

# STATE OF NEW YORK DEPARTMENT OF PUBLIC SERVICE

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## PUBLIC SERVICE COMMISSION

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*Secretary*

July 2, 2015

### Via U.S. Mail and Electronic Mail

The Honorable James F. Brennan  
New York State Assembly  
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Albany, NY 12248  
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[wheelockl@assembly.state.ny.us](mailto:wheelockl@assembly.state.ny.us)

RE: Matter 13-01288 and Case 11-M-0294 - Request for a copy of the un-redacted and complete annual report for the calendar year ending on December 31, 2013 submitted by all gas or electric corporations and entities subject to the PSC's lightened ratemaking regulation.<sup>1</sup>

### **(DETERMINATION – Trade Secret 15-09)**

Dear Assemblyman Brennan:

This letter constitutes my Determination as Records Access Officer (RAO) pursuant to §89(5)(b)(3) of the Public Officers Law (POL). It determines that certain of the information sought is entitled to an exception from disclosure as trade secrets of lightly regulated entities under §66(6) of the Public Service Law (PSL).

### **FOIL PROCEDURAL BACKGROUND**

At the outset, it should be noted that this is not the first time the confidentiality of Annual Reports submitted by all gas or electric corporations and entities subject to the Public Service Commission's (PSC) lightened ratemaking regulation, (referred to as lightly-regulated utilities or LRUs), has been determined. On March 31, 2014, the RAO received a FOIL request

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<sup>1</sup> This was part of a nine-part request submitted by Assemblyman Brennan on May 4, 2015.

from Assemblyman Brennan for copies of un-redacted annual reports filed on or after July 1, 2013. Since the deadline for filing of the 2012 reports was July 1, 2013, the wording of Mr. Brennan's FOIL request was limited to only those LRUs that had actually filed on July 1, 2013 - not before that date. Therefore, the LRUs that filed annual reports for calendar year 2012 before July 1, 2013 were not included in the RAO's 14-02 Determination. The 2015 FOIL request is worded in such a way as to obtain a Determination that addresses all of the 2013 annual reports.<sup>2</sup> The 14-02 Determination found 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; that page seven, lines four through and including ten should remain protected from disclosure as trade secrets; page eight, with the exception of property tax information, should remain protected from disclosure as trade secrets; and pages seven and eight, as described therein, were also protected from disclosure pursuant to requirements of the New York Independent System Operator, Inc. (NYISO). The RAO's Determination 14-02 was upheld by the Secretary on August 13, 2014.<sup>3</sup>

On May 4, 2015, the RAO received a request pursuant to the Freedom of Information Law (FOIL) under POL Article 6, from Assemblyman Brennan for, among other records, a copy of the un-redacted and complete annual report for the calendar year ending on December 31, 2013 (due date: July 1, 2014) submitted by all gas or electric corporations and entities subject to the PSC's lightened ratemaking regulation. This request included an affidavit of Robert McCullough supporting Assemblyman Brennan's 2014 claim that the LRU annual reports should be made public.<sup>4</sup>

On May 11, 2015, the RAO sent a letter to Assemblyman Brennan, acknowledging his request and informing him that a search for responsive records had been initiated and that a response could be expected on or before June 9, 2015.

On May 21, 2015, the RAO responded to the eight other categories of records described by Assemblyman Brennan in his May 4, 2015 FOIL request by providing the records or stating that the records could not be found after a diligent search of agency files. Also on May 21, 2015, the RAO advised the LRUs that had sought protection from disclosure of portions of their 2013 Annual Reports<sup>5</sup> of Mr. Brennan's request, stating that access to the records would be determined in accordance with POL §89(5). The RAO advised the LRUs of the opportunity to submit a written statement of necessity for an exception from disclosure pursuant to POL §89(5)(b)(2). Assemblyman Brennan was duly advised of the process to be followed.

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<sup>2</sup> See Appendix A.

<sup>3</sup> See [www.dps.ny.gov](http://www.dps.ny.gov). Matter 13-01288, In the Matter of Financial Reports for Lightly Regulated Utility Companies. Determination – Trade Secret 14-02 (issued June 30, 2014); Determination of Appeal of Trade Secret Determination 14-02 (issued August 13, 2014).

<sup>4</sup> Affidavits in support of a FOIL request are not typical; they are usually submitted with Statements of Necessity or Appeals of Determinations of the RAO.

<sup>5</sup> Of the companies subject to the reporting requirement listed here, only four are publicly traded companies: Calpine Corporation; Entergy Nuclear Operations, Inc.; NRG Energy, Inc.; and PSEG Power New York, Inc.

On May 26, 2015, the Independent Power Producers of New York, Inc. (IPPNY) submitted a request for an extension of time to file Statements of Necessity, on behalf of its members.<sup>6</sup> On May 28, 2015, the RAO granted the extension to all companies submitting Statements of Necessity to June 19, 2015 and notified Assemblyman Brennan of the extension.

All of the entities submitted Statements of Necessity, with the exception of National Grid Generation LLC, et al; and TC Ravenswood, LLC, TransCanada Services USA Inc. Of those companies filing Statements of Necessity, 24 also submitted affidavits of experts in support of their statements. The NYISO<sup>7</sup> submitted a statement in support of a number of market participants, along with an affidavit. IPPNY submitted a statement in support of its members, along with an affidavit.

On June 26, the RAO extended the time to issue a Determination in this case from June 30, 2015 to July 14, 2015, due to the need to review the significant number of documents submitted.

## **DETERMINATION**

### **Arguments of Robert F. McCullough**

The McCullough affidavit raises the same issues that were determined by the RAO and upheld by the Secretary in 2014, except the statement in paragraph 13 which claims that heat rates for 486 generating units in New York State can be found in EPA's NEEDS database.<sup>8</sup> The affidavit states that the Energy Information Administration (EIA) provides monthly data in its EIA-923 form and that, based on publicly available data, the affiant is "able to determine the heat rates of the plants of all 11 entities that submitted opposing affidavits."<sup>9</sup> The McCullough affidavit offers no support for that statement.

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<sup>6</sup> IPPNY is a not-for-profit trade association representing the independent power industry in NYS. 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 NYS.

<sup>7</sup> The New York Independent System Operator (NYISO) operates New York's high-voltage transmission network, administering and monitoring wholesale electricity markets, and planning for the state's energy future.

<sup>8</sup> The National Electric Energy Data System or NEEDS database contains the generation unit records used to construct the "model" plants that represent existing and planned/committed units in the U.S. Environmental Protection Agency's modeling applications. NEEDS includes basic geographic, operating, air emissions, and other data on these generating units.

<sup>9</sup> This number reflects the number of companies submitting affidavits along with Statements of Necessity in response to the RAO's May 5, 2014 letter.

### **Arguments of IPPNY**

As it did in 2014, IPPNY seeks to underscore the potentially disastrous consequences that would occur if it were determined that confidential, unit-specific financial and operating data of wholesale generators should be disclosed publicly instead of shielded from disclosure. IPPNY, in its own statement and through the affidavit of Mark D. Younger, aptly points out that the McCullough affidavit raises only one issue that was not argued in the 2014 Appeal of the RAO's Determination 14-02, and is thus, ripe for determination here.

The McCullough affidavit's one clear new reference to the location of data is the EPA's National Electric Energy Data System (NEEDS) database, which is available publicly.<sup>10</sup> According to the Younger affidavit, heat rates in the current NEEDS database are calculated based on the information in the EIA's 2013 Annual Energy Outlook (AEO).<sup>11</sup> The AEO relies on the information generators provide in their EIA-923 filings made with the Department of Energy. Heat rates that are calculated based on the EIA-923 filings are not the same as the heat rates that must be filed by lightly regulated companies in their annual reports to the Commission.

In conclusion, the Younger affidavit states that the heat rates published in the NEEDS database are just estimates of heat rates and not the actual heat rates that the PSC has directed the generators to file as part of their annual reports and that have been protected elsewhere. The fact that estimated heat rates are made public is not sufficient reason to release a unit's actual heat rate data from last year.

### **Arguments of the Lightly Regulated Utilities**

There is no need to summarize the 36 submissions of the individual companies that submitted Statements of Necessity or the 25 affidavits submitted in support of those Statements as most raised many of the same issues and cited the same authorities. All of the submissions are available on the Department's website at [www.dps.ny.gov](http://www.dps.ny.gov).

## **DISCUSSION**

Last year the RAO issued a comprehensive and extensive determination of more than 20 pages that outlined the relevant law and its application in this case. In as much as this matter is so similar to the matter that was the subject of the RAO Determination 14-02 and the Secretary's Appeal upholding that decision, no reason exists to depart from the prior determination.<sup>12</sup> There are two issues that must be addressed here, but their resolution does not change the prior determination.

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<sup>10</sup> See [http://www.epa.gov/airmarkets/documents/ipm/needs\\_v514.xlsx](http://www.epa.gov/airmarkets/documents/ipm/needs_v514.xlsx).

<sup>11</sup> See EPA's Power Sector Modeling Platform v.5.13, Chapter 3, section 3.8, located at: <http://www.epa.gov/airmarkets/programs/ipm/psmodel.html>.

<sup>12</sup> See FOIL-AO-11832, November 24, 1999.

The only change in law since the 14-02 Determination that would have any bearing on the prior issuance is the Albany County Supreme Court's decision in the Verizon case.<sup>13</sup> The matter discussed in that decision was addressed by the Secretary on Appeal in 2014 when she noted that, since the RAO concluded that the material was both trade secret and confidential commercial information under the tests in the PSC's regulations and, more critically, that the Encore test was met, a remand was not appropriate. Having appropriately addressed the claims of the companies in 2014, and given that those claims remain the same in 2015, I find no reason to revisit this matter.

The second issue is the point raised in the McCullough affidavit regarding the public availability of heat rates. This point is addressed and refuted by the Younger affidavit. Mr. Younger points out that the heat rates published in the NEEDS database are estimates of heat rates and not the actual heat rates that the PSC requires generators to file annually. I agree with this analysis and conclude that the fact that estimated heat rates are made public is not sufficient reason to release a unit's actual heat rate data from last year, as the actual heat rate is significantly more commercially sensitive to determining the competitive position of an entity than an estimate.

### **CONCLUSION**

In light of all the forgoing, the information claimed by the companies redacted from Annual Reports of Lightly Regulated Utilities for the year ending December 31, 2013 shall remain protected from disclosure on the same basis as outlined in Determination 14-02. Specifically, the redactions on pages four, five and six, shall remain protected from disclosure as trade secrets – for the private companies only. Since the public companies listed herein are already required to provide this data, the protection does not adhere to them, as they seem to concede. As 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, as described above, are also protected from disclosure pursuant to requirements of the NYISO.<sup>14</sup>

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<sup>13</sup> Matter of Verizon N.Y. v. New York State Public Service Commission, 46 Misc.3d 858 [Sup Ct, Albany County 2014].

<sup>14</sup> The NYISO routinely receives highly-sensitive commercial information during the course of its administration of the State's energy markets and has well-developed rules and procedures regarding the designation and protection of trade secrets and commercially-sensitive confidential information. Specifically, §6.1 of the NYISO's Market Administration and Control Area Services Tariff (MST) provides that the NYISO "shall use reasonable procedures to prevent the disclosure of Confidential Information and shall not publish, disclose or otherwise divulge Confidential Information to any person or entity without the prior written consent of the party supplying such Confidential Information, except as provided for under the ISO Market Monitoring Plan and/or ISO Code of Conduct." The NYISO Code of Conduct explains that Confidential Information consists of "any commercially sensitive information including, without limitation, trade secrets, equipment specific information (e.g., Generator specific data such as heat rates, etc.), and business

Review of my determination may be sought, pursuant to POL §89(5)(c)(1), by filing a written appeal with Kathleen H. Burgess, Secretary at the address given above, within seven business days of receipt of this determination. Unless a contrary showing is made, receipt will be presumed to have occurred on July 2, 2015 so the deadline for the receipt of any such written appeal is July 14, 2015.<sup>15</sup>

Sincerely,

/s/

Donna M. Giliberto  
Assistant Counsel &  
Records Access Officer

CC:

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Calpine Corporation and Subsidiaries  
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Castleton Energy Center, LLC  
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Cayuga Operating Company, LLC, et al  
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CCI Rensselaer LLC & CCI Roseton LLC  
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Constellation Energy Nuclear Group, LLC,  
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Crestwood Pipeline East LLC  
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strategies, affirmatively designated as Confidential Information by its supplier or owner ....”  
See also, NYISO Open Access Transmission Tariff (OATT), §12.4.

<sup>15</sup> This date takes into account the intervening holiday pursuant to NY General Construction Law §20.

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Niagara Mohawk Power Corporation et al  
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TC Ravenswood, LLC et al  
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Edgewood Energy, LLC; Equus Power I,  
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Energy LLC  
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FPL Energy Rockaway Peaking  
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Griffiss Utility Services Corporation  
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Howard Wind LLC  
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Talisman Energy USA Inc.  
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## Appendix A

1. Alliance Energy Group;
2. Astoria Energy LLC, Astoria Project Partners II, Astoria Project Partners LLC, and Astoria Energy II LLC;
3. Astoria Generating Company Holdings LLC (USPG);
4. Bayonne Energy Center, LLC;
5. Bluestone Gas Corp. of NY DTE Pipeline;
6. Brookfield Power New York Thermal Services LLC (filed for Carr Street Generating Station);
7. Brooklyn Navy Yard Cogeneration Partners, L.P.;
8. Caithness Long Island, LLC;
9. Calpine Corporation and Subsidiaries;
10. Canandaigua Power Partners, LLC, Canandaigua Power Partners II, LLC, c/o North America Utility & Global Wind (SunEdison);
11. Castleton Energy Center, LLC;
12. Cayuga Operating Company, LLC, Somerset Cayuga Holding Company, Inc., Somerset Operating Company, LLC, Upstate NY Power Producers, Inc.;
13. CCI Rensselaer LLC, CCI Roseton LLC;
14. Constellation Energy Nuclear Group LLC, Nine Mile Point Nuclear Station, LLC, R. E. Ginna Nuclear Power Plant, LLC;
15. Crestwood Pipeline East LLC;
16. Cross-Sound Cable Company, LLC;
17. DMP New York, Inc., Laser Northeast Gathering Company, LLC, Williams Field Services Company, LLC;
18. Emkey Gathering LLC, Emkey Transportation, Inc.;
19. Empire Generating Co, LLC;
20. Entergy Nuclear FitzPatrick, LLC, Entergy Nuclear Indian Point 2, LLC, Entergy Nuclear Indian Point 3 LLC, Entergy Nuclear Operations, Inc.;
21. Flat Rock Wind Power, LLC - Iberdrola Renewables, LLC;
22. Global Common Greenport LLC, Hawkeye Energy Greenport, LLC;



23. Hudson Transmission Partners, LLC;
24. Indeck-Olean, L.P.;
25. Lakeside New York, LLC, Lakeside Energy, LLC – n/k/a NEP Holdco1, LLC;
26. Lockport Energy Association L.P.;
27. Marble River, LLC c/o EDPR; NRG Energy, Inc.;
28. New Athens Generating Company, LLC, Athens Generating Company, L.P.;
29. Neptune Regional Transmission System LLC;
30. National Grid Generation LLC, The Brooklyn Union Gas Company, KeySpan Gas East Corporation, National Grid Glenwood Energy Center LLC, National Grid Port Jefferson Energy Center LLC;
31. Noble Environmental Power, LLC;
32. PSEG Power New York, Inc.;
33. RED (Recycle Energy Development, LLC) Rochester; Saranac Power Partners, L.P.;
34. Sheldon Energy LLC;
35. Sithe/Independence Power Partners, L.P.;
36. TC Ravenswood, LLC, TransCanada Services USA Inc.

While the following companies are subject to lightened regulation, they did not seek confidentiality for their annual filings:

1. Equus Power I, L.P.;
2. FPL Energy Rockaway Peaking Facilities, LLC;
3. Gateway Delmar LLC;
4. Griffiss Utility Services Corporation;
5. Howard Wind LLC;
6. Pinelawn Power LLC;
7. Shoreham Energy LLC;
8. Talisman Energy USA Inc.