STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

CASE 12-E-0201 - Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of Niagara Mohawk Power Corporation d/b/a National Grid for Electric Service.

CASE 12-G-0202 - Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of Niagara Mohawk Power Corporation d/b/a National Grid for Gas Service.

RULING DENYING, IN FULL, THE MOTION OF THE RETAIL ENERGY SUPPLY ASSOCIATION

(Issued September 7, 2012)

KIMBERLY A. HARRIMAN and RUDY STEGEMOELLER,
Administrative Law Judges:

INTRODUCTION

In a Motion filed August 16, 2012, the Retail Energy Supply Association (RESA) seeks to (1) prevent the response of Niagara Mohawk Power Corporation (Niagara Mohawk or the Company) to the Public Utility Law Project's (PULP) interrogatory PULP IR No. 107 and strike the Company's response to PULP IR No. 91 on grounds that the information sought is not relevant and its release would violate the Billing Services Agreement (BSA) between the Company and energy services companies operating in the utility's service territory; and (2) protect the Company's response to PULP IR Nos. 91 and, ultimately, 107 from being publicly disclosed.[1]

By e-mail ruling issued August 28, 2012, we determined (1) that the information sought in PULP IR Nos. 91 and 107 is relevant to the proceeding and (2) that the BSA did not prohibit

[1] The BSA is the written agreement between the Company and energy services companies (ESCOs) for the provision of consolidated billing – single utility issued bill containing utility distribution and ESCO commodity charges.

the release of the information. The Company was authorized to release its response to PULP IR No. 107, which it promptly did. We reserved, however, on the question of whether the information sought should be protected from public disclosure and directed the parties to continue to treat the information as confidential until we issued a written ruling on the motion.[2]

By this ruling we further articulate our basis for determining that the information sought is relevant to the proceeding and its release is not prohibited by the BSA. In addition, we also determine that the information does not warrant protection from public disclosure pursuant to the Public Officers Law §87 or the Commission's rules (16 NYCRR 6-1.3 and 6-1.4).

BACKGROUND

PULP IR No. 91 asked the Company to provide any internal analysis of the commodity prices charged to residential customers of energy services companies (ESCOs), such as those represented by RESA, in comparison to the charges that would have been billed by Niagara Mohawk for electric or gas commodity for the period 2008-2011 and monthly for 2012 to date. In its response, the Company provided the requested comparison for the months of July and December of 2011.

In its response the Company labeled the ESCOs as Suppliers 1-45 and provided, from what we can discern, information on the type of service (gas or electric) and whether the service included customers that were in an affordable program, received a low income credit, or were considered "low income" customers. In addition, the Company provided a

[2] Because PULP IR No. 92 requests information similar to that requested in PULP IR No. 91, our e-mail of August 28 instructed parties to treat PULP IR No. 92 on the same basis as PULP IR No. 91.

calculation of the total and average difference between the amount billed to residential customers by the ESCO and what the billing would have been under utility bundled service. The Company noted in its response that providing only two data points may not provide a complete answer to the questions posed. PULP IR No. 107 sought a similar price comparison for electric and gas commodity service for the most recent 24 month period, in the same format as the information that was provided in the Company's response to PULP IR No. 91.

RESA Motion and Response to ALJ Questions

On August 16, 2012, RESA filed a motion to prevent the Company from responding to PULP IR No. 107 and to strike its response to PULP IR No. 91. In support of its request RESA argues that the information sought by these interrogatories is not pertinent to the rates and charges of Niagara Mohawk that are the subject of these proceedings. Further, RESA contends that the BSA governs the exchange of confidential billing information between the ESCO and utility that should not be publicly disclosed. According to RESA, the BSA does not authorize release or disclosure of the billing information. Moreover, it argues that PULP's request for the information is an attempt by PULP to exercise, for its benefit, third party rights under the BSA, which states that no third party rights are conferred by the agreement.

RESA also requests that the information should be excepted from public disclosure pursuant to the Commission's rules of procedure, 16 NYCRR 6-1.3. It claims that the pricing data are not known by competitors (16 NYCRR 6-1.3(a)(2)) and that release of pricing data could cause unfair economic advantage for competitors. RESA states that ESCO-specific data, such as market share or ESCO gas commodity flows, have been

excepted from disclosure because such data are highly proprietary and release can cause competitive harm.[3]

With respect to this request, we issued an e-mail on August 21, 2012 directing all parties in possession of the response to PULP IR No. 91 to treat the information as confidential; the e-mail also asked parties to disclose whether they had shared the information with any outside party. Two parties indicated that the information had been so shared, but both parties indicated that they informed the outside parties of our directive and obtained commitments from them to treat the information as confidential. In the e-mail we also posited several questions to RESA and PULP. The questions focused on obtaining a better understanding of the parties' positions and are included in the summaries of RESA's and PULP's pleadings on this matter. We also, in a subsequent e-mail of August 24, 2012, directed the Company to refrain from responding to PULP IR No. 107 until we authorized the response.

On August 27, 2012, RESA submitted its response to our questions concerning (1) how provision of the requested information (PULP IR Nos. 91 and 107) violated the BSA; (2) why release of the requested information would create an unfair competitive advantage for ESCO competitors; and (3) how the information was different from that submitted by ESCOs to the Commission-sponsored Power To Choose web site.

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[3] RESA cites to: Case 05-E-1222, New York State Electric & Gas Corporation – Electric Rates, Ruling Granting Trade Secret Protection for ESCO Market Data (February 2, 2006); Case 98-M-1343, Retail Access Business Rules, Order Adopting Amendments To The Uniform Business Practices, Granting In Part Petition on Behalf of Customers and Rejecting National Fuel Gas Distribution Corporation's Tariff Filing (issued October 27, 2008), p. 26; and Secretary Determinations on Appeal 06-01 (October 20, 2006), 09-01 (May 5, 2009), and 08-01 (May 19, 2008).

In response to our first question – violation of the BSA – RESA asserts that the BSA was only intended to create rights between and among the signatories, the ESCO and the Company. It claims that the BSA does not specifically authorize the Company to release publicly or to any other party the ESCO pricing data provided to the Company. PULP's interrogatory, according to RESA, would have the Company act outside the bounds of the agreement.

As to how release of the information would create a competitive disadvantage, RESA responds that the information would provide competitors with an individual ESCO's pricing, revenues, number of customers and number of low income customers. This will, in turn, RESA asserts, enable competitors to discern pricing patterns and market behavior of operating ESCOs and develop a strategy for entry into the market.

RESA distinguishes its provision of first-of-the-month price offerings to the Commission's Power To Choose web site, which enables customers to see multiple ESCO commodity offers and compare them to each other. RESA contends that the price offerings on the Power To Choose web site only provide general offers for service that are good for the first of each month and do not indicate what offers and products may be for the remainder of the month. RESA notes that the offers are prospective offers and do not provide a basis to calculate an ESCOs' historical pricing and billing.

PULP Response

On August 27, 2012, PULP submitted its response to the RESA motion.[4] PULP, a nonprofit organization focused on utility

[4] In its response PULP also points out that PULP IR No. 92 asked for information similar to that sought by PULP IR No. 91. The Company's response to PULP IR No. 92 referred to its answer to PULP IR No. 91.

affordability and consumer protection issues, states that the information sought in PULP IR Nos. 91 and 107 is relevant because these proceedings include an examination of all the Company's tariffs, rules, practices and procedures. It maintains that the information sought is pertinent to the Company's low income customers and will aid the development of a record with regard to the Company's low income program. In addition, PULP contends that the utility, for example, (1) promotes a program that offers customers that migrate to ESCOs short-term savings and (2) indicates that customers could lower their bills over time by switching to ESCOs. The information sought, according to PULP, will help determine whether the Company's retail access programs and information should be altered. PULP goes on to argue that any alteration of programs or information could pose a cost to the Company that should be appropriately dealt with in the rate proceedings.

PULP does not believe the BSA bars it from receiving the requested information. According to PULP, the BSA establishes a business relationship between the ESCO and utility whereby the ESCO provides billing determinants to the utility and the utility in turn, based upon consumption data within its possession, renders a consolidated bill to the customer. The utility then purchases, at discount, the ESCO receivable, thereby relieving the ESCO of the responsibility for collection of the customer account.

PULP states that it does not seek the ESCO-provided billing determinant; it seeks only the comparative analysis between the ESCO charges and what would have been charged by the utility for commodity service. PULP asserts that information provided in response to PULP IR No. 91 and sought in PULP IR No. 107 does not enable an individual to calculate the ESCO-specific billing determinant. In addition, PULP contends that the

information provided by the Company is information within its ownership as a result of its purchase of the ESCO accounts receivable. Next it states that the BSA, while not authorizing the release of the comparative analysis, does not specifically forbid the release of such information. It contends that failure of the BSA to preclude disclosure of the information should be construed against the drafters of the agreement.[5]

PULP argues that even if the BSA precludes release of the information, the contract could not prevent the operation of open government, which, for our purposes in these proceedings, encompasses the public release of information concerning utility charges.[6] It also notes that in one of our rulings we found that "confidentiality promises between parties do not preempt the statutory requirement for disclosure of information."[7]

According to PULP, the Company's responses to PULP IR Nos. 91 and 107 should not be protected from public disclosure under either the Public Officers Law or the Commission's rules. It asserts that the information provided by the Company does not list individual ESCOs, their commodity prices, or any "comparative pricing information," and it does not provide ESCO revenues. The information only provides the comparison between billed ESCO commodity charges and what the utility would have charged for commodity service. PULP asserts that it is not possible to use the information to back into the ESCOs' billing determinants. As such, PULP asserts that RESA has not

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[5] Citing Lauer v. New York Telephone Co., 231 A.D.2d 126 (3rd Dept. 1997).

[6] Citing Anonymous v. Board of Education, 162 Misc.2d 300 (S. Ct. 1994).

[7] Ruling Denying Protection from Disclosure for Site Investigation and Remediation Expenses (issued July 23, 2012).

established how release of this general "bottom line" comparison information could cause ESCOs competitive injury.

The precedents RESA cites, according to PULP, are inapplicable to the issue at hand. PULP claims that the past decisions relied upon by RESA all focused on information specific to individually identified ESCOs, such as the number and types of customers served by the ESCO. Unlike the entities seeking information in the precedents cited by RESA, PULP notes that it neither sought nor received the identification of the ESCOs in the comparative analysis. PULP also notes that the ESCOs already publicly provide, via the Commission's Power to Choose web site, their price offerings and that, therefore, even if one can argue that the prices are being revealed in the response to PULP's interrogatories, such information is already publicly available.

Utility Intervention Unit Response

The Utility Intervention Unit of the New York State Department of State's Division of Consumer Protection (UIU) opposes RESA's motion.[8] UIU asserts that the information sought is relevant to the proceedings, as UIU will file testimony pertaining to aspects of the Company's operations based, in part, on the information provided in response to PULP IR Nos. 91 and 107.[9] UIU, among other things, contends that the information sought can aid in the analysis of the design and operation of the Company's outreach and education and low-income programs.

UIU supports public disclosure of the information and does not agree that such disclosure violates the BSA. Specifically, it notes that no ESCO-specific information is

[8] Letter dated August 27.

[9] On August 31, UIU filed testimony in these proceedings that relied, in part, on the information provided by the Company in response to the interrogatories.

being sought by PULP or provided by the Company and, therefore, the BSA, which governs the provision of ESCO billing determinants, is not triggered by the Company's provision of the comparison data. Second, UIU contends that the prior determinations protecting ESCO data from public disclosure, upon which RESA relies, pertain to instances where the information sought is ESCO specific, unlike the subject information here. Lastly, UIU asserts that failure to make this information public may cause the public financial harm, and such harm trumps any concern regarding the potential competitive harm that may befall ESCOs operating in Niagara Mohawk's service territory.

Other Responses

Department of Public Service Staff (Staff) replied to RESA's Motion and stated that the Commission's discovery rules are broad and permit discovery of not only relevant information but also information that may lead to the production of relevant information. Moreover, Staff notes that Commission rules authorize discovery of information that may be utilized by parties in cross-examination or the preparation of their cases. Staff also notes that rate review under Public Service Law §66(12) is broad and encompasses not only rates and charges of utilities but also the rules and regulations establishing utility service.

The New York State Energy Marketers Coalition (Coalition) submitted comments on RESA's Motion. Although the Coalition is not a party to this case, we will nevertheless summarize and consider the Coalition's arguments. The Coalition supports RESA's Motion. It complains that release of the Company's response to PULP IR Nos. 91 and 107 would divulge information stemming from a private transaction between the ESCOs and the Company. In addition, the information, according

to the Coalition, could cause customer confusion because the ESCO charges and possible utility charges for commodity service are most likely not covering similar services. For example, the Coalition notes that some ESCOs may offer fixed, variable or green pricing products that are not readily comparable to possible utility commodity charges.

DISCUSSION AND CONCLUSION

By this ruling we fully articulate our basis for determining that the information sought is relevant to the proceeding and its release is not prohibited by the BSA. In addition, we determine that the information does not warrant protection from public disclosure pursuant to the Public Officers Law §87(2) or the Commission's rules (16 NYCRR 6-1.3 and 6-1.4).

As noted above, PULP IR No. 92 asked for information similar to that sought by PULP IR No. 91; and the Company, in its response to PULP IR No. 92, referred to the information it provided in response to PULP IR No. 91. Therefore, the discussion below is equally applicable to the Company's response to PULP IR No. 92.

Relevance of the Information

As Staff points out, the Commission's discovery rules (16 NYCRR 5.8) are very broad. Under the Commission's rules, discovery is proper if it seeks information that is relevant, is likely to lead to relevant information, is useful in cross examination or is necessary for the preparation of the case.

The information provided by the Company in response to PULP IR Nos. 91 and 107 is relevant to these proceedings because the information pertains to issues that are properly before the Commission in these proceedings. The information provided by

the Company has the potential to inform the record with respect to several issues, including the design and structure of the Company's low income, retail access, and education programs. Rate proceedings often include consideration of these programs, as modification or implementation of such programs often have revenue requirement effects that are properly addressed when reviewing and setting utility rates.

The relevance of the Company's responses to PULP IR Nos. 91 and 107 is further substantiated with the filing of intervenor testimony on August 31, which included UIU and PULP testimony that relied, in part, on the IR responses. Although Staff did not specifically refer to the IR responses in its testimony, Staff filed testimony recommending the development of bill comparison requirements. The IR responses are relevant in evaluating this testimony.

Billing Services Agreement

In order to evaluate RESA's claim – that the BSA prohibits release of the information – we must first determine that it is appropriate for us to review and interpret the BSA. We find that such review is not only appropriate but also required in this instance. The BSA was adopted by the Commission, insofar as the agreement was appended to a joint proposal that the Commission adopted by order issued April 20, 2006.[10] Consequently, it is appropriate for us to review and interpret the agreement. Even absent the Commission's action of adopting the BSA, we are still required to review the agreement once we have determined that the responses to PULP IR Nos. 91 and 107 provide information relevant to the proceedings. The

[10] Case 05-M-0333, et al., Niagara Mohawk Power Corporation's Plan to Foster the Development of Retail Energy Markets, Order Clarifying and Adopting Joint Proposal on Competitive Opportunities (April 20, 2006).

Commission has incidental power to review and consider contracts between utilities and customers and should consider such contracts in exercising its rate setting jurisdiction if the contracts provide relevant information.[11]

Having determined that we must review the BSA with respect to RESA's claims, we now resolve the question whether the BSA prohibits the release by Niagara Mohawk of a comparative analysis between ESCO charges and what the utility would have charged. Two arguments are raised by RESA to support its position: (1) section 14.7 of the BSA prohibits the disclosure of the information; and (2) the BSA does not otherwise authorize the disclosure.

First, section 14.7 of the BSA states that no third party rights are conferred by the agreement.[12] According to RESA, PULP is attempting to exercise such third party rights via its interrogatories to the Company. RESA's argument is supported neither by the plain language of the contract nor the ample case law regarding attempts by third parties to exercise contractual rights. This section of the BSA is a standard contract clause used by signatories to an agreement to prevent third parties from attempting, for example, to enforce the terms

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[11] See Home Depot U.S.A., Inc. v. New York State Public Service Commission, 92 A.D.3d 1012 (3rd Dept. 2012)(finding that the Commission has incidental power to review utility-customer contracts; Burke v. New York State Public Service Commission, 47 A.D.2d 91 (3rd Dept. 1975) (finding it appropriate for Commission to determine if a contract existed between a municipality and New York Telephone); and Home Depot U.S.A., Inc. v. New York State Public Service Commission, 55 A.D.3d 1111 (3rd Dept. 2008)(remanding the Commission's decision in order for the Commission to take into consideration contract governing construction of shopping plaza and provision of water service).

[12] Section 14.7 of the BSA specifically states: "This agreement is solely between the Parties and is not intended to confer any rights whatsoever on any third parties."

of the contract or sue a signatory for damages under the contract.[13] In this instance, PULP is attempting to obtain information regarding the delta or difference between monthly ESCO charges and what customers would have paid for utility commodity service. PULP is not seeking to enforce the contract – e.g. the billing arrangement or purchase of receivables – and it is not trying to collect any debts or enforce any contractual obligations. Rather PULP is attempting to obtain the information as part of its efforts to contribute to the record in these proceedings on matters such as the Company's low income program and its retail access and associated education and outreach programs.

Second, the BSA does not otherwise specifically prohibit the release of the information. As we have observed in ruling on several of the Company's requests to keep confidential information developed by its contractors, agreements often include specific prohibition of disclosure of the information provided pursuant to the contract.[14] No such prohibition exists

[13] See Mendel v. Henry Phipps Plaza West, Inc., 6 N.Y.3d 783 (2006) (enforcement of a housing development contract); Facilities Development Corp. v. Miletta, 180 A.D.2d 97 (3rd Dept. 1992) (indemnification for damages related to a construction project); Nepco Forged Products, Inc. v. Consolidated Edison Company of New York, Inc., et al., 99 A.D 2d 508 (2d Dept. 1984) (payment under a contract for utility services).

[14] Ruling Granting Protection from Disclosure of Embedded Cost of Service Model (July 9, 2012), Ruling Granting Protection from Disclosure of Compensation Survey (July 12, 2012), Ruling Granting Protection from Disclosure of Bond Manager Recommendations (August 23, 2012).

here and it would be improper for us to expand our reading of the contract beyond the four corners of the agreement.[15]

In addition, even if we determined that such a prohibition existed under the contract, we would still require production of the information. As correctly stated by PULP, parties cannot contract away or preclude the Commission's exercise of jurisdiction over utility matters.[16] In this instance, as discussed above, those matters – the Company's low income, retail access and education programs - have been found relevant to these proceedings and thus, necessitate our examination of the information in question.

Protection from Public Disclosure

Having found the information relevant to the proceedings and its release not prohibited by the BSA, we now address the issue of whether the information should be withheld from public disclosure pursuant to Public Officers Law §87(2)(d) and 16 NYCRR 6-1.3 of the Commission's rules. We find that (1) the precedent relied on by RESA is inapplicable to the facts, (2) the information is of a general nature and its disclosure is unlikely to cause competitive harm, and (3) the general retail access policy of the Commission favors public disclosure of this

[15] See Riverside S. Planning Corp. v. CRP/Extell Riverside, L.P., 13 N.Y.3d 398 (2009)(contract review should consider the words contained within the four corners of the document and its words should be given their sensible meaning).

[16] Case 12-E-0201, et al., supra Ruling Denying Protection from Disclosure for Site Investigation and Remediation Expenses (July 23, 2012), citing Anonymous v. Board of Education, 162 Misc.2d 300 (S. Ct. 1994).

type of information. For these reasons we deny RESA's request to except the information from public release.[17]

Under the Public Officers Law, information within a state agency's possession is presumed to be available to the public, but may be withheld from the public if the information sought is trade secret (formula or patent) or its release would cause substantial competitive injury to the entity requesting confidentiality. The Commission's rules provide for consideration of additional factors when weighing a request for non-disclosure against the policy favoring disclosure, including (a) the extent to which disclosure would cause unfair economic or competitive damage; (b) the extent to which information is known to others and involves similar activities; (c) difficulty and cost of developing or duplicating information; and (d) whether disclosure is otherwise prohibited by law or regulation.

RESA claims that release of the information would cause ESCOs operating in Niagara Mohawk's service territory competitive harm. The information, according to RESA, would provide competitors with individual ESCO pricing, revenues, number of customers and number of low income customers and enable competitors to discern pricing patterns and market behavior of existing ESCOs and develop a strategy for entry into the market.

RESA misapplies the various Commission, Secretary and ALJ rulings it cites to the facts at hand. The information provided by the Company in response to PULP IR Nos. 91 and 107, as pointed out by PULP and UIU, neither identifies the ESCOs

[17] PULP argued that an ESCO essentially lacked standing to challenge the public disclosure of the information because the utility, having purchased the ESCO account receivable, owned the data (i.e. ESCO charges) that were utilized in conducting the comparative analysis. This argument is also persuasive in contributing to our conclusion to deny RESA's request for confidential treatment of the information.

operating in the Company's territory nor provides ESCO billing determinants, *i.e.* the per kilowatt hour charge of the ESCO. In addition, it is not possible to deconstruct the comparison data provided by the Company in order to arrive at the billing determinants. Consequently, the precedents cited by RESA, where such information was at issue, are not applicable to the facts before us.

RESA's allegations of possible competitive injury are speculative at best and fail to meet the burden necessary to successfully obtain confidential treatment of the information.[18] Its claims, that release of the information is likely to cause significant competitive injury, are largely based on its characterization of the information as providing ESCO pricing, revenues, and numbers of customers. Such information is not being provided in the Company's response to either PULP IR Nos. 91 or 107. Rather, the Company's responses provide blind lists of ESCOs, noted only by supplier numbers, information about whether the supplier serves customers in the Company's affordable program or low income discount program, and the total and monthly delta between what the Company billed on behalf of the ESCO and what it would have billed the customer for its own commodity service.

The general information provided by the Company is unlikely to provide individual competitors with a possible competitive advantage and it is unlikely to cause significant competitive injury to any specific ESCO. The information, for example, provided in response to PULP IR No. 107 shows a significant variation among suppliers in the total and average deltas; no uniform market strategy or pricing pattern is

[18] See Secretary Brilling January 12, 2011 letter to Mr. Usher Fogel, Trade Secret 10-4, Case 98-M-1343, finding that the variable rate contract of Hess Corporation was not entitled to confidential treatment.

revealed. Even if a pricing pattern or market strategy could be discerned, it is questionable if such information would prove useful to competitors. As the Coalition noted, ESCOs might offer a variety of pricing products and services, and it is impossible for competitors to obtain any insight into those types of pricing offers from the Company's responses to the interrogatories.[19]

Even if a slight degree of competitive injury could be shown, it would be outweighed both by the general policy favoring disclosure and the Commission's specific policy favoring transparency in the retail access market. The Commission requires ESCOs to file monthly first-of-the-month price offerings.[20] Price transparency and price discovery were the goals of the Commission's directive. The same rationale applies to the disclosure of comparative analyses between those charges and utility commodity charges. The Commission noted in the Price Reporting Order that consumers should be encouraged to explore the retail marketplace. The comparative analyses contained in the IR responses are consistent with the Commission's policy and may contribute to the transparency of the marketplace.[21]

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[19] The Coalition argues that the information will cause confusion because it does not reflect variable features such as fixed pricing or green pricing. This is an evidentiary issue that can be addressed by testimony or on cross-examination. It is not, in itself, sufficient reason to except the information from disclosure. We note that potential confusion does not appear on the list of criteria to be considered under 16 NYCRR 6-1.3.

[20] Case 06-M-0647, et al., Energy Service Company Price Reporting Requirements, Order Adopting ESCO Price Reporting Requirements and Enforcement Mechanism (issued November 8, 2006)(Price Reporting Order).

[21] Price Reporting Order, pp. 9, 13.

For the foregoing reasons, RESA's request to except from disclosure the information provided by the Company in response to PULP IR Nos. 91, 92 and 107 is denied. Pursuant to 16 NYCRR 6-1.4(d)(2), RESA may appeal this determination to the Secretary within seven business days after receipt of this ruling.

Notwithstanding this determination, under 16 NYCRR 6-1.3(c)(5) and 6-1.4(a)(3), the documents must continue to be treated as exempt from disclosure until 15 days after their entitlement to exception has been finally denied, or such later date as may be ordered by a court of competent jurisdiction. All parties who have received the information at issue are reminded that they remain bound by the terms of the Protective Order adopted in these proceedings.

KIMBERLY A. HARRIMAN

RUDY STEGEMOELLER