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August 1, 2017

George M. Pond, Esq.
Barclay Damon, LLP
80 State Street
Albany, New York 12207

Re: Case 15-M-0127 – In the Matter of Eligibility Criteria for Energy Service
Companies.

Case 12-M-0476 – 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 98-M-1343 – In the Matter of Retail Access Business Rules.

Dear Mr. Pond:

Attached please find the Determination of Appeal of Ruling Clarifying State Agency
Obligations With Respect to Protected Information in response to your Amended Appeal of the
Ruling Clarifying State Agency Obligations With Respect to Protected Information, Request for
Stay and Conditional Request for Leave to File One Day Out of Time of Direct Energy Services,
LLC, dated July 13, 2017.

Very truly yours,

Kathleen H. Burgess
Secretary

Attachment

cc: Robert Freeman

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

- CASE 15-M-0127 - In the Matter of Eligibility Criteria for Energy Service Companies.
- CASE 12-M-0476 - 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 98-M-1343 - In the Matter of Retail Access Business Rules.

**DETERMINATION OF APPEAL OF RULING CLARIFYING STATE AGENCY
OBLIGATIONS WITH RESPECT TO PROTECTED INFORMATION**

(Issued August 1, 2017)

INTRODUCTION AND SUMMARY

By filing dated July 12, 2017, Direct Energy Services LLC and its affiliates (Direct Energy) appeal the June 29, 2017 Ruling Clarifying State Agency Party Obligations with Respect to Protected Information (Clarifying Ruling) issued by Administrative Law Judges (ALJs) Ashley Moreno and Erika Bergen. The Clarifying Ruling follows an April 4, 2017 Determination of Appeal on Measures to Preserve Confidentiality, which remanded to the ALJs “for further consideration of how to address provision of information to other State agency parties pursuant to the [Committee on Open Government] advisory opinion.”¹ The Commission Rules provide that “the Secretary of the Commission shall hear appeals [from] the measures that will be taken to preserve the confidentiality” of information. (16 NYCRR § 6-1.4[d][1].) Accordingly, Direct Energy's appeal is addressed in this Determination.

As an initial matter, the appeal is untimely. Public Officer's Law (POL) § 89(5)(c)(1) and 16 NYCRR § 6-1.4(d)(1) set a timeline of seven days to file an appeal. Direct Energy did not meet that timeline, and its excuses for the late filing are unpersuasive.

In the alternative, Direct Energy's appeal is denied on the merits. The ALJs correctly concluded that they may distribute Direct Energy's information to state agency parties to these proceedings under the Protective Agreement (Agreement)² and an Order to Show Cause entered

¹ Cases 15-M-0127 et al., In the Matter of Eligibility Criteria for Energy Services Companies, Determination of Appeal on Measures to Preserve Confidentiality, issued April 4, 2017, (April 4 Determination) at 13.

² The Agreement is attached to the Clarifying Ruling as Exhibit 2.

by Albany County Supreme Court.³ The ALJs appropriately applied 16 NYCRR § 6-1.4, which expressly allows ALJs to distribute information to parties to a proceeding under a protective order. Contrary to Direct Energy's claims, the ALJs have not proposed disclosure of exempt information to other agency parties, in violation of POL § 89(5)(a)(3). The ALJs also met FOIL's requirements for safeguarding any information exempt from disclosure.

Furthermore, in requiring State parties to execute the Agreement, the ALJs have left no doubt that providing information to these parties is consistent with FOIL and regulations implementing FOIL. The Agreement ensures one consistent FOIL determination rather than several potentially competing determinations. The Committee on Open Government (COOG) has issued an advisory opinion that suggests that state agencies can agree to be bound by other agencies' FOIL determinations. COOG suggested that the Agreement be in writing and specify which records are the subject of the Agreement. ALJs crafted the Agreement to comply with these guidelines. The Agreement comports with COOG's guidelines and it is consistent with FOIL.

Direct Energy's claim that the ALJs' actions were *ultra vires* because they do not cite any provision of FOIL that would constitute a substantive FOIL determination in the Agreement or the associated Protective Order is without merit.⁴ Both the Agreement and the associated Protective Order are procedural devices that implement FOIL; they do not constitute a substantive FOIL determination. This is evident in both the Agreement and the associated Protective Order; both expressly state that they are not substantive FOIL determinations. Direct Energy observes that POL § 87(2)(d) provides substantial protection, which exempts from disclosure "trade secrets" or confidential commercial information, "which if disclosed would cause substantial injury to the competitive position of the subject enterprise." Direct Energy asserts that POL § 89(5)(a) implements that section, which protects information submitted pursuant to POL § 87(2)(d). The Clarifying Ruling and the Agreement give full effect to the procedural mechanism for exemption contained in POL § 89(5)(a) to the extent that Direct

³ Matter of Direct Energy Services v. Public Service Commission, Order to Show Cause, (Albany County Index Number 02664-17) (April 18, 2017) (Order to Show Cause).

⁴ Cases 15-M-0127 et al., Ruling Adopting Protective Order and Notice to Non-Parties, issued February 17, 2017, (Protective Order). As the Agreement applies the Protective Order to state parties, the Protective Order and Agreement will be frequently discussed together. The Protective Order will be referenced as "the associated Protective Order."

Energy seeks to invoke the protections of those statutes. As such, the Clarifying Ruling and the Agreement are fully consistent with FOIL, and therefore Direct Energy's appeal is rejected.

BACKGROUND

These proceedings were commenced to investigate "concerns about retail energy markets for residential and small non-residential customers. [The Commission found] that as currently structured, the retail energy commodity markets for residential and small non-residential customers cannot be considered workably competitive."⁵ The Retail Markets Order addressed "major weaknesses in the residential and small non-residential retail energy markets due to the lack of accurate, transparent and useful information and marketing behavior that create[d] and too often relie[d] on customer confusion."⁶

The Commission took further steps to address its finding that the mass market was not workably competitive in the above-captioned proceedings by imposing pricing restrictions on ESCO contracts with customers.⁷ On July 22, 2016, Albany County Supreme Court reversed imposition of such pricing restrictions on the ground that the ESCOs were denied their procedural due process rights.⁸

Thereafter, a notice announced that an evidentiary hearing with respect to the provision of gas and electric commodity service to the mass market would be conducted to examine, among other issues, what steps "must be taken to ensure that these customers receive valuable

⁵ Cases 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 Nonresidential Retail Access Markets (issued February 25, 2014) (Retail Markets Order), p. 10.

⁶ Id. at 4.

⁷ Cases 15-M-0127 et al., Order Resetting Retail Energy Markets and Establishing Further Process (issued February 23, 2016) (Reset Order).

⁸ National Energy Marketers Association et al. v. New York State Public Service Commn., (Albany County Index No. 868-16); Retail Energy Supply Association et al. v. New York State Public Service Commn., (Albany County Index No. 870-16); Family Energy Inc. et al. v. New York State Public Service Commn., (Albany County Index No. 874-16), Decision/Order issued July 22, 2016 (Zwack, J), aff'd Matter of National Energy Marketers Assn. v. Pub. Serv. Commn., 2017 NY Slip Op 05901 (July 27, 2017) and Matter of Retail Energy Supply Assn. v. Public Serv. Commn., 2017 NY Slip Op 05908 (July 27, 2017).

services and pay just and reasonable rates for commodity services.”⁹ ALJs were assigned and initial testimony and exhibits were due to be filed on April 7, 2017 (now extended to August 24, 2017). The December 2, 2016 Notice directed ESCOs to submit, *inter alia*, evidence of their prices, number of customers, and sales volumes.¹⁰

Following a procedural conference on notice to all ESCOs in the state and comments on a draft protective order, ALJs Moreno and Van Ort adopted the Protective Order¹¹ pursuant to 16 NYCRR § 6-1.4—the Commission regulations applying FOIL to administrative proceedings. (See 16 NYCRR § 6-1.4[c].) The Protective Order delineated the protections for information claimed to be exempt under FOIL and the process for parties to file it and exchange it with each other. Multiple ESCOs thereafter contacted the ALJs with concerns that protected information provided to State agency parties must be filed with agency RAOs. Those ESCOs apparently assumed that the State agency parties, including the DPS Staff, lacked power to protect agency information not filed with RAOs. On March 3, 2017, the ALJs issued a clarifying ruling¹² to address ESCO concerns surrounding the Protective Order.

After the ALJs issued the March 3 Ruling, COOG issued an advisory opinion on March 28, 2017, that addressed two issues raised in these proceedings. First, the advisory opinion considered whether the Protective Order itself could provide a FOIL exemption. (Advisory Opinion, at 1-2.) COOG did not determine whether the Protective Order is inconsistent with FOIL. Rather, it opined that “insofar as a state agency’s regulations render records or portions of records deniable [i.e., not subject to disclosure] in a manner inconsistent with FOIL or some other statute, those regulations are, in our opinion, invalid.” (*Id.* at 2.) Second, COOG considered whether state agencies could agree to be bound by another agency’s FOIL determinations. (*Id.*) COOG held that:

⁹ Cases 15-M-0127 et al., Notice of Evidentiary and Collaborative Tracts and Deadline for Initial Testimony and Exhibits, issued December 2, 2016, (December 2, 2016 Notice) at 3.

¹⁰ *Id.* at 7.

¹¹ Cases 15-M-0127 et al., Ruling Adopting Protective Order and Notice to Non-Parties, issued February 17, 2017, (Protective Order).

¹² Cases 15-M-0127 et al., Ruling Clarifying Status of Information Provided Pursuant Protective Order, issued March 3, 2017, (March 3 Ruling).

so long as such an agreement is made in writing and refers to the specific records at issue, such an agreement would be valid and consistent with law. A state agency that agrees to be bound by the terms of a protective order or agreement satisfies the requirement that such an agreement be in writing. (Id.)

On March 20, 2017, Direct Energy filed an appeal from the March 3 Ruling. Direct Energy alleged that it would suffer an irreparable injury if it was required to submit its information directly to DPS Staff and other state agencies. On April 4, 2017, the Secretary determined that the Protective Order would adequately protect Direct Energy's information pending a FOIL determination when submitted directly to DPS Staff.¹³ The Secretary remanded back to the ALJs the issue of whether other state agencies can be bound to protect Direct Energy's information and coordinate FOIL determinations with DPS.¹⁴ Direct Energy challenged this decision in Albany County Supreme Court, alleging that requiring it to submit its information directly to DPS Staff and other state agencies violates FOIL and is *ultra vires*. In an Order to Show Cause¹⁵ arising out of Direct Energy's appeal from the April 4 Determination, Justice Ryba prohibited ALJs from requiring that Direct Energy submit its information directly to other state agency parties.

On June 29, 2017, after consideration of a further round of initial and reply comments from interested parties, ALJs Moreno and Bergen issued a clarifying ruling that established the Agreement.¹⁶ The Protective Order, as applied to state agencies by the Agreement, contemplates that parties to the case could exchange discovery and serve filed documents containing "Protected Information"—that is, information claimed to be exempt under FOIL—directly with each other, including with state agency parties. However, the ALJs explained in the Clarifying Ruling that such a process was not currently available due to the strictures of Justice Ryba's Order to Show Cause. (Clarifying Ruling, at 12.) Consequently, to comply with the Order to

¹³ Cases 15-M-0127 et al., Determination of Appeal on Measures to Preserve Confidentiality, issued April 4, 2017, (April 4 Determination) at 2.

¹⁴ Id.

¹⁵ Order to Show Cause. The Order to Show Cause, however, expressly allows the ALJs to submit Direct Energy's information to other agency parties.

¹⁶ Cases 15-M-0127 et al., Ruling Clarifying State Agency Party Obligations with Respect to Protected Information, issued June 29, 2017, (Clarifying Ruling or the Agreement).

Show Cause, the ALJs directed that Protected Information be provided to state agency parties by submitting it first to the ALJs, who would then transfer it to the state agency parties. Direct Energy filed an appeal from this Clarifying Ruling and Agreement on July 12, 2017.

Direct Energy's Arguments

The gravamen of Direct Energy's position is that neither FOIL nor Commission regulations implementing FOIL provide for the Agreement or the associated Protective Order. Direct Energy alleges that it will suffer irreparable injury should, pursuant to the Agreement, the ALJs transmit its information to other agency parties. Direct Energy offers several arguments in its attempt to support this position. First, Direct Energy characterizes the ALJs' transmittal of Direct Energy's documents to state agency parties as a "disclosure" under FOIL. Accordingly, it claims that the Agreement violates POL § 89(5)(a) and 16 NYCRR 6-1.4(a)(4), which prohibit disclosure until 15 days after a final determination on a request for trade secret status has been made.

Next, Direct Energy argues the Ruling and Agreement are deficient because they fail to identify a specific provision of FOIL that would exempt information transmitted to state agency parties from disclosure. It asserts that disclosure of its information would result from case law rejecting claims that information can be exempted from FOIL by protective orders or agreements. Direct Energy provides case law¹⁷ that holds that protective orders are not a substitute for FOIL compliance and provide no exemption from disclosure. Additionally, agreements between parties to keep information confidential are claimed to not create FOIL exemptions and therefore provide no protection.¹⁸ Because the Protective Order itself does not include a specific basis for confidentiality under POL § 87(2), Direct Energy claims that it exposes the information to disclosure and Direct Energy to irreparable injury.

The appeal then discusses potential FOIL exemptions in POL § 87(2) that Direct Energy asserts would not apply. In particular, Direct Energy claims that the ALJs cannot transfer to other agency parties information claimed to be exempt from disclosure under POL § 87(2)(d) as "trade secrets" or "confidential commercial information" that would cause substantial

¹⁷ E.g. Matter of M. Farbman & Sons, Inc. v. New York City Health and Hospitals Corp., 62 N.Y.2d 75 (1984).

¹⁸ Washington Post Co. v. New York State Insurance Department, 61 N.Y.2d 557 (1984).

competitive injury if disclosed. Direct Energy claims that it has cited authority supporting its position that its information would not be protected, contrary to the ALJs' conclusion that no party cited supportive authority.

Direct Energy reads POL § 89(5) as prohibiting agencies from providing an exemption from disclosure unless the entity requesting exemption submits its request directly to that state agency. When state agency parties receive the information directly from the ALJs, Direct Energy asserts that the other agency's RAOs would not make a FOIL determination. Direct Energy claims that without such a determination, its information is subject to disclosure. Similarly, Direct Energy reads POL § 87(2)(d) as imposing procedural requirements on the trade secret exemption. The Clarifying Ruling and the Agreement, so Direct Energy argues, bypass those procedural requirements and therefore any FOIL determination would be *ultra vires*.

Moreover, Direct Energy argues that DOS and OGS regulations implementing FOIL prohibit the Agreement on procedural grounds. Like POL § 87(2), DOS and OGS regulations supposedly impose procedural requirements upon FOIL requests that, if not met, prohibit a FOIL determination. Specifically, Direct Energy claims those agencies' regulations require a party to submit its information directly to those agencies before those agencies can make a FOIL determination. As Direct Energy would not, under the Order to Show Cause and the Clarifying Ruling, directly submit its information to DOS and OGS, it asserts it cannot obtain an exemption and therefore will suffer irreparable injury due to disclosure as a result of the ALJs' transmittal of its information. Direct Energy asserts that such disclosure is particularly likely in light of the broad disclosure policies underlying FOIL.

Finally, Direct Energy reads the COOG advisory opinion as prohibiting the Agreement. Direct Energy notes that the Advisory opinion states that a "written agreement [by state agencies to abide by another agency's determinations under FOIL] would be valid and consistent with FOIL." Despite this opinion, Direct Energy interprets the first part of the advisory opinion (which considered a different issue entirely) as prohibiting the Agreement. It mischaracterizes the Agreement as either providing an exemption under FOIL or in lieu of FOIL. As either is inconsistent with FOIL, Direct Energy claims the Agreement is invalid.

Direct Energy proposes a solution to its perceived issues with the Agreement. Consistent with COOG's advisory opinion, Direct Energy claims that state agency parties can agree to be bound by another agency's FOIL determinations. Rather than having ALJs transmit information

to state agency parties under the Protective Order as the clarifying Ruling requires, Direct Energy proposes that it instead would submit its information directly to each agency's RAO. This arrangement would assertedly solve the alleged procedural defects that subject Direct Energy's information to disclosure.¹⁹

DISCUSSION

The appeal is denied. First, the appeal is rejected as untimely. Alternatively, on the merits the Secretary finds that Direct Energy has failed to support its claims that the Agreement is *ultra vires* and will lead to irreparable harm from a loss of exemption from disclosure under FOIL.

Timeliness

The Clarifying Ruling from which Direct Energy appeals was issued on June 29, 2017. Under 16 NYCRR § 6-1.4(d)(1), an appeal of "determinations with respect to the measures that will be taken to preserve the confidentiality of the information" must be brought within seven business days. The last day to file the appeal was July 11, 2017. As the appeal was filed on July 12, 2017, it is untimely. Direct Energy recognizes that the appeal is late if considered as a FOIL appeal. Its concession is not surprising given that it filed out-of-time in these proceedings before, and was admonished for its error.²⁰

Direct Energy's amended appeal baldly claimed that § 6-1.4(d)(1) does not apply, but does not dispute that appeals with respect to confidentiality matters fall under 16 NYCRR § 6-1.4(d)(1). Contrary to Direct Energy's claims, 16 NYCRR § 6-1.4(d)(1) is the provision governing this appeal. Section 6-1.4(d)(1) governs appeals from "measures that will be taken to preserve the confidentiality" of information. The Clarifying Ruling creates the Agreement,

¹⁹ Direct Energy has not appealed the ALJs' conclusion that they are bound by Justice Ryba's Order, or explained how its proposed solution comports with that Order, or if that Order needs to be modified. Direct Energy may well offer a practical solution to the problems it raises, inasmuch the Agreement would allow other agency RAOs to respect ALJ decisions on confidentiality. That solution is, however, not legally required for the reasons given in this Determination; the ALJs can step into the shoes of other agency RAOs for purposes of compliance with FOIL. Further, it is not immediately apparent that the practical solution is available, given that Direct Energy's appeal is untimely, it has not addressed the ALJs' conclusion, and the Order to Show Cause has not been modified, if that is required.

²⁰ April 4 Determination, at 1, n. 1.

which is designed to ensure that Direct Energy's information remains confidential. This is unambiguously a "measure[] . . . taken to preserve confidentiality." In addition, Direct Energy provided no argument whatsoever that this is an interlocutory appeal in its appeal or affidavit.²¹ Accordingly, section 6-1.4(d)(1) applies and the applicable time period for appeal is seven business days.

Nor has Direct Energy provided any basis for forgiving its lack of compliance. Direct Energy alleges clerical error to explain the late filing, but fails to provide an explanation as to why that error should constitute a basis for accepting the appeal under FOIL. In response to the Secretary's request that Direct Energy support its claim of "clerical error,"²² Direct Energy filed a responding affidavit stating that it put the wrong filing date on the calendar.²³ The affidavit also asserted it could properly have filed an interlocutory appeal.²⁴

Direct Energy has not demonstrated "good cause" for its untimeliness. In *Entergy v. PSC*,²⁵ the Third Department found good cause where Entergy filed a petition for rehearing one day late. There, however, there was an intervening cause for late filing: a third-party delayed the filing. Entergy timely filed its petition with a third-party vendor, and that vendor sent a misleading message to Entergy that the petition was sent. To ensure that Entergy's filing was not spam, however, the third-party vendor did not file the petition until the following day. Here, Direct Energy filed late because its counsel incorrectly calendared the filing date. Even more troubling is the fact that Direct Energy has filed late in these proceedings before and received an extension and a warning not to do so again.²⁶ This late filing is accordingly not an isolated incident. In short, there was no filing within the seven business-day deadline and Direct Energy did not show good cause for the late filing. Consequently, the appeal is rejected as untimely.

²¹ Cases 15-M-0127 et al., GMP Affidavit, received 7/18/2017, at ¶ 6 (GMP Affidavit).

²² Letter, at 1. [Cases 15-M-0127 et al., Letter from Secretary Burgess to Mr. George M. Pond, regarding Amended Appeal, issued 7/17/2017 (Letter).]

²³ GMP Affidavit, at ¶ 6.

²⁴ GMP Affidavit, at ¶ 7. Interlocutory appeals give parties 15 days to appeal. (16 NYCRR § 4.7[b].)

²⁵ Matter of Entergy Nuclear Power Mktg., LLC v. New York State Pub. Serv. Commn., 122 A.D.3d 1024 (3d Dep't, 2014).

²⁶ April 4 Determination, at 1, n. 1.

Merits

In the alternative, the Secretary nonetheless reaches the merits. At the outset, the allegedly improper “disclosure” under POL § 89(5)(a) that Direct Energy describes is not a disclosure at all. (E.g. Appeal, at 4.) When evidence is distributed to parties to this proceeding pursuant to a protective order, no “disclosure” is made. Under FOIL, “disclosure” refers to granting access to and delivering nonexempt records to members of the public upon request, thereafter making the records publicly available. (E.g. POL § 87[2].) Here, the ALJs are not giving any of Direct Energy’s information to the public. Rather, ALJs are transmitting Direct Energy’s information to agency parties in this proceeding pursuant to a protective order, a long-standing practice critical to efficient and comprehensive administrative litigation. Under a protective order, receiving parties protect the information from disclosure. Above all, POL § 89(5)(a)(3) exempts records from disclosure until 15 days following a final FOIL determination. Until the ALJs make a FOIL determination, Direct Energy’s records are exempt from disclosure. FOIL itself unconditionally protects Direct Energy’s information, rendering Direct Energy’s concerns without merit.

When Direct Energy claims there is no statute or regulation authorizing disclosure of information to other agencies, it misrepresents the context of the process the ALJs established; the Agreement and Clarifying Ruling are a mechanism for implementing FOIL exemptions. Both FOIL and the PSC regulations implementing FOIL authorize the Agreement and the associated Protective Order. For example, Section 87(4)(a) obligates agencies, *inter alia*, to promulgate regulations to determine “the manner of safeguarding against any unauthorized access to the records.” (POL § 87[4][a][3].) The regulations are promulgated in conformity with these requirements. Section 6-1.4 applies when an ALJ is assigned, taking the place of the RAO. In following the requirements of POL § 87(4)(a)(3), “the presiding officer may require that information submitted for a FOIL exemption be submitted immediately under a protective order so that all parties may have access without delay.” (16 NYCRR § 6-1.4[b][1].) Section 6-1.4(c) requires the presiding officer to “take appropriate measures” to safeguard the information.

In full compliance with FOIL’s requirements, the PSC regulations unambiguously allow ALJs to transmit immediately Direct Energy’s information to parties under a protective order pending a FOIL determination, and to determine how best to safeguard that information. State agencies are parties to the proceedings from which this case arises, and thus the ALJs can

transmit information to state agencies under a protective order without any further agreement. However, given the parties' concern about the sensitivity of information in this proceeding, the ALJs took further protective measures and created the Agreement. The Agreement prohibits state parties from disclosing the information, thereby furthering the requirements of POL §§ 87(4)(a)(3), 89(5)(a)(3), and 16 NYCRR § 6-1.4(c). (Agreement, at 2.)

Moreover, the Agreement creates a process that will consistently protect Direct Energy's information as § 87(4)(a)(3) requires. DPS—the agency with the substantive expertise to evaluate Direct Energy's information for confidentiality—makes the FOIL determination that binds all state parties. (Clarifying Ruling, at 7-8.) Indeed, claims for protection as trade secret and critical infrastructure in PSC proceedings invariably involve arguments that require an understanding of the State's energy industry to resolve. Under the Agreement, there is one determination, rather than several independent and potentially competing determinations. (*Id.* at 9.) By using the Agreement to ensure consistency, the ALJs are following their statutory mandate to protect Direct Energy's information. Because the Agreement protects Direct Energy's information, it complies with FOIL and regulations implementing FOIL.

Nor do OGS or DOS regulations implementing FOIL prohibit the Agreement. Direct Energy reads the subparts it cites as limiting each agency's authority to designate Direct Energy's information confidential under FOIL. (Appeal, at 9-10.) However, other subparts contradict Direct Energy's reading. When each regulation is read as a whole, OGS and DOS have the authority to enter into the Agreement. For example, 9 NYCRR § 330-1.7(c) requires OGS to keep protected any "record deemed a trade secret or critical infrastructure information [that] has been submitted to the agency;" who deems the information confidential or how OGS receives it are unimportant. (*See* 9 NYCRR § 330-1.7[c].) Other subparts—§ 330-1.7(b), for example—are specific, referring to who submits the information (a person) and how OGS received it (as a request for exemption under FOIL). (*Compare* 9 NYCRR § 330-1.7[b] *with* § 330-1.7[c].) DOS is given the general power to deny access to records under FOIL by 19 NYCRR § 80.6(a). Section 80.6(a)(1), like 6 NYCRR § 330-1.7(b), is more specific, describing the special procedure that applies when a person submits information with a request for confidentiality. (*Compare* 19 NYCRR § 80.6[a] *with* § 80.6[a][1].) Essentially, OGS and DOS regulations have the same basic scheme. Each agency has broad powers to designate records confidential under FOIL. Specific procedures apply in cases where the agency receives a request

to exempt information from disclosure under FOIL. Direct Energy's reading of the subparts neglects to consider other provisions of the regulations that allow for the Agreement.

Similarly, Direct Energy alleges that POL § 87(2)(d) prohibits agencies from granting an exemption from FOIL if it does not directly submit its information to that agency's RAO. Direct Energy cites the latter two clauses of 87(2)(d), alleging that the information must first be submitted to that agency or derived from information submitted to that agency. (Appeal, at 8-9.) However, Direct Energy neglects to consider the first clause of 87(2)(d), which allows agencies to grant an exemption if Direct Energy's documents "are trade secrets." In that clause, there is no prerequisite; agencies retain the authority to grant an exemption regardless of how those agencies received the information.

Furthermore, Direct Energy's readings of PSC, DOS, and OGS regulations implementing FOIL conflict with FOIL. Direct Energy claims that transmitting its information to state agencies is a disclosure, and that DOS and OGS regulations apply substantive FOIL exemptions based on how those agencies received the information, not just on the substance of the information. (Appeal at 4, 8-9.) FOIL maximizes public access to government records. (POL § 84.) Thus, "[a]ll government records are . . . presumptively open for *public* inspection and copying unless they fall within one of the enumerated exemptions of Public Officers Law § 87(2)." (Gould v. New York City Police Dept., 89 N.Y.2d 267, 274 [1996] [emphasis added].) Correspondingly, FOIL exemptions enumerated in POL § 87(2) deny the public—not state agencies—access to government records. Additionally, FOIL exemptions are based on content, not on how the agency receives the information. (See, e.g., POL § 87[2][d] [denying access to records because they contain trade secrets, not because of how the exempting agency receives the documents].)

Here, Direct Energy's interpretations of agency regulations implementing FOIL are untenable as they conflict with FOIL. Direct Energy claims that 16 NYCRR § 6-1.4(b)(1) does not allow ALJs to distribute Direct Energy's information to other state agencies because doing so would constitute a disclosure under FOIL. (Appeal, at 4.) FOIL exemptions protect from disclosure to the public, not sharing with other government agencies as needed in agency proceedings. Direct Energy claims that because it does not submit information to OGS and DOS directly, it cannot obtain FOIL determinations from those agencies. (Appeal, at 8-9.) However, OGS and DOS have broad powers to determine whether information is exempt from FOIL.

They can reach agreements with DPS to protect information submitted to DPS. Additionally, because information is exempt based on content and not how an agency receives the information, Direct Energy's arguments are unavailing.

The COOG advisory opinion clearly demonstrates that the Agreement complies with FOIL. The "construction given statutes and regulations by the agency responsible for their administration, if not irrational or unreasonable, should be upheld." (Howard v. Wyman, 28 N.Y.2d 434, 438 [1971].) This deference is strongest when the application of a statute "involves knowledge or understanding of underlying operational practices." (Matter of New York Life Insurance Co. v. State Tax Commission, 80 A.D.2d 675, 676 [3d Dep't 1981]; Wyman, 28 N.Y.2d at 438.) COOG is tasked with administering FOIL, and it issues advisory opinions pursuant to its mandate. (POL § 89[1][b].) Because of COOG's responsibilities and understanding of FOIL and FOIL's operational practices, COOG's advisory opinions, "if not irrational or unreasonable," should be upheld. (Sheehan v. Binghamton, 59 A.D.2d 808, 809 [3d Dep't 1977]; Miracle Mile Assoc. v. Yudelson, 68 A.D.2d 176, 181 [4th Dep't 1979]; see also Gannett Co. v. James, 108 Misc. 2d 862, 865 [Sup Ct, Monroe County 1981], aff'd 86 A.D.2d 744 [holding that COOG advisory opinions should be "given great weight"].)

Here, COOG issued an advisory opinion stating that "so long as [the Agreement] is made in writing and refers to the specific records at issue, [the Agreement] would be valid and consistent with law." (COOG Advisory Opinion). This opinion is reasonable and rational—no provision of FOIL prohibits state agencies from coordinating their FOIL determinations. The Agreement is a written and signed document that refers to the specific records at issue—information to which state agencies have access by virtue of being a party. (Agreement, at 1.) The Agreement is consistent with COOG's requirements and it is consistent with FOIL.

Direct Energy cites an inapplicable section of the Advisory Opinion to make its argument. (Appeal, at 14-15.) The Advisory Opinion addresses two issues Direct Energy raised in a previous appeal. The first issue is whether the Protective Order itself can hold information confidential independent of FOIL. (COOG Advisory Opinion.) Direct Energy cites this section as supporting its claim that the Advisory Opinion prohibits the Agreement. (Appeal, at 14-15.) Yet this section neither decides nor discusses whether state agencies may coordinate their FOIL determinations. Further, as neither the Protective Order nor the Agreement seek to hold information confidential independent of FOIL, this section is speculative. (Protective Order, at

¶ 27 [“This Protect[ive] Order does not constitute a substantive ruling that the Protected Information is entitled to confidential status pursuant to FOIL”]; see Agreement, at 2 [binding signatories to ALJs’ substantive FOIL determination rather than making a substantive FOIL determination].) The second section plainly decides the issue of whether state agencies can enter an agreement to be bound by DPS’s FOIL determination – and did so in favor of DPS’s position. (COOG Advisory Opinion.)

Second, the Agreement is procedural, not substantive, and thus Direct Energy’s concerns regarding substantive FOIL exemptions are unfounded.²⁷ The Agreement and the associated Protective Order both state that neither makes a substantive ruling. (Protective Order, at ¶ 27 [“This Protected Order does not constitute a substantive ruling that the Protected Information is entitled to confidential status pursuant to FOIL”]; see Agreement, at 2 [binding signatories to ALJs’ substantive FOIL determination rather than making a substantive FOIL determination].) Instead, the Agreement and the associated Protective Order *implement* FOIL. The Protective Order provides a method to protect information pending a substantive FOIL determination. (Protective Order, at ¶ 1.) The Agreement merely binds all state parties to the Protective Order and DPS’s FOIL determinations, made in the first instance by ALJs. (Agreement, at 2.)

Nor does the Agreement propose a method to circumvent FOIL. The Agreement never holds that Direct Energy’s information is confidential independent of FOIL. The Agreement instead mirrors FOIL provisions that exempt all information submitted for a FOIL determination from disclosure pending a final FOIL determination. (Compare POL § 89[5][a][3] [exempting information from disclosure until 15 days after a final FOIL determination] with Agreement, at 1 [“The State Agency agrees that it will maintain as confidential all Protected Information until, at a minimum, 15 days after a Providing Party’s claim has been finally denied”].) Again, the Agreement only *implements* FOIL.

Because the Agreement and the associated Protective Order are procedural devices for implementing FOIL, Direct Energy’s concerns about the alleged lack of substantive FOIL exemptions are unfounded. First, Direct Energy raises a red herring when it claims that “the ALJs make no attempt in the [Clarifying] Ruling to identify any specific statutory exemption under POL § 87(2) that would protect information that other state agencies receive from the

²⁷ Indeed, it appears that most of Direct Energy’s argument in section II.B. of its appeal is a straw man, as ALJs never discussed, let alone decided, any substantive FOIL exemptions.

ALJs from disclosure in response to a FOIL request made to such other agencies.” (Appeal, at 6.) The Ruling does not cite a FOIL provision because the Agreement does not need to do so—the Agreement is procedural and does not itself seek to provide an exemption under FOIL. It would be Direct Energy that would first specify the statutory basis for confidentiality under FOIL by filing for exemption under POL § 87(2)(d) and thereby availing itself of the processes and protections of POL § 89(5).

Third, Direct Energy claims that POL § 87(2) does not exempt information from disclosure as a result of a protective agreement. It cites M. Farbman & Sons, Inc. v. New York City Health and Hospitals Corp., noting that protective orders do not provide an exemption under FOIL. (Farbman, 62 N.Y.2d 75, 81 (1984).) While that proposition is correct, it is immaterial. As stated above, the Protective Order and Agreement here are merely procedural vehicles for allowing easy sharing of information among parties to a case; whether the information is actually exempt from FOIL disclosure on the merits would be determined, if and when necessary, based on whether the information meets one of the exemptions from disclosure enumerated under POL §87(2), and not based on its exchange under the Protective Order and Agreement.

Here, Direct Energy proclaims its intent to seek an exemption under POL §§ 87(2)(d) and 89(5). If Direct Energy is successful, it will be those statutes that provide for the FOIL exemption, not the Protective Order, which, on its face, clearly does not create an independent FOIL exemption. (Protective Order, at ¶ 27 [“This Protected Order does not constitute a substantive ruling that the Protected Information is entitled to confidential status pursuant to FOIL”].) Other cases Direct Energy cites are equally inapposite. Unlike this situation, those cases deal with instances where the agency tried to exempt information from disclosure independent of FOIL. (E.g., Washington Post Co. v. New York State Insurance Department, 61 N.Y.2d 557 [1984]; McCrory v. Village of Mamaroneck, 34 Misc. 3d 603 [Sup Ct, Westchester County 2011].) Direct Energy’s claim that an agency cannot use a protective order to shield information that would otherwise be subject to disclosure under FOIL overlooks, again, that the FOIL exemptions under POL § 87(2) remain available to protect confidential material. The Protective Order is a step in the FOIL process, not independent of it.

Lastly, Direct Energy claims the Clarifying Ruling fails to answer how other state agencies will justify denying a FOIL request. (Appeal, at 7.) However, the Agreement and Clarifying Ruling do answer this concern: DPS’s substantive FOIL determination binds state

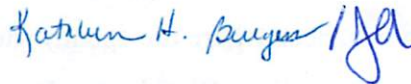
agency signatories to the Agreement. (Agreement, at 2.) In the Clarifying Ruling, the ALJs make a compelling case for why this arrangement is the only workable way to accommodate the role of other state agencies as parties appearing in a PSC proceeding. Indeed, neither Direct Energy nor any other party in the case has made a case for an alternative process that meets the needs of the parties and the agencies and complies with FOIL.

In sum, the Agreement and the associated Protective Order never claim to protect information independent of FOIL or make a substantive FOIL determination. The Agreement, pursuant to FOIL and PSC regulations, merely implements FOIL. Direct Energy's concerns are unfounded.

CONCLUSION

For the reasons discussed above, Direct Energy's appeal from the June 29, 2017 Clarifying Ruling issued by ALJs Moreno and Bergen is denied. Contrary to Direct Energy's claims, the Agreement and Clarifying Ruling are not *ultra vires*. They conflict neither with the substantive requirements of POL § 87(2)(d) for the exemption of "trade secrets" and "confidential commercial information" that would result in substantial competitive injury if disclosed nor with the procedural requirements of POL § 89(5)(a)(3). Rather, the Agreement and the Clarifying Ruling allow Direct Energy to claim exemption from disclosure for information that is allegedly confidential because of POL §§ 87(2)(d) and 89(5) and to shield such from disclosure to the public and thereby allowing it to participate in the Commission proceeding.

By the Commission,



Kathleen H. Burgess
Secretary