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VIA E-MAIL

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Ms. Donna Giliberto
Records Access Officer
State of New York
Department of Public Service
Three Empire State Plaza
Albany, NY 12223-1350

Re: Case 12-M-0282 – In the Matter of Staff’s Review of a New York State Electric & Gas Corporation/Rochester Gas and Electric Corporation Security Breach - Request for Protection from Public Disclosure Based on Personal Privacy, Information System and Critical Infrastructure Exemptions

Dear Ms. Giliberto:

Pursuant to the New York State Freedom of Information Law ("FOIL") and Part 6 of the New York State Public Service Commission's ("Commission") regulations, New York State Electric & Gas Corporation and Rochester Gas and Electric Corporation (together, the "Companies") hereby request protection from public disclosure for certain information based on the personal privacy, information system, and critical infrastructure exemptions. The information includes employee names, home telephone numbers and cell phone numbers and specific details regarding the Companies' security and information technology systems (the "Confidential Information").

I. ARGUMENT

A. Personal Privacy Exemption

Section 87(2) of the New York State Public Officers Law ("POL") states in relevant part that an agency may deny access to records or portions thereof that "if disclosed would constitute an unwarranted invasion of personal privacy." N.Y. Pub. Off. Law § 87(2)(b) (McKinney 2011). In Empire Realty Corp. v. New York State Div. of Lottery, the court found that "what constitutes unwarranted invasion of personal privacy is measured by what would be offensive and objectionable to a reasonable person of ordinary sensibilities. This determination requires

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balancing the competing interests of public access and individual privacy.” Empire Realty Corp. v. New York State Div. of Lottery, 230 A.D.2d 270 (3rd Dep’t 1997).

The Confidential Information includes employee names, home telephone numbers and cell phone numbers. Employees would not expect this information to be disclosed to the public. Accordingly, such information should be exempted from public disclosure.

B. Information System Exemption

POL Section 87(2)(i) allows agencies to deny the public access to records that "if disclosed, would jeopardize the capacity of an agency or an entity that has shared information with an agency to guarantee the security of its information technology assets, such assets encompassing both electronic information systems and infrastructures" (the "Information System Exemption"). Id. at § 87(2)(i). Until very recently, this FOIL exception applied only to government agencies. In July 2010, this exception was broadened to cover all entities that share information with an agency.

While this FOIL disclosure exemption has yet to be incorporated into the Commission's regulations, the Companies submit that the Confidential Information falls squarely within the type of information the Information System Exemption seeks to protect. In particular, the Confidential Information contains information relating to the Companies' internal management of their information systems and infrastructure; b) the nature of the Companies' information system resources; and c) the Companies' internal protocols. Release of this information would jeopardize directly the Companies' ability to guarantee the security of their information systems and infrastructure. Therefore, the Confidential Information should be protected from public disclosure pursuant to the Information System Exemption.

C. Critical Infrastructure Information

A person or entity who submits records to any agency may identify those records or portions thereof that may contain critical infrastructure information, and request that the agency that maintains such records except such information from disclosure under Section 87(2). Id. at § 89(5)(a)(1-a). Consistent with POL Section 89(5)(a)(1-a), the Commission's regulations allow critical infrastructure information to be protected from public disclosure. 16 NYCRR § 6-1.3(b)(3).

Critical infrastructure information is defined as "systems, assets, places or things, whether physical or virtual, so vital to the state that the disruption, incapacitation or destruction of such systems, assets, places or things could jeopardize the health, safety, welfare or security of the state, its residents or its economy." POL § 86(5).

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The Commission has recognized that utility infrastructure is a critical component in maintaining national security and sustaining the economy, and that it is important to safeguard public utility assets.¹ Information that provides specific details as to the operational and security measures used by the Companies to guard against an attack on critical infrastructure constitutes critical infrastructure information.²

In this instance, the Confidential Information relates to the Companies' information technology and security systems. If publicly released, the Confidential Information could be used to damage the Companies' critical infrastructure. Damage to the Companies' information systems could jeopardize the health, safety, welfare or security of the state, its residents or its economy. The Confidential Information, therefore, should also be protected as critical infrastructure information.

II. CONCLUSION

In light of the above, the Confidential Information fits within FOIL's personal privacy, information system and critical infrastructure information exemptions and must be protected from public disclosure. Therefore, the Companies respectfully request that the Commission protect the Confidential Information from public disclosure.

If you have any questions regarding this filing, please contact me at 518-434-4977.

Respectfully submitted,

A handwritten signature in blue ink that reads "Noelle M. Kinsch".

Noelle M. Kinsch

Enclosure

¹ Case 02-M-0953 - Proceeding on Motion of the Commission as to Telephone and Energy Utility Arrangements for Safeguarding the Security of their Physical Equipment and Cyber Systems, Order Directing Further Action (Sept. 30, 2003).

² Case 09-E-0310 - In the Matter of the American Recovery and Reinvestment of 2009, Determination of Records Access Officer (May 28, 2009).