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Partner

August 1, 2016

Records Access Officer  
New York State Public Service Commission  
Three Empire State Plaza  
Albany, New York 1223-1350

**Re: Request for Exemption of Annual Report of SBF New York, LLC from  
Disclosure under the Freedom of Information Law  
Matter 13-01288**

Dear Records Access Officer:

SBF New York, LLC, formerly known as NEP Holdco 1, L.L.C., (“SBF”) respectfully requests that its Annual Report and the Annual Report of Lakeside New York LLC (“Lakeside”) submitted herewith both be exempted from disclosure under New York’s Freedom of Information Law (“FOIL”). SBF is submitting separate Annual Reports for itself and for Lakeside due to the fact that it acquired ownership of the Beaver Falls and Syracuse generating facilities from Lakeside facilities on February 13, 2015. Accordingly, the Lakeside Annual Report covers these facilities for the period from January 1 to February 12, 2015, and the SBF Annual Report covers these facilities for the period from February 13, 2015 to December 31, 2015.

Redacted copies of both of these Annual Reports (the “Annual Reports”) have been filed with the Secretary, identifying the portions of these Annual Reports for which SBF seeks exemption from disclosure under FOIL (the “Confidential Information”). The Confidential Information contained in these Annual Report qualifies for exemption from disclosure under FOIL both as “trade secrets” and also as “confidential commercial information” exempt from disclosure under §§ 87(2)(d) and 89(5)(a)(1) of the Public Officers Law (“POL”) for the reasons set out below.

**1. Analysis**

POL § 87(2)(d) states in relevant part that agencies must deny access to records that “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.” In *Verizon New York, Inc. v. New York State Public Service Commission*, the Appellate Division, Third Department, rejected the rulings of the RAO and the Commission that the requirement of a showing of

“substantial competitive injury” applied to information found to be trade secret.<sup>1</sup> The court held that the “trade secret” and the “substantial injury” tests are two alternative standards, such that information satisfying either test must be exempted from public disclosure under FOIL. SBF respectfully submits that the Confidential Information satisfies each of these alternative standards and must therefore be exempted from disclosure.

*i. Trade Secret*

The Commission’s Regulations define a trade secret as “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.”<sup>2</sup> These regulations set forth six non-exclusive factors for determining whether particular information should be considered to be a trade secret:

1. the extent to which disclosure would cause unfair economic or competitive damage;
2. the extent to which the information is known by others;
3. the value of the information to the possessor of the data and its competitors;
4. the difficulty and cost of developing the information;
5. the difficulty of recreating the data without permission; and
6. whether the data is otherwise exempted by law from disclosure.<sup>3</sup>

These standards are virtually identical to the standards for the identification of trade secrets contained in the Restatement of Torts.<sup>4</sup>

The Confidential Information satisfies each of these factors. The Confidential Information would be of significant competitive value to SBF’s competitors, since that information could be used to secure an unfair advantage in the wholesale electricity market. The Confidential Information is not generally available to the public nor does it constitute the type of information that competitors make available to each other in the normal course of business. Instead, this information is the product of a significant investment of time, effort and expense by SBF that cannot be replicated by others without SBF’s direct involvement and consent. This information is held by SBF on a confidential basis and is not disclosed to others except on a confidential basis or as required by law.

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<sup>1</sup> 137 A.D.3d 66 (2016).

<sup>2</sup> 16 N.Y.C.R.R. § 6-1.3(a).

<sup>3</sup> 16 N.Y.C.R.R. § 6-1.3(b)(2) (2014).

<sup>4</sup> See Restatement [First] of Torts § 757, Comment b.

*ii. Substantial Competitive Injury*

The Confidential Information also constitutes information obtained from a commercial enterprise, the disclosure of which would cause substantial injury to the competitive position of the subject enterprise. The Confidential Information was obtained from SBF and Lakeside, which are commercial enterprises. Because the redacted portions of the Annual Reports contain detailed information that would be commercially valuable to SBF's competitors and that is not available to those competitors by other means, its disclosure would provide SBF's competitors an unfair advantage in the competitive New York's electricity markets. As previously noted, the Confidential Information includes annual operating costs for SBF's generating units, including cost estimates for the current and accrued assets, as well as significant operating characteristics such as average heat rates, total available hours, hours of planned outage and maintenance.

The competitive wholesale electricity markets in which SBF operates do not provide regulated rates for electricity suppliers. Instead, prices for energy, capacity and other generation-related services are established by competition among suppliers in the bid-based markets administered by the NYISO. Suppliers submit bids for the opportunity to provide products (energy, ancillary services or capacity), a clearing price based on those offers is established, and only the "winning" bidders are allowed to supply the market.

Using the Confidential Information, competitors could adjust their behavior in these wholesale markets to enhance their competitive position at SBF's expense. First, competitors could use this information to accurately estimate SBF's bids to sell electricity to the NYISO and then undercut those bids. Unit-specific revenues, heat rate information and unit other specific expenses can enable a competitor to derive SBF's marginal cost by reverse engineering based on the number of hours the Lakeside units would be dispatched. This would allow competitors to underbid SBF, ultimately driving it out of the market. Second, competitors could use this information to identify the least cost improvements to their facilities needed to reduce their operating costs and heat rates to levels that would permit them to consistently undercut SBF's bids in the future.

Moreover, public knowledge of the outage and maintenance rates of the SBF's generating facilities would also put SBF at a disadvantage when it is negotiating for competitive vendor services. Access to the Confidential Information may also cause competitors to change their decisions concerning their own units, such as decisions to invest in capital upgrades and maintenance. All these outcomes could ultimately harm consumers in New York State, who depend on the proper operation of New York's competitive wholesale power markets to provide reliable supplies of electric power at just and reasonable prices.

Because disclosure of this information would cause SBF to suffer substantial competitive injury and would unfairly advantage its rivals in the competitive wholesale power markets operated by the NYISO, the Commission must find the Confidential Information to be exempt from disclosure under FOIL.

**2. Conclusion**

Accordingly, for the foregoing reasons, SBF New York, LLC's Confidential Information satisfies both the "trade secret" and the "substantial injury" tests under the POL and must therefore be exempted from disclosure under FOIL.

Respectfully submitted,

/s/

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