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January 25, 2011

Hon. Jaclyn A. Brilling
Secretary
Public Service Commission
Three Empire State Plaza
Albany, NY 12223-1350

2011 JAN 25 PM 2:48

RE: Case 09-M-0544 – Electronic Filing, Distribution & Issuance of Documents

Dear Secretary Brilling:

I am submitting these comments on the proposed amendments to multiple Parts of 16 *NYCRR* to provide for electronic filing, as noticed in the *State Register* of December 15, 2010 as PSC-50-10-00007-P. The main purpose of this proposal is to require electronic filing, distribution and issuance of most documents used in Public Service Commission (PSC) proceedings. According to the regulatory impact statement (RIS), other changes are made to the affected sections to remove obsolete or outdated provisions.

Two changes would be made to Subpart 6-1, which contains regulations implementing the Freedom of Information Law (FOIL), that appear to conflict with the express language of that statute. (Although the RIS does not include FOIL among the statutory authority cited for the rule changes, FOIL does continue to govern public access to PSC records.) First, the proposed rule would replace the existing text of §6-1.2 (which more or less tracks FOIL's language on fees) with the following new provisions:

> **"§6-1.2. Fees**
>
> The fees for preparing and reproducing Department records shall be in accordance with a schedule of fees maintained by the Secretary and made publicly available."

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Regardless of the PSC's intentions (concerning which the RIS provides no information), this change appears to conflict with the law. FOIL requires that each agency shall promulgate rules "pertaining to the availability of records and procedures to be followed, including the fees for copies of records." (Public Officers Law §87(1)(b)). Nothing in the statute allows an agency to establish such fees in a separate document – which could be changed at any time without any notice to the public – and merely substitute a reference to that separate document in the actual filed FOIL regulations.

In addition, FOIL provides agencies with a limited number of options for assessing fees for public documents. No fee can be charged for inspection of records or for employee time to prepare photocopies of records (*cf.* 21 *NYCRR* §1401.8(a)). Fees for paper copies up to 9" by 14" may not exceed 25¢ per page, and the fee for any other record cannot exceed the actual cost of reproduction, in accordance with standards put into FOIL by legislation I sponsored that became Chapter 223 of the Laws of 2008. It is not clear what benefit the PSC believes will result from omitting this information from its regulations. Several other agencies have amended their FOIL rules to incorporate the provisions of Chapter 223, but none have found it necessary to remove the fee provisions to some other non-regulatory document. The PSC should follow their lead and continue to include the required FOIL fee provisions in regulations.

Another proposed change to the FOIL regulations concerns the PSC's handling of requests for trade secret or confidential commercial information status. In current §6-1.3(b)(2), the test for such status is identical to the language in FOIL – the person must show the reasons why the information, if disclosed, "would cause substantial injury to the competitive position of the subject commercial enterprise." The proposed rule would change this to provide for a showing that "the information, if disclosed, would <u>be likely to</u> cause substantial injury to the competitive position of the subject commercial enterprise." Again, the intent behind this change is unknown since the RIS is silent on this provision. However, if the PSC is seeking to broaden its standard for granting trade secret requests, this change may well contravene the requirements of FOIL.

I am also concerned over the PSC's failure to follow the requirements of the State Administrative Procedure Act (SAPA) in determining the impact of the proposed rule on small businesses, local governments and rural areas of the State. SAPA §202-b requires agencies to prepare a regulatory flexibility analysis (RFA) which addresses the specific impacts of a proposal on small businesses and local governments, and directs agencies to conduct outreach to such entities to assure their participation in the rule making process. Other provisions of SAPA establish similar requirements for evaluating a rule's impact on rural areas (§202-bb) and job creation (§201-a).

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There is currently no statutory authorization for an agency to dispense with these requirements. As you may know, a budget bill introduced last year would have allowed an agency to combine SAPA statements, provided that all of the elements of such documents were included in the RIS (A.9714/ S.6614). However, this legislation was not enacted, and in any case the RIS in this rulemaking does not appear to contain all of the elements of an RFA.

For example, §202-b requires that an RFA contain an estimate of the annual cost of compliance with rule by small businesses and local governments. The RIS, however, indicates that the PSC did not perform a study, but "assumed that costs would either decrease or remain the same for all parties" and "does not think that parties, whether small businesses, local governments or others, would need specialized professional services in order to implement the proposed rule." Had the PSC actually performed the targeted outreach required by SAPA, its assessment of the cost impact of the rule on small businesses, local governments and rural areas would likely have been more reliable.

Finally, the RIS also fails to include any discussion of how the proposed rule relates to the provisions of the State Technology Law. Specifically, §305(1) of this law authorizes state agencies to use electronic records in accordance with rules and regulations promulgated by the Office for Technology (OFT). Both this subdivision and §309, as well as OFT's regulations at 9 NYCRR §540.5(b)(3), provide that no person shall be required to submit or file a record electronically except as otherwise authorized by law. At a minimum, the RIS should address how the proposed regulations, which would authorize the PSC to deny a waiver request and require electronic filing, square with these statutory provisions.

Please feel free to contact me if you require any additional information on the issues raised in this letter.

Sincerely,

RoAnn M. Destito

ROANN M. DESTITO
Chair, Assembly Standing Committee
On Governmental Operations

cc: Robert J. Freeman, Committee on Open Government
Karen Geduldig, Office for Technology