THE ASSEMBLY

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Committee on Corporations,
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and Commissions

COMMITTEES
Codes;
Education;
Real Property Taxation

August 27, 2015

Kathleen H. Burgess
Secretary
New York State Department of Public Service
3 Empire State Plaza
Albany, NY 12223

Re: Matter 13-01288 and Case 11-M-0294 – Request for a copy of the un-redacted and complete annual report for the calendar year ending on December 31, 2013 submitted by all gas or electric corporations and entities subject to the PSC's lightened ratemaking regulation.

Dear Secretary Burgess:

I hereby appeal the July 2, 2015 determination made with respect to the above-referenced matter, which determination denied my request for a copy of the un-redacted and complete annual report submitted by every gas or electric corporation subject to PSC's lightened rate-making regulations for the 2013 calendar year.

Preliminary Statement

This is an appeal filed pursuant to subdivision five of section 89 of the Public Officers Law from a determination, dated July 2, 2015, issued by the records access officer (hereinafter, "RAO") of the New York State Department of Public Service ("PSC") concerning the "Matter 13-01288 and Case 11-M-0294 – Request for a copy of the un-redacted and complete annual report for the calendar year ending on December 31, 2013 submitted by all gas or electric corporations and entities subject to the PSC's lightened ratemaking regulation."

On May 4, 2015, my office submitted a request pursuant to article six of the public officers law seeking, among other things, a copy of the un-redacted and complete annual report covering calendar year 2013 submitted by each and every gas or electric corporations and entities subject to PSC's lightened ratemaking regulations. The request included a supporting affidavit of Robert F. McCullough, sworn to on the 31st day of March, 2015. ("McCullough Affidavit I").

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In the aforementioned determination, the RAO concluded that the information contained in their 2013 annual reports for which the companies requested confidentiality would remain protected from disclosure. The RAO further determined that the information described in pages four, five, six and portions of pages seven and eight of the annual report remain protected as trade secrets; and other parts of pages seven and eight are protected from disclosure "pursuant to the requirements of NYISO."

As set forth in more detail below, the RAO determination should be reversed for the following reasons:

I. Many of the statements of necessity and requests for exception failed to meet the statutory and PSC's regulatory definitions of "trade secret" or competitive harm. The RAO erred in granting blanket approval to each and every statement and request submitted in connection with the subject FOIL request. The RAO also failed to provide specific justifications for granting the exceptions. Moreover, much of the redacted information is available from other public sources. Finally, the entities requesting confidentiality failed to prove that disclosure of the redacted information would cause competitive harm.

II. The determination to grant blanket exceptions of certain pages of the annual report is arbitrary and capricious.

III. Disclosure of the redacted information would not give other market participants a cognizable competitive advantage due to the nature of NYISO's bid auction process, and to the historic and now irrelevant nature of the redacted information.

IV. NYISO's code of conduct cannot serve a legal basis for confidentiality.

V. PSC's lightened ratemaking regulations are *ultra vires*.

In support of the arguments set forth in the instant appeal, we are including a 190-page affidavit of Robert F. McCullough, sworn to on the 25th day of August, 2015 ("McCullough Affidavit II"), the contents of which are incorporated into, and made a part of, this appeal.

Applicable Laws and Regulations

I. Subdivision six of §66 of the Public Service law.

6. Require every person and corporation under its supervision and it shall be the duty of every such person and corporation to file with the commission an annual report, verified by the oath of the president, vice-president, treasurer, secretary, general manager, or receiver, if any, thereof, or by the person required to file the same. * * * The report shall show in detail (a) the amount of its authorized capital stock and the amount thereof issued and outstanding; (b) the amount of its authorized bonded indebtedness and the amount of its bonds and other forms of evidence of indebtedness issued and outstanding; (c) its receipts and expenditures during the preceding year; (d) the amount paid as dividends upon its stock and as interest upon its bonds; (e) the names of its officers and the aggregate amount paid as salaries to them and the amount paid as

wages to its employees; (f) the location of its plant or plants and system, with a full description of its property and franchises, stating in detail how each franchise stated to be owned was acquired; and (g) such other facts pertaining to the operation and maintenance of the plant and system, and the affairs of such person or corporation as may be required by the commission. Such reports shall be in the form, cover the period and be filed at the time prescribed by the commission. The commission may, from time to time, make changes and additions in such forms.

II. Paragraph (d) of subdivision two of §87 of the Public Officers law:

2. Each agency shall, in accordance with its published rules, make available for public inspection and copying all records, except that such agency may deny access to records or portions thereof that:

* * *

(d) are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise;

III. Paragraph (a) and (b) of §6-1.3 of 16 New York Codes, Rules and Regulations:

6-1.3 Records containing trade secrets, confidential commercial information or critical infrastructure information.

(a) Definition of a trade secret. A *trade secret* may consist of any formula, pattern, device or compilation of information which is used in one's business, and which provides an opportunity to obtain an advantage over competitors who do not know or use it.

(b) Manner of identifying trade secrets, confidential commercial information or critical infrastructure information.

* * *

(2) A person submitting trade secret or confidential commercial information to the department shall clearly state the reason(s) why the information should be excepted from disclosure, as provided for in section 87(2)(d) of the Public Officers Law. In all cases, the person must show the reasons why the information, if disclosed, would be likely to cause substantial injury to the competitive position of the subject commercial enterprise. Factors to be considered include, but are not necessarily limited to:

(i) the extent to which the disclosure would cause unfair economic or competitive damage;
(ii) the extent to which the information is known by others and can involve similar activities;
(iii) the worth or value of the information to the person and the person's competitors;
(iv) the degree of difficulty and cost of developing the information;
(v) the ease or difficulty associated with obtaining or duplicating the information by others without the person's consent; and

(vi) other statute(s) or regulations specifically excepting the information from disclosure.

(3) A person or entity submitting, or otherwise making available, critical infrastructure information to the department shall clearly state the reason(s) why the information should be excepted from disclosure, as provided in section 87(2) of the Public Officers Law. * * *.

Arguments

It is well settled in this State that public records must be disclosed unless they fall within a specific statutory exception. Since the overall purpose of the FOIL laws is to ensure that the public is afforded greater access to public records, the exception must be interpreted narrowly. See, Aurigemma v. NYS Dept. of Taxation, 128 AD3rd 1235, 1237 (3rd Dept. 2015); Columbia-Greene Beauty School, Inc. v. City of Albany, 121 AD3rd 1369, 1370 (3rd Dept. 2014). To meet its burden, the party seeking exception must present specific persuasive evidence that disclosure will cause it to suffer a competitive injury; it cannot merely rest on a speculative conclusion that disclosure might potentially cause harm. Markowitz v. Serio, 11 NY3rd 46, 51 (2008); see also Matter of Encore Coll. Bookstores v Auxiliary Serv. Corp. of State Univ. of N.Y. at Farmingdale, 87 NY2d 410, 420-21 (1995).

I. Trade Secret; Substantial Competitive Injury. In this case, the statements of necessity and requests for an exception (hereinafter, the "requests") submitted by the lightly regulated entities are all generally based on the contention that the redacted information consists of either trade secrets or information which, if disclosed, would cause substantial injury to their competitive position. See POL, §87(2)(d).

1. Trade secret. For those seeking confidentiality on the grounds of "trade secret", the PSC established in regulations a test for determining whether or not the exception should be granted. (16 NYCRR §6-1.3; see, "Applicable Laws and Regulations", item "III", above) According the regulations, the factors to be considered include, but are not limited to:

(i) the extent to which the disclosure would cause unfair economic or competitive damage;
(ii) the extent to which the information is known by others and can involve similar activities;
(iii) the worth or value of the information to the person and the person's competitors;
(iv) the degree of difficulty and cost of developing the information;
(v) the ease or difficulty associated with obtaining or duplicating the information by others without the person's consent; and
(vi) other statute(s) or regulations specifically excepting the information from disclosure.

As noted in the RAO determination, the PSC received some 36 requests in connection with the subject FOIL request. Upon information and belief, in each and every case, the requests were granted.

The RAO erred in her determination by granting a virtual blanket approval to each and every request that was submitted in connection with the 2013 annual report. Although similar in tone, language, argument and organization, not all of the requests are identical nor do they all provide the same exact information. Some requests provide detailed explanations, with supporting data and expert affidavits (e.g., Alliance, Astoria Projects, Calpine, Indeck-Olean); some provide less

factual and more conclusory statements (e.g., Brookfield, Hawkeye, Lockport, Marble River); while others contain simple requests (e.g., Flat Rock, Howard Wind, Hudson TC, Neptune)[1]. Yet, all of them were approved, and later confirmed in the July 2 determination.

An agency must articulate "particularized and specific justification" for not disclosing requested documents. Matter of Gould v. NYPD, 89 NY2nd 267, 274-75 (1996); see also Aurigemma v. NYS Dept. of Taxation, *supra*. In this case, the RAO has failed to provide any reasons whatsoever for granting a request for confidentiality. There also does not appear to be any evidence that the RAO made any official determinations granting any specific entity's request for trade secret status because no copy of the determination appears on the PSC's website for the present case and matter. Upon information and belief, it appears as though the RAO accepted the explanations included in the more detailed statements and applied their logic to all of the 36 entities seeking confidentiality.

One of the essential elements of a "trade secret" is that the trade secret must be a secret and must not be public knowledge or of a general knowledge in the trade or business. Information that is public knowledge or that is generally known in an industry cannot be a trade secret. Ruckelhaus v. Monsanto Co., 476 US 986, 1002 (1984); see also COG, FOIL–AO–18756, pg. 3; August 22, 2011. As stated in McCullough Affidavit II (see below), contrary to the boilerplate assertions of the entities, much of the redacted information is available and known to the market participants. Financial information is generally available through annual and quarterly reports, financing documents, and credit reports. Detailed operational data is already available through the Energy Information Administration, the Federal Energy Regulatory Commission, the Environmental Protection Agency, and the Nuclear Regulatory Commission. Such data is frequently contained in financial statements, released to the press, or publically available in other proceedings.

2. Substantial injury to competitive position. A party seeking an exception on the grounds of competitive injury must present specific persuasive evidence of actual competition and the likelihood of substantial competitive injury. See, Markowitz v. Serio, *supra*; COG, FOIL–AO–12890; August 15, 20011; COG, FOIL–AO–18756; August 22, 2011. An agency seeking the benefit of an exemption bears the burden of demonstrating that the exception applies. Matter of Hanig v. State of NY Dept. Of Motor Vehicle, 79 NY2nd 106, 109, cited with approval in Matter of Gould v. NYPD, 89 NY2nd at 285; Columbia-Greene Beauty School v. City of Albany, *supra*.

Here, the requests have not offered or presented any specific or any persuasive evidence that disclosure of an un-redacted 2013 annual report would cause a substantial competitive injury. They have failed to present any specific facts, data or any other proof to show actual competition or a likelihood that disclosure will place them at a competitive disadvantage. (See, McCullough Affidavit II) Moreover, there is nothing in the requests showing either the worth or value of the redacted information or the degree of difficulty and cost of developing such information. (COG, FOIL–AO–12376, page 3, November 6, 2000). Any explanation or evidence suggesting that the requesting entities will suffer a competitive disadvantage is theoretical, at best. In the absence of proof of harm, a denial of access is inconsistent with the Court of Appeals ruling in Markowitz v. Serio, *supra*.

[1] Based on records posted on PSC's website for case #13-01288, as of August 12, 2015.

The claim of substantial competitive injury is further undermined by the fact that a number of entities submitted un-redacted 2013 annual reports. **(**See, for examples, the 2013 annual reports of National Grid, PSEG, Edgewood Energy, Equus Power I, FPL Energy Rockaway, Gateway Delmar, Griffiss Utility, Howard Wind, Pinelawn Power, Talisman Energy**)** In such a competitive environment where, according to the requests, even the most basic and benign information would give market participants a competitive advantage, there appears to be a significant number of market participants that do not believe that disclosing all of the information required in PSC's annual report either constitutes a trade secret or will cause them economic harm or disadvantage. If some of the participants in the market conclude that disclosure would be harmless, others cannot effectively claim that disclosure of equivalent information would result in harm, let alone "substantial" harm to their competitive position.

Many entities assert that competition in the industry is a given. Yet, it is impossible to determine or evaluate the level of competition unless the net income and rates of return are disclosed to the public. The very assertion that there is adequate competition rests on testing that statement by disclosure of core financial information and for the public to see this information. Disclosure of revenues, costs, and net income for companies operating plants with differing fuel types and different markets might show wide variation in rates of return demonstrating some market segments are uncompetitive, or that some pricing structures, such as "marginal cost pricing," or "market clearing price" assure excessive rates of return because of large differentials between revenues and costs.

It is plain from the documentary record that many of the requests do not meet the "trade secret" test required in PSC regulations. The RAO took the various assertions made by the requesting entities at face value in relation to claims that the industry was competitive and that disclosure of certain information is likely to cause substantial competitive injury. These claims come entirely from the industry and are not subject to any review in an independent proceeding where the facts can be developed by parties with views or positions inconsistent with these claims. The information required in the annual report would give the public a clearer picture of the actual extent of competition rather than assertions by the industry of robust competition.

3. Non-dispatchable Resources and Substantial Injury to Competitive Position. Nuclear power plants, including Constellation Energy Nuclear Group and Entergy have argued that exposing their operational data would place their bids at a competitive disadvantage. (See Affidavits submitted by Marc L. Potkin for Entergy and Jeanne M. Jones on behalf of Constellation). This argument is similar to those being made by their competitors in this proceeding, but the fact of the matter is that the operations and financials for a nuclear power plant are very different from those of other types of generators, such as gas powered facilities.

Energy generated by nuclear, wind, and hydro are known in the industry as "non-dispatchable" meaning that their output is a function of their operating conditions making the optimal bid for such a resource at or below zero. (See McCullough Affidavit II, para 52). As a result, nuclear plants are not dispatched on an hourly basis and even though their operations include heat, which can be calculated, it does not affect hourly operations.

Moreover, a nuclear plant's operations are unlike those of a natural gas-fired plant since they cannot be turned on and off like a natural gas-fired plant can. Doing so would be expensive and in some cases risky. Instead, nuclear plants are baseload generators that run flat-out. This means that there isn't a need for a bidding strategy for the companies that run them, explaining why the nuclear plant bids are offered at or below $0MWh. A nuclear plant's financials are also different because necessary costs, such as fuel, can often be purchased years before use, making fuel costs essentially sunk costs. (See McCullough Affidavit II paras. 52-57).

Similarly, wind and hydro facilities also generate energy as a function of operating conditions. Energy is only generated when there is wind and inflows. Bids made by wind and hydro are also effectively zero. Both Noble Renewable Resources and Canandaigua Power Partners are "non-dispatchable" resources that argued confidentiality was necessary to protect their companies from competitive injury. (See affidavits of C. Kay Mann on behalf of Noble Renewable Resources and Tara Ormund on behalf of Canandaigua Power Partners).

In conclusion, the RAO erred by treating affidavits submitted by nuclear, wind, and solar generators the same as those submitted by other companies in the industry since their concern of competitive injury is not valid. Mr. McCullough's Affidavit II specifically refutes the concerns raised by Entergy (see paras. 108-125), Noble (paras. 176-183), Constellation (paras. 236-248) and Canandaigua (paras. 300-304), which will be discussed in greater detail below in the "Summary of Rebuttals."

II. <u>Blanket exemption</u>. As stated above, an agency must articulate "particularized and specific justifications" for not disclosing requested documents. Blanket exemptions are "inimical to FOIL's policy of open government". <u>Matter of Gould v. NYPD</u>, 89 NY2nd at 275.

In the determination, the RAO granted a blanket exception to the information required in pages 4, 5 and 6, and portions of pages 7 and 8 of the annual report. Pages 4-5 consist of the "Balance Sheet" and seek over 180 pieces of information; page 6 is the "Income Statement" and consists of 35 questions; page 7 seeks the name, location and operational data (10 items) for every generation unit; and page 8 seeks the "description" of 16 different capital assets.

The determination to grant a blanket exception to the information contained in pages 4-8 of the annual report is arbitrary and capricious. The RAO does not explain why the disclosure of each and every item on such pages would be a trade secret or cause substantial competitive injury. No distinction is made among the different data elements.

For example:

In pages 4-5 (Balance Sheet), how does the disclosure of the "total amounts" (p.4, line 28; p.5, lines 10, 21, 34) reveal a trade secret or cause substantial competitive injury?

In page 5, would the disclosure of an entity's common and preferred stock involve a trade secret or cause substantial competitive injury?

In page 6 (Income Statement), which of the 35 items are trade secrets or would cause substantial competitive injury, if disclosed?

In page 8 (Electric Plant), is a "description" of the requested items a trade secret or would disclosure cause substantial competitive injury?

Here, the RAO erred in providing a blanket exception to each and every item required in pages 4-8 of the annual report. The RAO should be required to justify with specificity the confidential nature of each data element contained in such pages. My FOIL request is not seeking to determine costs or even how the entities arrive at the prices they charge. See, Ragusa v. New York State Law Department, 578 N.Y.S.2d 959, 964 (1991) It merely seeks the information mandated in law.

III. Disclosure of Redacted Information. Even assuming that the requests made a prima facie case for confidentiality, the redacted information should be disclosed for the following reasons:

1. Uniform clearing price auction. Many of the requests argue that disclosure of the redacted information will allow competitors to determine production costs, learn their bidding strategies, and provide them with an unfair competitive advantage. Their arguments are entirely specious.

No one disagrees that there are many financial factors and decisions that form the basis of a bid, and that disclosure of sensitive, inside information could affect a bidding strategy. Unfortunately, these arguments would make sense only in the context of a normal auction process, in which the highest (or lowest) responsible bidder is awarded the contract. NYISO's uniform clearing (or market clearing) price auction does not operate in this manner.

Under uniform-price auctions, all suppliers receive the same market-clearing price which is set at the offer price of the most expensive resource chosen to provide supply. In contrast, in the traditional cost-driven "pay as bid" auction, prices paid to winning suppliers are based on their actual bids, rather than the bid of the highest priced supplier selected to provide supply. (Tierney, "Uniform-Pricing versus Pay-as-Bid in Wholesale Electricity Market"; NYISO publication; page 2; March 2008). Under a uniform-price auction, there is no true competition between the suppliers. Each supplier can bid its marginal costs; bids are not based on a supplier's actual costs. All suppliers receive the same market clearing price.

Since the uniform clearing price auction is intended to set a bid that covers marginal operating costs, financial data is irrelevant to bidding. As such, there is little or no competitive impact. Disclosure of the redacted information will have little or no effect on bidding strategy.

Under a uniform price auction, disclosure of the redacted information will not cause substantial competitive injury. As discussed above, sellers have no cognizable interest in keeping wholesale electricity rates and rate changes secret because they are, by federal statute, required to be publicly filed.

2. Historical data. Many of the entities argued that disclosure of the redacted information would adversely affect their competitive advantage and would allow their competitors "inside" knowledge of their operations.

It is important to emphasize that the subject FOIL request seeks information that may be more than two years old. In an industry in which operational costs are primarily dependent on fuel costs, the price of which has fluctuated greatly in the past two years, and consumer demand (and in which bids are made by the hour), it is hard to imagine how truly useful or valuable the redacted information, if disclosed, would be to the other participants in the industry. Indeed, it would not be surprising if the redacted information is already known by market participants.

Although records involving a company's current financial condition or its investment plans for the future could be extremely valuable to a competitor, if disclosed, records containing the same information prepared years ago likely would be of little value. The passage of time reduces or eliminates the harm that might arise when a disclosure involves more current information. (COG, FOIL–AO–18756; 2011) The value of the information to competitors and, therefore, the potentially harmful effects of disclosure, continually diminish with the passage of time. (COG FOIL–AO–12890; Aug 15, 2001).

In any event, none of the requests have provided any convincing proof or evidence that release and disclosure of an un-redacted and complete copy of the 2013 annual report would cause substantial competitive injury. To allow certain entities to hide basic financial information concerning their operations contravenes the public interest. See, Astoria Gas Turbine Power LLC v. Tax Commission of the City of New York, 7 NY 3rd 451, 456 (2006).

IV. NYISO code of conduct. In the determination, the RAO also concluded that pages seven and eight of the annual report "are also protected from disclosure pursuant to the requirements of the NYISO".

The RAO's reliance on NYISO's code of conduct for the basis for confidentiality is erroneous and without legal foundation. As mentioned above, in this state, disclosure is required unless the requested information falls squarely within one of the specific statutory exemptions. We are not aware of any law that allows the assertion of an exemption on the basis of a code of conduct of a private nonprofit corporation.

Moreover, the NYISO code of conduct applies to ISO's directors, officers and employees only, and not to market participants.

V. Ultra vires. Administrative agencies, as creatures of the Legislature within the executive branch, can act only to implement their charter as it is written and as given to them. An agency cannot create rules that were not contemplated or authorized by the Legislature. Matter of Tze Chun Liao v. NYS Banking Dept., 74 NY2nd 505, 510 (1989) cited with approval in NY Superfund v. NYSDEC, 18 NY3rd 289, 295 (2011). See also, NYS Superfund Coalition, Inc. v. New York State, 75 NY2nd 88 (1989). An administrative agency has no authority to create rules and regulations without a statutory predicate, whether the predicate is expressed or implied. Matter of Wilner v. Beddoe, 33 Misc. 3rd 900, 915 (Sup. Ct. NY Co., 2011). An agency may not promulgate a rule that is inconsistent with, or in contravention of, the will of the legislature. See, New York Jurisprudence 2nd, Administrative Law, §33.

The PSC has determined that since the subject entities "clearly" operate in a competitive environment, lightened regulations is appropriate; that imposing extensive record-keeping obligations is not warranted. The PSC further claimed that it has sufficient discretion to implement the lightened regulation regime. (See, Wallkill decisions, Case 91-E-0350, issued August 21, 1991 and April 11, 1994. See also Case 11-M-0294)

We disagree. Subdivision six of section 66 of the Public Service law requires "every person and corporation under [PSC] supervision" (emphasis added) to file an annual report containing certain mandated information. There is nothing in the law authorizing either the Department of Public Service or the PSC to make a distinction between entities that operate in a "competitive" environment versus a "non-competitive" environment. We are also unable to identify which provision of the Public Service Law grants DPS or PSC the discretion to implement such regulations.

As argued above, we are also not convinced that the PSC has "clearly" shown that the subject entities operate in a competitive environment. We are unaware of any PSC studies, findings or reports supporting this conclusion.

Since the PSC did not possess the statutory authority to do so, the lightened rate-making regulations should be declared null and void. All corporations and entities subject to such regulations should be required to comply with the requirements of section 66.

VI. McCullough Affidavit I. The subject FOIL request was accompanied by McCullough Affidavit I, in which Mr. McCullough stated that much of the information that the entities claim confidentiality is in fact neither confidential nor secret.

In the determination, the RAO focused only on one example and did not address or respond to McCullough's assertions that much of the information that the entities claim to be confidential is widely and readily available from other sources, including the entities' own publications, filings and reports.

The RAO's rejection of a majority of the McCullough affidavit was arbitrary and capricious. The McCullough affidavit offered valid assertions about the industry. Yet, the RAO rejected most of the affidavit and instead, focused narrowly on one point; whether heat rates for 486 generating units in New York State can be found in EPA's NEEDS database. The affidavit included relevant and pertinent information that supported my contention that trade secret status was not warranted in this matter. However, a majority of the McCullough affidavit was dismissed and did not appear to receive equal substantive administrative consideration as the supporting documents and statements submitted by the entities.

McCullough Affidavit II

In support, and as part, of this appeal, we are attaching McCullough Affidavit II. Mr. McCullough has perused each and every request and supporting documentation submitted in connection with the subject FOIL request and, in his affidavit, has concluded that the information contained in the requests meets none of the standards concerning trade secrets or substantial competitive injury. Information in the lightly regulated annual reports has not been shown to

cause economic harm because: (i) the information is widely available, (ii) the competitive worth of the annual reports is negligible, (iii) the cost of deriving it is low, (iv) it can be developed easily by third parties, and (v) such information is so far from being forbidden by other statutes or regulations that require much of its disclosure.

In his affidavit, Mr. McCullough addresses and refutes each one of the affidavits justifying secrecy by showing that, in each case, much of the data that the entity claims to be secretive and not obtainable by other parties or the public is in fact widely available or easily calculable. Mr. McCullough points out that significant operational details are already available at the U.S. Environmental Protection Agency, the U.S. Energy Information Administration, the U.S. Nuclear Regulatory Agency, and the Federal Energy Regulatory Commission. He provides detailed examples of the source data on heat rates, examples of the bids at the New York Independent System Operator, and financial filings.

Mr. McCullough also notes that either purposefully or by inadvertence, much of the information claimed as secret by the affiants' companies is available on the internet. It is important to note that given the vast amount of information publicly available, the affiants have not identified one substantive example of hardship in this or previous years, nor explained why widespread market manipulation is not common in states and countries with more transparent rules than New York's.

Summary of Rebuttals

In paragraphs 75 to 86 of McCullough Affidavit II, Mr. McCullough effectively and in detail refutes the contentions of Dr. Nichole Bouchez that (i) releasing data could disadvantage the generator whose costs are revealed, (ii) by knowing a generator's marginal costs, a competitor and engage in anti-competitive manner or in collusion with others, and (iii) release of the data will result in negotiating disadvantage.

Mr. McCullough also points out that, notwithstanding NYISO's masking process, it would not be difficult for a skilled analyst or researcher to "unmask" the identity of the bidders. (See e.g., McCullough Affidavit II, paras. 23, 82 and 83.) Thus, the argument that everyday financial and operational data be kept secret to keep bids from market participants is moot since the bids of such participants are already available.

Responding to Mr. Mark Younger's affidavit, Mr. McCullough refutes Mr. Younger's claim that EIA-923 filings provide only annual numbers, as it clearly includes monthly data (McCullough Affidavit II, paras. 88 and 89). He goes on to correct Mr. Younger's false assertion that heat rates cannot be determined using EIA-923 monthly data, showing in fact that linear regression of the data reduces the impact of outliers and provides a realistic estimate (para. 90). He shows several ways that the heat rate information for one of NRG's plants, Oswego Harbor, as well as other plants, can be easily computed (paras. 91-97). He discusses market inefficiencies in the NYISO auction system due to the secrecy of market participants (paras. 98-103), and derives the Masked-Generator IDs used by Oswego Harbor (para. 100). He closes by revealing that financial data for Oswego Harbor is easily found, disqualifying it from consideration as a trade secret (paras. 104-107).

In his rebuttal of Mr. Marc Potkin's affidavit, Mr. McCullough states that, contrary to the assertions of Mr. Potkin that Entergy does not publish or make public specific operational data, individual plant data is often released by Entergy in its published reports and investor presentations. Mr. McCullough further points out that the un-redacted Annual Reports for Entergy, along with several other entities that requested confidentiality, are readily available on the Internet. (McCullough Affidavit II, paras. 111, 112, 116-121). Information that is public knowledge or that is generally known in an industry cannot be a trade secret. Ruckelhaus v. Monsanto Co., 476 US 986, 1002 (1984). If there has been voluntary disclosure or if the facts pertaining to the matter are a subject of general knowledge in the trade, then any right to confidentiality has evaporated. See, 104 NY Jur. 2nd 234.

Refuting the claims made in Mr. Michael D. Ferguson's affidavit, Mr. McCullough lists several sources for heat rates at Indeck-Olean (paras. 127-131), reveals the plant's Masked-Generator ID (para. 132), and shows that financial information for Indeck-Olean, such as cost structure and FERC filings, is widely available (paras. 133-135).

Mr. McCullough continues, responding to Mr. Jennings Goodman's affidavit by showing several sources for Calpine's unit-level heat rate data (paras. 137-139), outage rates (para. 140), and Masked-Generator ID (para. 141). He points out that financial data for Bethpage Energy Center is available from multiple sources, including FERC filings, SEC filings, and the media (paras. 142-145).

Mr. Christopher Trabold's claims of trade secret and confidential commercial information are disproven by Mr. McCullough's analysis of Brooklyn Navy Yard's unit-specific heat rates (paras. 147-149), the company's Masked-Generator ID (para. 150), and by demonstrating the ease of access to Brooklyn Navy Yard's financial information from sources like FERC, New York Public Service Commission (PSC), and credit ratings (paras. 151-153).

Returning to NRG, Mr. McCullough counters Mr. William Lee Davis's claims of secrecy regarding the operational and financial information of the Arthur Kill plant. Mr. McCullough shows the ease of estimation of Arthur Kill's unit-specific heat rates (paras. 155-158) and the Masked-Generator ID (para. 159). Mr. McCullough also shows the ease of estimating heat rates for NRG's gas turbines at their Astoria plant (para. 160) as well as the forecasts of future heat rates for the repowering projects at Huntley and Dunkirk (para. 161). Finally, Mr. McCullough points out the financial information of Arthur Kill from FERC filings (para. 162).

In his rebuttal to Mr. Liam Baker, Mr. McCullough states that the heat rates of Astoria Generating can be readily ascertainable or determined (paras. 164-169), and the Masked-Generator ID (para. 170). Mr. McCullough also determines that Astoria's cost and revenue information can be found by reviewing FERC and SEC filings (paras. 171- 173), as well as the company's own annual reports, which can be found by conducting a Google search (para. 174). Mr. McCullough also rebuts the concern for confidentiality of Astoria's unit specific information by providing publicly available information regarding the financial health of the company by providing the 2012 Moody's credit announcement of the company (para. 175).

Mr. McCullough goes on to show the ease of access to Noble Renewable Resources' bidding strategy, revealing Noble's Masked-Generator IDs in the process (paras. 177-180). He also notes

that Noble's comments are surprising because heat rates are not a factor in wind projects (para. 177). Mr. McCullough uses financial information from FERC, as well as SEC filings, to refute Ms. C. Kay Mann's claims of Noble's financial confidentiality (paras. 181-183).

Contrary to Mr. Alan P. Dunlea's claims, Mr. McCullough shows that operational information for Empire Generating Co. is indeed easily derived, and in some cases publicly disclosed by the company (paras. 185-188). He reveals the Masked-Generator ID for Empire (para. 189), and shows the ease of access to financial information from FERC quarterly reports (para. 192) and publicly available information that assesses Empire's financial health such as Moody's credit rating (para. 190).

Addressing Mr. Charles McCall's concern for confidentiality, Mr. McCullough shows that none of Astoria Project Partners' operational or financial data is secret. He derives unit-specific heat rates using multiple sources (paras. 194-196), and reveals the Masked-Generator IDs of Astoria's generating units (paras. 197 and 198). Claims of financial confidentiality are also proven false using sources from FERC, credit rating agencies, and financial data disclosed during Astoria's sale (paras. 199-201).

Mr. McCullough provides a thorough response to Mr. Jay Kanive's claims that disclosure of Castleton Energy Center's financial and operational information would cause competitive harm. Mr. McCullough shows that such heat rate information is easily computed (paras. 205, 206, and 208), that Mr. Kanive actually disclosed Castleton's operational data in his affidavit (para. 207), and that Castleton's Masked-Generator ID is easily determined (para. 209). He also reminds that Castleton's financial information was recently disclosed during the plant's sale. Notably, Mr. McCullough remarks, if Castleton's competitors are as motivated to access its information as Mr. Kanive claims, then those competitors likely already have the information discussed in the McCullough Affidavit II (paras. 210 and 211).

Affiant Mr. Jerry Goodenough expresses concern for the confidentiality of marginal cost information for Cayuga Operating Co. and Somerset Operating Co. Mr. McCullough quickly shows that this information is not confidential at all, computing Somerset's heat rate (paras. 216-218), its Masked-Generator ID (para. 219), and financial information disclosed when the plant was sold (para. 220).

Rebutting the arguments of Mr. Duane K. Duclaux, Mr. McCullough calculates the heat rates for CCI Roseton and CCI Rensselaer (paras. 224-227 and 229-231), as well as the Masked-Generator IDs (paras. 228 and 232). Mr. McCullough demonstrates that financial information is not secret using financial information on Roseton made public by recent bankruptcy filings by its former owner (para. 233-235).

Mr. McCullough's response to the affidavit of Ms. Jeanne M. Jones shows that operational and financial information for Constellation are not confidential at all. He provides detailed operating information (paras. 239 and 240), and shows un-redacted, unit-specific operational data for Ginna and Nine Mile Point (paras. 240 and 241). The Masked-Generator IDs are also revealed (paras. 242 and 243). Mr. McCullough concludes by showing that Constellation's full financial information, including site-specific revenues and costs, are easily accessed through Google (para. 244). Financial information was also made public during the sale of 49.9% of its nuclear units to

EDF, a utility owned by the French government (paras. 245 and 246) as well as through SEC forms filed when Exelon acquired Constellation (para. 247).

In reply to the affidavit of Mr. Steven Squillante, Mr. McCullough shows that operating and revenue information on Hawkeye Energy Greenport are already publicly available, disqualifying it from consideration as trade secret or confidential commercial information. The heat rates for Hawkeye are shown (paras. 251-255), as well as Hawkeye's revenue information from the company's sole purchaser, Long Island Power Authority (paras. 256 and 257).

In his rebuttal to Mr. John Beach, Mr. McCullough reveals complete un-redacted operational and financial data for New Athens Generating Co (paras. 262-265, and 267). He also determines New Athens' Masked-Generator IDs (para. 266).

Mr. Stuart Black claims that Public Service Enterprise Group Power New York's (PSEG Power NY) financial and operational information are confidential commercial information, which is countered by Mr. McCullough's analysis. Mr. McCullough shows the heat rate of PSEG Power NY's plant, Bethlehem Energy Center (paras. 271-273). He also reveals the Masked-Generator IDs of Bethlehem Energy Center (para. 274). PSEG Power NY's Lightly Regulated Annual Reports are also shown to reveal financial information (paras. 275 and 276).

In response to Mr. Jerry D. Baker, Mr. McCullough illustrates how Saranac Power Partners' heat rates and operational data are not confidential at all, as they are disclosed in multiple sources (paras. 280-284). Saranac's Masked-Generator ID is revealed (para. 286). Mr. McCullough additionally shows how Saranac's plant-specific financial data is already publicly disclosed through parent company CE Generation's financial reports (paras. 287-290).

Mr. Henry D. Jones's claims of Sithe/Independence's confidential information are refuted by Mr. McCullough, who shows that operational data like heat rate were disclosed during the sale of Sithe/Independence (para. 293). Mr. McCullough also computes Sithe/Independence's heat rates using EPA and EIA sources (paras. 294-296). The plant's Masked-Generator IDs are revealed (para. 297). Mr. McCullough additionally shows how financial information on Sithe/Independence is publicly available from FERC and SEC filings (paras. 298 and 299).

Contrary to Ms. Tara Ormond's claims that Canandaigua Power Partners maintain confidential financial and operating information, Mr. McCullough shows that complete, un-redacted reports for the company are posted on the Internet (paras. 302-304).
Mr. McCullough concludes by reiterating that none of the affidavits, from 2014 or 2015, make sound arguments. He stresses that none of the information sought for exemption could constitute a trade secret or confidential commercial information (paras. 305-307).
See attached McCullough Affidavit II for a fuller and more detailed response to each of the supporting affidavits submitted by the requesting entities.

Conclusion

The PSC has always believed that the disclosure of financial information is vital to ensure that markets function competitively and for the benefit of the customers. Allowing certain participants of the electric industry in this State to shield their financial and operational data is

contrary to and totally inconsistent with the mandate of the Public Service Law requiring annual reports, PSC policies on transparency and accountability, and the Freedom of Information Law.

For the foregoing reasons, it is clear that the arguments and contentions made in the requests in support of secrecy and confidentiality are without merit. The RAO determination should be reversed and an order be issued requiring the release of un-redacted and complete annual reports prepared and submitted by all corporations and entities subject to PSC's lightened ratemaking regulations for reporting year 2013.