disclosing ESCO. Since acquiring the information in the Pricing Compilation would, if disclosed, take no effort or cost, a competing ESCO would be able to significantly reduce its individual costs to participate in the market, while undercutting and driving out the disclosing ESCO that has expended time and resources to develop the information.[48]

A significant amount of resources are expended by ESCOs to develop the information in the Pricing Compilation, which is used to create ESCOs' pricing and marketing strategies. ESCOs spend a considerable amount of time and money to develop effective marketing

[45] *See* Statement, at 10-13; Attachment A.
[46] *Id.* at 6.
[47] *Id.* at 12-13; Attachment A, at 3.
[48] *See* Statement at 15-16.

strategies to build their retail customer base in New York.[49] Prior to entering the market and when offering new products or services, ESCOs conduct extensive market research to identify the geographic areas they want to target, the customer base they want to reach, and the products they want to sell.[50] These efforts are expensive and time consuming and are often the difference between an ESCO successfully competing or failing in the marketplace.[51]

The information in the Pricing Compilation cannot be easily acquired or duplicated by others. Obtaining this level of detailed knowledge of an ESCO's commercial information is simply not possible without investing significant time and resources, and even then, would be extremely difficult to acquire. In fact, the Commission's inability to compile this information without the filing requirement in the Retail Markets Order demonstrates the sensitivity of the information in the Pricing Compilation, the measures ESCOs take to protect the information, and the difficulty of acquiring the information. Due to the potential unfairness and competitive harm that could result by allowing emerging and potential competitors to obtain valuable commercial information without significant expense or effort, the New York Court of Appeals has held that no further analysis is required if "FOI[L] disclosure is the sole means by which competitors can obtain the requested information."[52] In those situations, the Court has made clear that trade secret protection is warranted.[53] Here, ESCOs historical pricing and other information contained in the Pricing Compilation is only available as a result of the RAO's Determination, which is akin to a FOIL request. For these reasons, the RAO erred in not finding that the subject information in the Pricing Compilation was protected as a trade secret.[54]

[49] *Id.*
[50] *Id.*
[51] *Id.* at 11-12, 15-16.
[52] *Encore College Bookstores v Auxiliary Serv. Corp*., 87 NY2d 410, 420 (1995).
[53] *Id.*
[54] *See Encore*, 87 NY2d at 420.

The RAO also incorrectly concludes that disclosure of ESCOs Pricing Compilations would not place certain ESCOs at a competitive disadvantage in the marketplace. The RAO bases her decision on the assumption that historical pricing information for all ESCOs will be disclosed to the public.[55] However, this assumption ignores the points made in RESA's Statement that *new market entrants* will receive a competitive advantage from disclosure of ESCOs' Pricing Compilations.[56] As noted in RESA's Statement and above, ESCOs spend a significant amount of time and resources planning their pricing and marketing strategies before entering into the marketplace.[57] With the disclosure of the Pricing Compilation, a new market entrant will have the distinct advantage of surveying the marketplace and utilizing current ESCOs' information to develop its strategies, without having to exert much effort or financial resources.[58] For the same reasons, current market participants would also realize a competitive advantage for the areas of the market in which they do not currently operate.[59] This situation would permit ESCOs to manipulate the market by using the knowledge they gain from the Pricing Compilation to undercut disclosing ESCOs and drive out their competition.[60]

Similar concerns led the RAO and Secretary to protect the trade secret and confidential commercial information of lightly-regulated generators in a recent separate matter.[61] There, the RAO and Secretary concluded that disclosure of certain of the generators' financial information in Commission-required annual reports would cause substantial harm to the marketplace because

[55] Determination, at 10-11.
[56] Statement, at 15-16 (noting that competitors could use the information to enter the market and offer similar services at below market prices as well as to target specific geographic market segments, all without having to bear the cost of undertaking extensive market research).
[57] *Id.*
[58] *Id.*
[59] *Id.* at 16.
[60] *Id.*
[61] *See* Matter 13-01288: *In the Matter of Financial Reports for Lightly Regulated Utility Companies*, RAO Determination of Trade Secret Information 14-02 (Filed June 30, 2014); *id.*, Determination of Appeal of Trade Secret Determination (Issued Aug. 13, 2014); *id.*, RAO Determination of Trade Secret Information 15-09 (Filed July 2, 2015); *id.*, Determination of Appeal of Trade Secret Determination (Issued Oct. 27, 2015).

it would allow competitors and potential market entrants to forecast a generator's marginal costs and pricing strategies.[62] Once a competitor gained access to such information, it could use that knowledge to exploit the marketplace by charging prices aimed at driving disclosing companies out of the market, which ultimately would result in reduced competition and higher overall costs to customers.[63]

In its Statement, RESA demonstrated that disclosure of the Pricing Compilation would result in similar harm in the marketplace.[64] The RAO, however, declined to apply the same reasoning to the Determination in this proceeding on the superficial basis that the lightly-regulated generators "decision deals with annual reporting requirements and a different part of the industry that is subject to some amount of federal regulation," and because "[t]he 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."[65] Neither of those reasons provides any analysis or justification as to how the information requested in the lightly-regulated generators matter differs from the information the ESCOs filed with the Commission in this proceeding. In fact, both situations deal with the disclosure of highly-sensitive financial data that would permit competitors to "reverse engineer" a competing company's pricing, hedging, and margin strategies.[66] The fact that the lightly-regulated generators decision deals with a different part of the energy industry or is subject to federal regulation has no bearing on the confidentiality of the information or the resulting harm

[62] *Id.*, RAO Determination of Trade Secret Information 14-02 (Filed June 30, 2014), at 19-21; *id.*, Determination of Appeal of Trade Secret Determination (Issued Aug. 13, 2014), at 12-15.
[63] *Id.*
[64] Determination, at 14.
[65] Matter 13-01288: *In the Matter of Financial Reports for Lightly Regulated Utility Companies*, RAO Determination of Trade Secret Information 14-02 (Filed June 30, 2014), at 19-21; *id.*, Determination of Appeal of Trade Secret Determination (Issued Aug. 13, 2014), at 12-15.
[66] Determination, at 12-13; Attachment A, at 3; *See* Matter 13-01288: *In the Matter of Financial Reports for Lightly Regulated Utility Companies*, RAO Determination of Trade Secret Information 14-02 (Filed June 30, 2014), at 19-21; *id.*, Determination of Appeal of Trade Secret Determination (Issued Aug. 13, 2014), at 12-15.

from disclosure at issue in the proceeding. As such, it is not a valid reason for departing from the Secretary's and RAO's recent determinations in the lightly-regulated generators' matter or for refusing to extend similar protection to ESCOs' financial information. Instead, the Secretary should apply the same rationale from the lightly-regulated generators matter to the analogous circumstances here, reverse the Determination, and continue the confidential treatment of the Pricing Compilation.

Lastly, the RAO erroneously rejected the Cusati Affidavit in support of RESA's Statement on the ground that it "does not meet the standard that must be demonstrated."[67] Although the Determination is silent as to what "standard" the Cusati Affidavit purportedly fails to meet, it appears to suggest that the Cusati Affidavit was somehow insufficient to the RAO because it was not provided by an "economist or other expert."[68] However, there is no requirement that an affidavit come from "an economist or other expert" within a particular industry. Indeed, the RAO has previously recognized that evidence may be provided based upon the "personal knowledge of people employed or retained by the party seeking such exemption."[69] As previously noted, Mr. Cusati has been working in the retail energy industry for more than 15 years and has experience with an ESCO's development of products and pricing strategies. Based on Mr. Cusati's deep personal knowledge of the industry, his Affidavit should have been accepted as relevant evidence supporting RESA's Statement and request for confidential protection of the Pricing Compilation.[70]

[67] Determination, at 11, n.49.
[68] *Id.* at 11.
[69] Matter 13-01288: *In the Matter of Financial Reports for Lightly Regulated Utility Companies*, RAO Determination of Trade Secret Information 14-02 (Filed June 30, 2014), at 17; *see also Dilworth v Westchester Cnty Dep't of Correction*, 93 AD3d 722, 724-25 (2d Dept 2012) (concluding that an affidavit from a corrections officer was sufficient to support a request for an exception from disclosure).
[70] *See Dilworth*, 93 AD3d at 724-25.

For all of the foregoing reasons, the RAO erred in concluding that the Pricing Compilation was not protected from disclosure as a trade secret. Accordingly, the Determination should be reversed, and the Secretary should direct the RAO to continue treating the Pricing Compilation as confidential information under the POL.

B. The RAO Incorrectly Concluded That The Information In The Pricing Compilation Is Not Protectable As Confidential Commercial Information

The RAO determined that the Pricing Compilation is not protected as confidential commercial information because ESCOs failed to demonstrate that disclosure of the Pricing Compilation would result in substantial injury.[71] This conclusion is erroneous, and the Determination should be reversed on this independent ground.

For information that is not a trade secret, POL § 87 (2) (d) permits an agency to deny access to information submitted "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."[72] When considering this exemption for confidential commercial information, the Commission and New York courts use a two-prong test to determine whether records or portions thereof may be excepted from disclosure pursuant to POL § 87 (2) (d).[73] The first prong is met if the party requesting an exception from disclosure demonstrates the presence of actual competition in the marketplace.[74] Whether disclosure of the information is likely to cause substantial injury, such that the second prong of the test is met,

[71] Determination, at 10. The Determination does not independently address or analyze RESA's requests for both trade secret protection and/or confidential commercial status. As a result, it is unclear what reasoning, if any, applies to the RAO's refusal to protect the Pricing Compilation as confidential commercial information that would cause substantial injury to the competitive position of ESCOs.
[72] POL § 87 (2) (d).
[73] *Encore*, 87 NY2d at 420; *Verizon New York, Inc. v New York State Pub. Serv. Commn.*, 2016 NY Slip Op 00239(U) (3d Dept 2016).
[74] *Encore*, 87 NY2d at 420.

turns upon the commercial value of the requested information to competitors and the cost of acquiring such information through other means.[75] As the Court of Appeals has explained,

> "[b]ecause competition in business turns on the relative costs and opportunities faced by members of the same industry, there is a potential windfall for competitors to whom valuable information is released under [FOIL]. If those competitors are charged only minimal [FOIL] retrieval costs for the information, rather than the considerable costs of private reproduction, they may be getting quite a bargain. Such bargains could easily have competitive consequences not contemplated as part of [FOIL]'s principal aim of promoting openness in government."[76]

Consistent with this precedent, the Commission's regulations guide the RAO to consider the following factors in assessing the likelihood of substantial injury from the disclosure of certain information:

> "(i) the extent to which the disclosure would cause unfair economic or competitive damage;
> (ii) the extent to which the information is known by others and can involve similar activities;
> (iii) the worth or value of the information to the person and the person's competitors;
> (iv) the degree of difficulty and cost of developing the information;
> (v) the ease or difficulty associated with obtaining or duplicating the information by others without the person's consent; and
> (vi) other statute(s) or regulations specifically excepting the information from disclosure."[77]

The Determination correctly acknowledges that the first prong of the test is met because ESCOs have demonstrated competition within the electric and natural gas industries in New York State.[78] However, the Determination erroneously and without elaboration states that the second prong of the test is not met.[79]

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[75] *Id.*
[76] *Id.*
[77] 16 NYCRR § 6-1.3 (b) (2).
[78] Determination, at 10.
[79] *Id.*

As described in detail above and in the Statement, RESA has provided sufficient evidence to demonstrate that the Pricing Compilation should be protected from disclosure under POL § 87 (2) (d).[80] In short, the information contained in the Pricing Compilation is extremely difficult, if not impossible, to obtain without Staff's contemplated disclosure here.[81] ESCOs vigorously protect such information from being released to competitors because it can be used to forecast an ESCO's pricing, hedging, and margin strategies.[82] Together, these facts, among others discussed in more detail above, demonstrate that the Pricing Compilation is protectable as confidential commercial information and should not be disclosed.[83]

Further, although the Determination states that ESCOs will not experience substantial harm from disclosure of the information in the Pricing Compilation, the Statement clearly identified that disclosure of this information would provide new market entrants and competing ESCOs with an unfair advantage in developing market and pricing strategies when compared to ESCOs currently operating within the market or within specific sections of the market.[84] An imbalance of the market in this way would cause disclosing ESCOs substantial harm and would have a deleterious effect on the competitiveness of the market and ultimately result in higher prices for customers.[85] This exact harm led the RAO and Secretary to protect lightly-regulated generators' financial information in a recent analogous matter.[86] The same reasoning from that

[80] *Supra* at 10-14; Statement, at 8-12.
[81] *Id*. at 10-17; Attachment A.
[82] *Id*. at 12-13; Attachment A, at 3.
[83] *Encore College Bookstores v Auxiliary Serv. Corp*., 87 NY2d 410, 420 (1995) (noting that "[w]here FOI[L] disclosure is the sole means by which competitors can obtain the requested information, the inquiry ends here").
[84] Statement, at 15-16.
[85] *Id.*; Matter 13-01288: *In the Matter of Financial Reports for Lightly Regulated Utility Companies*, RAO Determination of Trade Secret Information 14-02 (Filed June 30, 2014), at 19-21; *id.*, Determination of Appeal of Trade Secret Determination (Issued Aug. 13, 2014), at 12-15.
[86] *See* Matter 13-01288: *In the Matter of Financial Reports for Lightly Regulated Utility Companies*, RAO Determination of Trade Secret Information 14-02 (Filed June 30, 2014), at 19-21; *id.*, Determination of Appeal of Trade Secret Determination (Issued Aug. 13, 2014), at 12-15.

matter should be applied to this proceeding, the Determination should be reversed, and the information in the Pricing Compilation should continue to be protected under the POL.

In sum, the Determination neither refutes the evidence provided in RESA's Statement nor provides any independent reasoning or justification for the RAO's conclusion that the Pricing Compilation is not protected as confidential commercial information. Instead, the Determination contains a conclusory statement that ESCOs have failed to demonstrate that disclosure of the information would result in substantial injury. For the reasons set forth above, the Determination should be reversed, and the Secretary should find that the Pricing Compilation is exempt from disclosure pursuant to POL § 87 (2) (d) and 16 NYCRR § 6-1.3 (b) (2).

III. CONCLUSION

As demonstrated above, the Determination misapplies the standards that govern requests for confidential treatment under POL § 87 (2) (d), erroneously fails to follow the Secretary's and RAO's recent rationale in the analogous lightly-regulated generator matter, and disregards evidence submitted by RESA in support of its Statement. For all of these reasons, the Secretary should reverse the RAO's Determination and find that the Pricing Compilation is exempt from public disclosure as a trade secret or as information obtained from a commercial enterprise, which, if disclosed, would case substantial injury to the competitive position of each individual ESCO.

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