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**DEPARTMENT OF STATE**  
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August 27, 2012

Honorable Kimberly Harriman  
Honorable Rudy Stegemoeller  
Administrative Law Judges  
New York Public Service Commission  
3 Empire State Plaza  
Albany, New York 12223-1350

Re: Cases 12-E-0201 and 12-G-0202 – Niagara Mohawk Power Corporation d/b/a  
National Grid—Electric and Gas Rates.

Dear Judges:

The Utility Intervention Unit (UIU) of the New York State Department of State's Division of Consumer Protection opposes the motion of the Retail Energy Supply Association (RESA) seeking to prevent any disclosure, even to the parties in this proceeding including Department of Public Service Commission Staff, of price information directly comparing Niagara Mohawk's commodity charges to the charges of commodity suppliers (identified not by name but numbered "Supplier 1" through "Supplier 45") operating within Niagara Mohawk's service territory. The UIU also opposes RESA's alternative request to afford the information trade secret status, which would prohibit public disclosure. To the UIU's knowledge, disclosure of this information would provide New York's retail access consumers easily comparable pricing information for the very first time in more than a decade. The UIU intends to propose in its testimony modifications to various aspects of Niagara Mohawk's operations based on these data.

As part of the Public Service Commission's (PSC or Commission) retail access program, Niagara Mohawk offers a consolidated billing service under which it bills customers for the ESCO commodity charges and its delivery charges on one single bill. ESCOs provide billing information for each customer and Niagara Mohawk then includes the ESCOs' charges on the bills it issues to customers.

RESA's motion seeks to suppress information sought in PULP's Interrogatory Requests (IRs) 91 and 107. PULP requested in IR 91 that Niagara Mohawk provide "...any internal analysis of whether residential customers receiving commodity service from ESCOs whose charges are billed by Niagara Mohawk paid more or less than full (bundled) service customers for their electric or gas service for 2008 through 2011 and monthly for 2012 to date." In its response, Niagara Mohawk explained that its analysis compared the July 2011 and December 2012 ESCO customer billings to Niagara Mohawk's commodity costs for the same period. PULP followed up that response with its IR 107, which asks Niagara Mohawk to provide "...a price comparison of single bill residential ESCO natural gas and electric service with residential bundled service from National Grid for the most recent 24 month period...."

RESA, admittedly speaking on its own behalf as an organization and not necessarily representing the views of its members,<sup>1</sup> asserts that the information sought in PULP IRs 91 and 107 relates to private, non-public confidential billing information compiled by Niagara Mohawk on behalf of each ESCO participating in the consolidated billing program. In support of this assertion, RESA first relies on Section 14.7 of the written agreement between Niagara Mohawk and each ESCO.<sup>2</sup> That section states: “This Agreement is solely between the Parties and is not intended to confer any rights whatsoever on any third parties.” According to RESA, this language does not authorize Niagara Mohawk to release or disclose any of the billing information provided by ESCOs to Niagara Mohawk.

While it is arguable that this language addresses the public disclosure of identified, named customer-specific and ESCO-specific data, the UIU finds no nexus between this language and the appropriateness of Niagara Mohawk providing data comparing prices it charged to prices charged by unidentified ESCOs during two months in 2011.

Second, RESA claims that the data constitute a trade secret pursuant to 16 NYCRR Section 6-1.3(a) (2), thus rendering the data protected from disclosure. RESA argues:

[T]his pricing information data and compilation concerning ESCO activities has the potential to provide an unfair economic advantage to other entities as it presents pricing data for individual entities currently in the market. This information is not known by other competitors and remains solely within the province of the ESCO and the customer.<sup>3</sup>

RESA asserts that Commission precedent requires that “individual” data concerning market activities and operations obtained by the utility from ESCOs should be treated in a confidential manner and not be subject to disclosure.

RESA cites a ruling by Administrative Law Judge (ALJ) William Bouteiller in support of that proposition. In that ruling, the ALJ stated:

The Department does not publish the disaggregated, customer migration information; to date, it has kept this information confidential. Absent any objections, I find that until such time as the Department of Public Service were to release monthly, firm specific, load information for the ESCOs that operate in the State, the information that NYSEG has provided in this case to CPB, in response to its discovery requests, is entitled to protection.<sup>4</sup>

RESA also cites a Commission order in the Retail Access Business Rules proceeding. In that order, the Commission stated:

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<sup>1</sup> RESA Motion, fn 1.

<sup>2</sup> “Agreement for Billing Services and For the Purchase of Electric/Accounts Receivable” (BSA).

<sup>3</sup> RESA Motion at 3.

<sup>4</sup> Case 05-E-1222, NYSEG – Electric Rates, Ruling Granting Trade Secret Protection For ESCO Market Data (issued February 2, 2006).

Disclosure of Customer Complaint Information

In response to the Commission's March 19, 2008 Notice, CPB and PULP believe that information on the number and type of customers that an ESCO serves, and the number of complaints filed against an ESCO should be made public. The ESCOs disagree, and in support of their argument cite an October 20, 2006 letter, in which Secretary Brillling stated that the disclosure of such customer information could cause substantial injury to the competitive positions of ESCOs, especially new market entrants and those with specific geographic marketing campaigns. We see no reason to adopt a different reasoning in this case. Accordingly, we will continue to maintain the confidentiality of the information which describes the numbers of customers served by each ESCO.<sup>5</sup>

These documents do not support RESA's motion. While "company-specific," the information in Niagara Mohawk's response does not identify the ESCOs by name. Instead, the ESCOs are identified as Suppliers 1-45. In contrast, the documents cited by RESA all address instances of identified, company-specific information. Financial harm to consumers by not disclosing this information trumps any scintilla of competitive harm to unspecified companies that may result from disclosure.

Third, RESA claims that the data is neither material nor relevant to the rate case, stating that ESCO prices do not "implicate or relate to the just and reasonable nature of Niagara Mohawk's future distribution or commodity rates."<sup>6</sup> The UIU disagrees with this claim; a rate case addresses utility policies and practices, not just rates.

The data shows that in July 2011 and December 2011 a significant percentage, perhaps as much as three-quarters, of residential customers (including low-income customers) purchasing commodity from ESCOs paid in some cases greater than \$20 more than they would have paid had they purchased commodity from Niagara Mohawk. This is disturbing. It appears that for many ESCOs the amount of "overcharge" on commodity completely negated the low-income discount on delivery. This suggests that the cost of the low-income programs, which are subsidized by the general body of ratepayers, is not well spent. While it may be argued that a generic retail access proceeding is the most appropriate forum to address the implications of the data, this analysis is relevant to *this* proceeding insofar as the data inform the UIU's position on the design and operation of Niagara Mohawk's outreach and education and low-income programs. For instance, the UIU may propose in its testimony that Niagara Mohawk's customer service representatives should provide low-income customers a summary of the data so that these customers understand that purchasing commodity from ESCOs may not be cost effective.

Additionally, the implications of the data would support a proposal that, to begin the move toward price transparency, Niagara Mohawk should develop and launch an online bill

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<sup>5</sup> Case 98-M-1343 – In the Matter of Retail Access Business Rules, Order Adopting Amendments To the Uniform Business Rules (issued October 27, 2008), at 26. The section heading refers to customer complaint information but the conclusion in the text is confined to a determination that the number of customers served by a specific, identified ESCO should be afforded trade secret protection. The UIU doubts that the PSC intended to imply that the number of customer complaints lodged against a particular ESCO is confidential.

<sup>6</sup> RESA Motion at 4.

calculator on its website to assist current ESCO customers to determine whether it was beneficial for them to have switched to an ESCO. Central Hudson and National Fuel Gas Company have historical bill comparison tools on their websites that provide current ESCO customers the ability to compare what they paid over a period of 24 months with their ESCO and what they would have paid had they remained with their respective utility. The UIU intends to propose that Niagara Mohawk provide a similar consumer tool.

The foundation concept of retail access is that free market competition would benefit consumers by providing lower rates and better service than the utilities are able to offer. Retail access exists primarily to benefit consumers; its purpose should not be to protect ESCOs from competition. Customers are protected and markets work more smoothly when various firm's prices are readily available in a manner that makes it easy to compare prices. RESA's assertion that this information is already known to customers is not plausible.<sup>7</sup> The information provided in Niagara Mohawk's response to IR 91 is a useful first step towards that transparency even though the names of the specific ESCOs are not included and the price comparisons are historical rather than current.

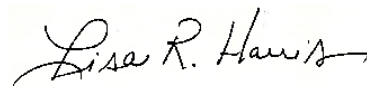
RESA's request is striking when compared to the way in which the New York Independent System Operator (NYISO) handles confidential market data: Such data, which specifically identifies individual bidders, is publically available once it becomes three months old, as stated in the NYISO's Market Services Tariff:

### **6.3 Disclosure of Bid Information**

Pursuant to Commission requirements, the ISO shall make public Bid information from the Energy, Capacity and Ancillary Services markets, including Bids submitted for Virtual Transactions, but not the names of the bidders making any of these Bids, three months after the Bids are submitted. The ISO shall post the data in a way that permits third parties to track each individual bidder's Bids over time. Prior to such disclosure, Bid information submitted to the ISO by Market Participants shall be considered Confidential Information.<sup>8</sup>

The UIU urges Your Honors to deny RESA's motion in its entirety and allow public discovery to continue unimpeded. Suppression of this information would conflict with the spirit of New York's consumer protection policies serving to provide adequate disclosures and information to consumers to allow them to make informed marketplace decisions.

Respectfully submitted,



Lisa R. Harris, Esq.  
Director, Division of Consumer Protection

C: Active Parties

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<sup>7</sup> RESA Motion at 3.

<sup>8</sup> NYISO Market Services Tariff, Section 6.3; the "Commission" referred to is the Federal Energy Regulatory Commission and not the PSC.