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*Via Electronic Filing*

June 2, 2014

Donna Giliberto, Esq.  
Records Access Officer  
State of New York Department of Public Service  
Three Empire State Plaza, 18th Floor  
Albany, New York 12223-1350

Re: Matter 13-01288 - In the Matter of Financial Reports for Lightly Regulated Utility Companies.

Dear Ms. Giliberto:

Indeck-Olean Limited Partnership (“Indeck-Olean”), the owner and operator of a 76 megawatt natural gas-fired cogeneration facility located in Olean, New York (the “Facility”), hereby respectfully requests that the Records Access Officer (“RAO”) grant permanent trade secret and confidential commercial information status to the information designated as Confidential through yellow highlighting in the attached electronic form of Annual Report (the “Confidential Information”), under Section 6-1.3(b)(1) of the New York State Public Service Commission’s (“Commission”) Rules and Regulations (16 NYCRR § 6-1.3) and Section 87(2)(d) of the New York Public Officers Law (“POL”), because such information is confidential, proprietary, and constitutes a trade secret. Concurrent with this letter, Indeck-Olean has submitted its Annual Report for its 2012 calendar year electric operations to the Commission with the Confidential Information redacted in compliance with the Commission’s January 23, 2013, order issued in Case 11-M-0294.

On May 5, 2014, the RAO sent a letter to Assemblyman James Brennan in response to his honor’s request to obtain un-redacted annual reports filed by companies subject to the Commission’s lightened regulation under the Freedom of Information Law (“FOIL”), POL Article 6 (the “FOIL Request”). In its letter, the RAO informed entities subject to the Commission’s lightened regulation that Department of Public Service Staff intended to determine whether confidential information included in their annual reports is entitled to

exception from public disclosure under the POL and invited them to submit statements of necessity in support of such demonstration.

While Indeck-Olean believes that the confidential information in its 2012 Annual Report is not subject to the FOIL Request because it applies only to agency records existing as of the time the FOIL Request was served on the Commission, out of an abundance of caution, Indeck-Olean hereby submits its Statement of Necessity in support of its request for permanent trade secret and confidential commercial information status.<sup>1</sup> As demonstrated below and in the attached affidavits of Michael D. Ferguson and Dr. Nicole Bouchez, Principal Economist, Market Design, of the New York Independent System Operator, Inc. (“NYISO”), which was filed in support of the NYISO’s Statement of Necessity on April 24, 2014 in Case 12-E-0577,<sup>2</sup> the information redacted from Indeck-Olean’s 2012 Annual Report qualifies as trade secret or confidential commercial information under the POL and the Commission’s Trade Secret Rules because disclosure would be likely to cause substantial injury to Indeck-Olean’s competitive position.

#### **I. STATEMENT OF NECESSITY FOR EXCEPTION FROM DISCLOSURE**

Indeck-Olean requests that the RAO rule that two related categories of information be excepted from disclosure. First, Indeck-Olean requests that its Facility’s operating characteristics, which include minimum generation levels, operating hours, heat rate, and outage rate, be excepted from disclosure. Second, Indeck-Olean requests that certain of its financial information, which include its balance sheet, expenses, and net income, be excepted from disclosure. Both categories of information should be protected from disclosure because they meet the definition of trade secret or confidential commercial information under the POL. This information is not publicly available and its release would be likely to cause substantial competitive harm, both to Indeck-Olean and to the New York competitive markets in general, thereby harming consumers of electricity in New York State.

Section 87(2) of the POL establishes specific exemptions under which information otherwise subject to FOIL can be withheld from disclosure. Specifically, Section 87(2)(d) provides that an agency may deny access to records or portions thereof that:

are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a

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<sup>1</sup> *Papay v. Haselhuhn*, No. 07 Civ. 3858(LAP) (SDNY Oct. 21, 2010) (stating “[t]he Committee on Open Government, which promulgates rules and regulations with respect to implementing FOIL and furnishes advisory opinions to agencies regarding the law, has stated that ‘the Freedom of Information Law pertains to existing records.’”)

<sup>2</sup> Case 12-E-0577, *Proceeding on Motion of the Commission to Examine Repowering Alternatives to Utility Transmission Reinforcements*, Nicole Bouchez Affidavit (April 24, 2014) (“Bouchez Affidavit”).

commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise.

When applying the exemption, the Commission and New York courts have used a two-prong test to determine whether records or portions thereof may be excepted from public disclosure pursuant to POL §87(2)(d). *Encore College Bookstores, Inc. v. Auxiliary Service Corp. of the State of New York at Farmingdale*, 87 N.Y.2d 410, 420 (1995). According to the Court of Appeals, the first prong of the test is met if it is shown that the enterprise submitting the information in question faces actual competition, and the second prong is met if it shows that disclosure of the information would be likely to cause substantial competitive injury. The Court further stated that the question of whether disclosure would be likely to cause substantial competitive injury turns on the commercial value of the requested information to competitors and the cost of acquiring it through other means. *Id.* at 420 (citing *Worthington Compressors v. Costle*, 662 F.2d 45, 51 (D.C. Cir. 1981)). The Court held that:

Because the submitting business can suffer competitive harm only if the desired material has commercial value to its competitors, courts must consider how valuable the information will be to the competing business, as well as the resultant damage to the submitting enterprise. *Where FOIA disclosure is the sole means by which competitors can obtain the requested information, the inquiry ends here.* *Id.* (emphasis added).

Pursuant to Section 87(2), applicable case law, and Commission precedent, the redacted material is appropriately exempted from disclosure pursuant to FOIL under the two-prong standard articulated in *Encore*. First, competition exists in the electricity market in New York. As discussed in the Bouchez affidavit, the existence of competition in the electricity market in New York is well established.<sup>3</sup>

Second, the disclosure of the information, which is not publicly available, would be likely to cause substantial competitive injury because the information is commercially valuable. If this information is disclosed publicly, when combined with other financial data that is publicly available, Indeck-Olean's competitors and vendors will have detailed financial information on its commercial activities and will be able to determine the Facility's financial health, costs of production, and its marginal costs.

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<sup>3</sup> See, e.g., Case 94-E-0952 et al., In the Matter of Competitive Opportunities Regarding Electric Service, Opinion & Order Regarding Competitive Opportunities for Electric Service, Op. No. 96-12, confirmed 196 Misc.2 924 (Albany County 1996), aff'd, 273 A.D.2d 708; see also, Case 12-E-0577, Proceeding on Motion of the Commission to Examine Repowering Alternatives to Utility Transmission Reinforcements, Determination On Appeal Of Records Access Officer's Determination (October 29, 2013) at 6.

As explained in the Ferguson affidavit, because Indeck-Olean owns only the single Facility, release of its detailed financial information would provide an in depth view of the financial health of the Facility, which competitors can use to harm Indeck-Olean. One of the stated reasons the Commission requires annual reports from lightly regulated companies is to monitor their financial health. The Commission stated in its order: “Financial information may signal an early warning that a wholesale generator is encountering economic difficulty.”<sup>4</sup> Mr. Ferguson explains:

Competitors and vendors that know the financial health of a generator can use this information in guiding their negotiating and investment strategies to the determinant of the generator. For example, a competing supplier that knows that a generator is in financial distress would be advantaged in competing with the generator for sales of electricity. It would know that it could underbid the distressed generator only temporarily until the generator was forced out of business. Similarly, a vendor that knows a generator is financially distressed may require more onerous payment terms for providing services to the generator than it otherwise would if it did not have such information. Alternatively, a vendor that knows a generator is financially strong may negotiate for a higher price because it knows that the costs of its services will not materially affect the generator’s financial health.<sup>5</sup>

In addition, as explained in the Ferguson and Bouchez affidavits, unit-specific operating data and financial information of the kind sought to be protected here can be used to determine the marginal costs for providing electricity at the Facility, which can have several deleterious effects on Indeck-Olean’s competitive position.<sup>6</sup> Release of this information can harm Indeck-Olean’s ability to negotiate competitively with its suppliers. Specifically, generator outage and maintenance information is kept confidential because generators obtain vendor services on a competitive basis. Knowledge of a generator’s outage and maintenance rates could put the generator at a disadvantage when negotiating contracts for these services.

In addition, releasing this information would likely harm Indeck-Olean because it would allow a competitor to underbid the Facility, thereby reducing the Facility’s revenues and

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<sup>4</sup> Case 11-M-0294, In the Matter of the Filing of Annual Reports by Electric and Gas Corporations Subject to Lightened Ratemaking Regulation, *Order on Annual Reporting Under Lightened Ratemaking Regulation and Establishing Further Procedures* (March 23, 2012) at 19.

<sup>5</sup> Ferguson Aff. at ¶ 7.

<sup>6</sup> *Id.* at ¶ 8; Bouchez Aff. at ¶¶ 7-9.

potentially driving it out of the market. Disclosing the information can also place Indeck-Olean at a negotiating disadvantage with buyers in bilateral arrangements for energy and capacity because the buyer will be able to determine the generator's cost and confidential negotiating positions.

Dr. Bouchez explains that release of unit-specific operating data, or any data that can be used to determine a generator's marginal costs, can have a broader negative anti-competitive effect on the electricity market.<sup>7</sup> According to Dr. Bouchez, if a competitor or competitors are able to determine a generator's marginal cost, they can more easily engage in predatory pricing, inappropriately exercise market power, or collude with other generators, which can cause higher clearing prices. For example, a generator or generators with knowledge of another generator's marginal costs could increase its offer prices to an amount significantly in excess of its own marginal costs, but sufficiently below the marginal cost of their more expensive competitors to ensure the generator will continue to be dispatched, resulting in a higher price (assuming the unit was the unit setting the price). These outcomes would result in harm to the competitive nature of NYISO markets and, ultimately, harm New York consumers of electricity if such behavior resulted in higher prices.

New York courts have agreed with the above rationale in holding that information that can be used to determine a generator's production costs should be exempt from disclosure under FOIL. The Appellate Division Third Department upheld an administrative ruling that the release of a generator's operational data would cause substantial injury to the competitive position of the generator, stating that disclosure would allow competitors to infer essential aspects of the generator's production costs, thereby causing competitive damage to the generator.<sup>8</sup>

Similarly, the Secretary, in her decision on an appeal from an RAO determination, ruled that heat rate information is exempt from public disclosure.<sup>9</sup> In doing so, the Secretary cited to the fact that the NYISO treats heat rates as confidential and does not publicly release this information.<sup>10</sup> In addition, the Secretary pointed out that Title V air permits do not publish heat rate information.<sup>11</sup> The Secretary also stated that based on the fact that the NYISO also protects other generator specific data pursuant to its confidentiality policies and federal tariff, the Secretary "would be inclined to likewise consider protecting such data," but could not do so on

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<sup>7</sup> Bouchez Aff. at ¶ 10.

<sup>8</sup> See *New York State Electric & Gas Corp. v. New York State Energy Planning Board*, 221 A.D.2d 121 (3d Dept. 1996).

<sup>9</sup> Case 12-E-0577, Proceeding on Motion of the Commission to Examine Repowering Alternatives to Utility Transmission Reinforcements, Determination on Appeal of Records Access Officer's Determination (October 29, 2013) at 7-8.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 8.

the record in that specific proceeding.<sup>12</sup> Further, the Federal Energy Regulatory Commission has long been established that the release of such information would be detrimental not only to the company itself but also to markets and, concomitantly, consumers.<sup>13</sup>

## II. CONCLUSION

Indeck-Olean respectfully requests that the RAO rule that certain of its Facility's operating characteristics, including minimum generation levels, operating hours, heat rate, outage rate, and certain of its financial information, including its balance sheet, expenses, and net income, is confidential trade secret information that must be excepted from disclosure under FOIL.

Respectfully submitted,

READ and LANIADO, LLP  
25 Eagle Street  
Albany, NY 12207

Attorneys for Indeck-Olean Limited  
Partnership

By: \_\_\_\_\_/s\_\_\_\_\_  
David B. Johnson

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<sup>12</sup> *Id.* at fn. 20.

<sup>13</sup> See, e.g. *Enhancement of Electricity Market Surveillance and Analysis through Ongoing Electronic Delivery of Data from Regional Transmission Organizations and Independent System Operators*, 139 FERC ¶ 61053, at P 30 (2012); *N.Y. Indep. Sys. Operator, Inc.*, 131 FERC ¶ 61,169, at P 15 (2010); *S. Cal. Edison Co.*, 135 FERC ¶ 61,201, at P 20 (2011); *Hydrogen Energy Cal. LLC*, 135 FERC ¶ 61,068, at P 25 (2011); *N.Y. Indep. Sys. Operator, Inc.*, 130 FERC ¶ 61,029, at P 3 (2010).

**MATTER 13-01288 - REQUEST FOR RECORDS**

## **AFFIDAVIT OF MICHAEL D. FERGUSON**

STATE OF ILLINOIS )  
 )SS  
COUNTY OF COOK )

I, Michael D. Ferguson, being duly sworn, deposes and states as follows:

1. My name is Michael D. Ferguson and I am employed as the Vice President of Asset Management for Indeck Energy Services, Inc. (“Indeck”) and Indeck-Olean Limited Partnership (“Indeck-Olean”), the owner and operator of a 76 megawatt natural gas-fired cogeneration facility located in Olean, New York (the “Facility”). My place of business is 600 N Buffalo Grove Road, Suite 300, Buffalo Grove, IL 60089.
2. I have worked at Indeck for 19 years and have been the Vice President of Asset Management since 2001. As such, I am involved with managing the sales of the Facility’s energy and capacity into the electric and capacity markets administered by the New York Independent System Operator, Inc. (“NYISO”).
3. I am writing this affidavit in support of Indeck-Olean’s Statement of Necessity demonstrating that certain information redacted from its 2012 annual report filed in the above-referenced matter qualifies as trade secret or confidential commercial information that should be excepted from disclosure under New York’s Freedom of Information Law (“FOIL”). As demonstrated below, the release of Indeck-Olean’s balance sheet, net income, expenses, and certain unit specific operating information would cause competitive injury and undue harm to Indeck-Olean and to the competitive electricity and capacity markets in New York State.
4. I have reviewed the Affidavit of Dr. Nicole Bouchez, Principal Economist, Market Design, of the NYISO, which was filed in support of the NYISO’s Statement of Necessity on April 24, 2014 in Case 12-E-0577 and is attached hereto. I fully support and adopt the positions expressed in Dr. Bouchez’s affidavit describing the harm a generator owner could incur if its marginal costs information is disclosed publicly.
5. Indeck-Olean is a privately owned company and closely guards and does not release publicly certain of its Facility’s operating characteristics, including minimum generation levels, operating hours, heat rate, outage rate, and certain of its financial information, including its balance sheet, expenses, and net income (“Confidential Information”). Indeck-Olean will be harmed if its Confidential Information is released. If this information is disclosed publicly, when combined with other financial data that is publicly available, Indeck-Olean’s competitors and vendors will have detailed financial information on its commercial activities and will be able to determine the Facility’s financial health, costs of production, and its marginal costs.
6. Because it owns only the single Facility, release of Indeck-Olean’s detailed financial information, including its balance sheet, expenses, and net income would provide an

in depth view of the financial health of the Facility. Indeed, one of the stated reasons the Public Service Commission (“Commission”) requires annual reports from lightly regulated companies is to monitor their financial health. The Commission stated in its order: “Financial information may signal an early warning that a wholesale generator is encountering economic difficulty.”<sup>1</sup>

7. Indeck-Olean operates in direct competition with other energy suppliers in New York’s competitive wholesale electricity markets. Competitors and vendors that know the financial health of a generator can use this information in guiding their negotiating and investment strategies to the determinant of the generator. For example, a competing supplier that knows that a generator is in financial distress would be advantaged in competing with the generator for sales of electricity. It would know that it could underbid the distressed generator only temporarily until the generator was forced out of business. Similarly, a vendor that knows a generator is financially distressed may require more onerous payment terms for providing services to the generator than it otherwise would if it did not have such information. Alternatively, a vendor that knows a generator is financially strong may negotiate for a higher price because it knows that the costs of its services will not materially affect the generator’s financial health.
8. Release of the Confidential Information will also allow a competitor to derive Indeck-Olean’s marginal costs and its bidding strategy which will cause Indeck-Olean competitive injury and undue harm in the NYISO market. Confidential marginal cost information is the basis of Indeck-Olean’s competitive bidding strategy into the NYISO administered markets. A competing supplier could use Indeck-Olean’s marginal cost information to underbid it, resulting in Indeck-Olean’s competitive offers not being accepted, causing it to forego sales, and raising electricity prices to consumers.
9. The NYISO-administered wholesale electricity markets vitally depend on market participants’ ability to formulate and submit confidential bids. The type of information that Indeck-Olean seeks to protect from release to the public is considered highly confidential by the NYISO because that same information can be used by competitors and others to gain advantage to the detriment of Indeck-Olean and the market itself.
10. In addition, release of Indeck-Olean’s operating hours, outage rates, and outage and maintenance costs would give Indeck-Olean’s competitors and vendors an undue advantage in understanding their effect on current and future plant operations and revenues and could put Indeck-Olean at a competitive disadvantage when negotiating contracts for operating and maintenance services.
11. This concludes my affidavit.

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<sup>1</sup> Case 11-M-0294, In the Matter of the Filing of Annual Reports by Electric and Gas Corporations Subject to Lightened Ratemaking Regulation, *Order on Annual Reporting Under Lightened Ratemaking Regulation and Establishing Further Procedures* (March 23, 2012) at 19.

Dated: June 2, 2014

Michael D. Ferguson  
Michael D. Ferguson

Subscribed and Sworn to before me this  
2<sup>nd</sup> day of June, 2014

Michael D. Ferguson

Notary Public for the State of Illinois  
My Commission Expires on: 8/7/16



## AFFIDAVIT OF DR. NICOLE M. BOUCHEZ

State of New York §  
County of Rensselaer §

I, Nicole Bouchez, being duly sworn, depose and state as follows:

1. I am the Principal Economist, Market Design, of the New York Independent System Operator, Inc. (“NYISO). My business address is 10 Krey Boulevard, Rensselaer, New York, 12144.
2. I have worked as an Energy Economist for 11 years. I hold a Ph.D. and M.A. in International Economics from the University of California, Santa Cruz and a B.A. in Economics and International Relations from the University of California, Davis.
3. The New York Independent System Operator facilitates several markets for electricity products in New York: a day-ahead and a real-time market for the sale of electricity; markets for ancillary services; a market for installed capacity; a market for financial hedging instruments known as Transmission Congestion Contracts (TCCs); and a virtual market. In addition, suppliers and purchasers trade installed capacity, energy and TCCs through bilateral contracts.
4. There is competition among suppliers in the sale of electricity to New York consumers in that a diverse set of unaffiliated suppliers have resources in excess of the demand for those resources. The seven hundred and thirteen generation facilities in New York are owned by one hundred distinct entities<sup>1</sup>, including public and municipal power authorities. In 2013, total generation capacity for New York was 37,920 MW. By contrast, the NYISO projects a peak demand for Summer 2014 of 33,666 MW, and

<sup>1</sup> Some of these corporate entities may be related.

experienced a record winter peak demand of 25,738 MW on January 7, 2014. At times when the transmission system is congested only a subset of generation facilities may be available to serve the load.

5. The NYISO-facilitated energy and installed capacity markets are auction-based markets. Generators or marketers submit offers for the opportunity to provide product, a clearing price based on those offers is established, and commitments or contracts are provided to “winning” generators.
6. In workably competitive markets like those administered by the NYISO, economic theory indicates that offers will approximate the generator’s marginal cost to supply product: in this case, to generate electricity.
7. Proprietary, generator-specific data—such as heat rates, which are the amount of energy in British Thermal Units (BTUs) that generators consume to produce a given quantity of electricity—can be used in combination with publicly-available data to determine a generator’s marginal cost. Generator outage and maintenance rates and costs are confidential because generators obtain vendor services competitively. Knowledge of a generator’s projected outage and maintenance rates and costs could put them at a disadvantage when negotiating contracts with vendors to provide these services. The NYISO’s Code of Conduct requires that NYISO treat such data as confidential, and NYISO market participants treat that data as confidential; therefore it is not publicly available.
8. Likewise, disclosing unit-specific economic modeling outputs, including projected emissions output and unit revenue, would permit a competitor to “reverse-engineer” a generator’s projected output in subsequent years. Moreover, such data can be used to

approximate a generator's marginal cost by modeling the expected price at which a generator's offer to provide supply would be accepted based on the number of hours that unit would be dispatched. In order to produce these modeling outputs, the NYISO relies upon information that, pursuant to the NYISO's Code of Conduct, must be treated as confidential – including generator maintenance schedules, and, in this case, generator-specific data provided to the NYISO on a confidential basis by NRG and Cayuga. The economic modeling output data that the NYISO provided to the DPS Staff on a confidential basis is not publicly available.

9. Releasing data that can be used to determine a generator's marginal cost can disadvantage the generator whose costs were revealed ("Generator A") in bidding against other generators to serve load. A competing generator with higher marginal costs ("Generator B") could, for a period of time, submit offers slightly below the known marginal costs of Generator A, so that Generator A's competitive offers are not accepted. While Generator B would lose money in the short term, deliberately undercutting Generator A (which does not possess a similar understanding of Generator B's cost to produce energy) could ultimately force Generator A out of the market, permitting Generator B to subsequently raise its offer price. Both Generator A and consumers of electricity would be harmed by Generator B's behavior. Once Generator A has left the market, consumers would be exposed to higher clearing prices for energy and capacity.
10. Alternatively, by knowing a generator's marginal cost, a competitor can more easily exercise market power in an anti-competitive manner, or engage in collusion with other market participants. Generators exercising market power or colluding with other generators can increase the clearing price of energy or capacity in the NYISO

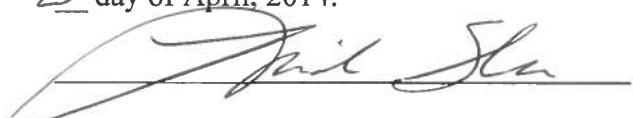
administered markets and auctions under some circumstances, thereby causing harm to energy consumers and competitive markets. By way of example, a generator with knowledge of another generator's marginal costs could increase its offer prices to an amount significantly in excess of its own marginal costs, but sufficiently below the marginal cost of their more expensive competitors, to ensure the generator will continue to be dispatched. This behavior would result in higher wholesale electric prices for periods in which the generator sets the market clearing price.

11. Release of generator specific data can also place the subject generator at a negotiating disadvantage with buyers in future bilateral arrangements for energy and capacity.
12. I have personal knowledge of the facts and opinions herein and if called to testify could and would testify competently hereto.

Executed on April 25, 2014

  
Nicole Bouchez

Subscribed and Sworn to before me this  
25<sup>th</sup> day of April, 2014.

  
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Notary Public for the State of New York  
My Commission Expires on: 12/29/16

LINDA SLOAN  
Notary Public - State of New York  
No. 01SL6198599  
Qualified in Schenectady County  
My Commission Expires December 29, 2016