STATE OF NEW YORK DEPARTMENT OF PUBLIC SERVICE

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Via Electronic Mail

October 11, 2013

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RE: Case 12-E-0577 - Request for un-redacted versions of 12 filed documents[1], the non-public submissions, the non-public communications, the meeting records, and future submissions

(DETERMINATION – Trade Secret and Critical Infrastructure Information 13-04)

Dear Mr. Amato:

This letter is a Determination pursuant to §89(5) of the Public Officers Law (POL). It discusses the entitlement to an exception from disclosure as trade secrets, POL §89(5)(a)(1) and critical infrastructure information, POL §89(5)(a)(1-a) of certain records submitted by records

[1] Dunkirk Part 2 Reliability Study, Filing No. 11 filed February 15, 2013 on behalf of Niagara Mohawk Power Corporation (Ni Mo); b. NYSEG Transmission Cost Submission, Filing No. 14 filed February 19, 2013 on behalf of NYSEG; c. Information Related to Estimated Costs of Anticipated Transmission System Upgrades to Address Long-term Reliability Needs, Filing No. 15 filed February 19, 2013 on behalf of Ni Mo (see footnote 3); d. Redacted Version of Cayuga Operating Company LLC's Repowering Proposal, Filing No. 21 filed March 26, 2013 on behalf of Cayuga; e. Dunkirk Repowering Options - Redacted, Filing No. 24 filed April 1, 2013 on behalf of NRG; f. Report on Repowering Options – Redacted, Filing No. 51 filed May 17, 2013 on behalf of Ni Mo; g. NYSEG Report on Cayuga Repowering Analysis, Filing No. 52 filed May 17, 2013 on behalf of NYSEG; h. Repowering Reports, Filing No. 70 filed June 28, 2013 on behalf of Ni Mo; i. Cayuga Comments on NYSEG Report, Filing No. 83 filed August 16, 2013 on behalf of Cayuga; j. Comments of National Grid, Filing No. 86 filed August 19, 2013 on behalf of Ni Mo; k. Redacted Response, Filing No. 97 filed September 5, 2013 on behalf of Ni Mo; and l. Cayuga Revised March 26 Proposal, Filing No. 98 filed September 6, 2013 on behalf of Cayuga.

submitted by New York State Electric & Gas Corporation (NYSEG); National Grid; Cayuga Operating Company LLC (Cayuga); and NRG Energy, Inc. (NRG) in the above-entitled matter.

Please be advised that requests b, c[2], d, e, f, g, and h – as detailed in footnote 1 – are the subject of a separate request under POL Article 6, Freedom of Information Law (FOIL) for which the above-entitled companies have submitted statements of necessity and documents with fewer redactions than their original filings. The Records Access Officer (RAO) issued a Determination on October 3, 2013[3] in which she found that NYSEG, National Grid, Cayuga and NRG failed to carry the burden of proof with regard to entitlement to an exception from disclosure as trade secret or confidential commercial information. The RAO found that the information claimed as Critical Infrastructure Information by NYSEG warranted an exception from disclosure. That Determination is pending Appeal to the Secretary of the Commission. Pending a Determination on appeal, the rationale regarding those records will not be disturbed and is fully set forth in the October Determination.[4] In addition, this Determination will consider requests a, i, j, k, and l.

BACKGROUND OF THE PROCEEDING

By Order dated January 18, 2013 the New York State Public Service Commission (Commission or PSC) instituted a proceeding to examine repowering alternatives to utility power plant reinforcements and directed National Grid and NYSEG to work with generation owners to evaluate repowering of two power plants in upstate New York.

The Commission directed National Grid to evaluate repowering as an alternative outcome for the Dunkirk generating station and NYSEG to do the same for the Cayuga generating stations. The closing of the power plants could cause reliability concerns. The companies were instructed to examine the relative costs and benefits of repowering the plants at their existing sites compared to alternative transmission upgrades over the long term. The benefits to be evaluated include the reliability, environmental, and customer impacts associated with the repowering and transmission solutions.

As part of this evaluation, the companies are required to file with Staff projected costs of the transmission alternatives that they propose to evaluate, solicit bids from the current owners of the Dunkirk and Cayuga plants for the level of support required to finance repowering of their respective facilities, and file reports analyzing repowering alternatives in terms of reliability and other impacts and make recommendations to the Commission.

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[2] National Grid filed an un-redacted update to the February 19 correspondence on July 31, 2013, which is available at http://dmm.dps.state.ny.us/dmm/MatterManagement/CaseMaster.aspx.

[3] 12-E-0577, Proceeding on Motion of the Commission to Examine Repowering Alternatives to Utility Transmission Reinforcements. Determination of the Records Access Officer 13-03, October 3, 2013. Hereinafter referred to as "Determination 13-03".

[4] NYSEG and NRG also submitted Statements of Necessity regarding documents already addressed in Determination 13-03. Their arguments will not be addressed here.

The January 2013 Order established deadlines for bid solicitation (Request for Proposals or RFPs), and for the utilities to file information with the Commission showing the anticipated costs of the transmission upgrades they proposed to implement, in the form requested by Staff. It also established a deadline for the generators to submit bids to the soliciting utilities and for the utilities to file their reports and recommendations with the Commission.

FOIL PROCEDURAL BACKGROUND

On September 16, 2013, EARTHJUSTICE, by its attorney Christopher Amato[5], served a Motion on Secretary Burgess seeking access to, among other records in the above-entitled case, 12 documents, seven of which are now the subject of an October 3, 2013 Determination of the RAO. Secretary Burgess referred the Motion to the RAO to be treated as a FOIL request pursuant to POL.[6]

On September 23, 2013, the RAO sent a two-fold letter to EARTHJUSTICE and the Companies outlining the procedural process that would be employed to determine access to the requested documents.[7] All of the Companies submitted Statements of Necessity and filings with fewer redactions.

On September 26, 2013 EARTHJUSTICE served a Motion on Secretary Burgess for an Order revoking the Secretary's conversion of the September 16, 2013 Motion for Access to Critical Documents to a request for records under FOIL; and revoking the Secretary's referral of the aforementioned Motion to the RAO for decision.[8] On October 10, 2013, Secretary Burgess responded to the September 26, 2013 Motion by clarifying that no conversion of the Motion took place, and upholding the referral to the RAO.[9]

DETERMINATION

Cayuga's Arguments

Cayuga claims protection for "sensitive cost and pricing information and proprietary technical details" in the Revised Comments and Revised Repowering Proposal (RRP) pursuant

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[5] Mr. Amato also represents Ratepayer and Community Intervenors, Citizens Campaign for the Environment and Environmental Advocates of New York in this proceeding.

[6] Case 12-E-0577, Proceeding on Motion of the Commission to Examine Repowering Alternatives to Utility Transmission Reinforcements. Letter Regarding Access to Records issued by Secretary Burgess. (issued September 23, 2013).

[7] Case 12-E-0577, Two-Fold Letter from RAO to Mr. Amato/EARTHJUSTICE, et al. (issued September 23, 2013).

[8] Case 12-E-0577, Motion to Revoke Secretary's Conversion and Referral of Motion for Access to Documents filed by EARTHJUSTICE, dated September 26, 2013.

[9] Case 12-E-0577, Letter to Christopher Amato, Esq., from Kathleen H. Burgess, Secretary, Regarding Request for Records, dated October 9, 2013.

to POL §89(5).[10] The Company provided an affidavit of Jerry Goodenough, Cayuga's Chief Operating Officer, in support of its arguments that disclosure of this information would cause substantial injury to Cayuga's competitive position as well as other participants in the Commission's ongoing solicitation process, including, but not limited to, NYSEG and its ratepayers.[11]

Cayuga argues that the public disclosure of certain granular cost and pricing information (e.g., the estimated fixed costs for Options 1 and 3 in Exhibit 4 of the Revised Comments or the estimated cost for civil engineering for Option 2 on page 19 of 43 of the Revised Repowering Proposal) and proprietary technical details concerning Cayuga's proposal to repower the Cayuga Generating Station would competitively damage Cayuga by, for example, revealing to potential future bidders and vendors the costs Cayuga expects to incur to repower the Station. It argues that if disclosed, Cayuga would be in an unfair competitive position in future potential negotiations with such bidders and vendors regarding the various repowering options which would diminish its negotiating leverage and undercut its efforts to obtain maximum value for NYSEG and its ratepayers.

Cayuga further argues that public disclosure of the information would provide unfair economic advantage to its competitors causing it substantial competitive and economic injury since the information describes in detail the costs of building and operating the Station. This information could be used by competitors to determine the Station's repowering costs and subsequent production costs, affording Cayuga's competitors an advantage in the competitive markets by allowing them to advance their own projects over the Station and causing unfair economic and competitive damage to Cayuga. Disclosure would provide Cayuga's competitors access to information that is not known to them, would be valuable to them, and would be extremely difficult for them to develop on their own, as they do not have access to the Station or Cayuga's proprietary inputs for the proposed repowering and subsequent operation of the Station.

Finally, in preparing its initial Repowering Proposal, Cayuga retained Ventyx, Inc. to provide certain long-term market forecast information, generated using proprietary modeling formulas. Information from Ventyx's Fall 2012 Northeast Power Case was incorporated into Cayuga's Repowering Proposal. The agreement between these parties explicitly contemplates that this information and these formulas will remain confidential. Cayuga argues that disclosure of this information cause substantial injury to its competitive position as well as that of Ventyx, and would violate their confidentiality agreement.

Ventyx submitted its own Statement of Necessity in this case.[12] The two-paragraph letter requests protection from disclosure under POL §87(2) and 16 NYCRR §6-1.3 of its long-

[10] Requests "i" and "l".
[11] Case 12-E-0577, Affidavit of Jerry Goodenough, (filed by Cayuga with the RAO on October 7, 2013).
[12] Case 12-E-0577, Statement of Necessity of Ventyx, (filed by Cayuga with the RAO on October 7, 2013).

term market forecast information, generated by using its proprietary modeling formulas. It states that Ventyx's Fall 2012 Northeast Power Case was used in NYSEG's Repowering Report. It states that this information was incorporated into Cayuga's Repowering Proposal. It states that the agreement between Ventyx and Cayuga explicitly states that the aforementioned information and material pertaining to it may not be disclosed unless Ventyx provides written consent.

National Grid's Arguments

With regard to the request for Dunkirk Part 2 Reliability Study, filed February 15, 2013 (Filing No. 11),[13] National Grid states the Study was provided in support of National Grid's unredacted estimate of costs for transmission projects that would address reliability impacts of a Dunkirk shutdown. The Reliability Study identifies the specific projects described in the transmission cost estimate filing; however, the Reliability Study also includes information the Company considers critical infrastructure information under POL §§86(5), 87(2)(f) and 89(5)(a)(1-a), and 16 N.Y.C.R.R. § 6-1.3.

The Company submitted a revised redacted version of the Dunkirk Part 2 Reliability Study that eliminates some of the redactions included in the February 15, 2013 filing. The revised redacted document still removes information the Company considers CII. Section 3 of the revised redacted Dunkirk Part 2 Reliability Study removes information on certain outage scenarios and their respective significance. Redactions in Tables 1-16, 18-22, 26, 29-32, and 34-36 remove information regarding a variety of system contingency conditions and the respective transmission elements that would be primarily affected by those contingencies. Redactions in Sections 5-9 remove more detailed information regarding the impacts of various contingencies on important elements of the transmission system.

The information obscured in the revised redacted Dunkirk Part 2 Reliability Study includes information regarding specific electric system vulnerabilities under different generation operating conditions and contingencies. National Grid argues that disclosing such information would highlight important system assets the disruption of which could have significant adverse effects on electric service and reliability in western New York, and jeopardize the health, safety, welfare or security of the state, its residents or its economy.

Concerning the request for Comments of National Grid, filed August 19, 2013 (Filing No. 86),[14] National Grid argues that the information for which it seeks protection from disclosure was provided by NRG as part of its March 26, 2013 response to National Grid's request for proposal for repowering the Dunkirk electric generating station, or in NRG's responses to information requests related to the RFP Response. NRG previously requested confidential treatment of the information, and National Grid's request is intended to preserve NRG's interest in protecting the Confidential Information pending determination on NRG's request.

[13] Referred to infra as request "a".
[14] Referred to infra as request "j".

With regard to the request for the Redacted Response (2013 Study), filed September 5, 2013 (Filing No. 97),[15] National Grid states that the document includes the Company's Transmission Reliability Report, Western Division Area Review, Needs Assessment Report (Aug. 31, 2013) and Transmission Analysis, Western Division Area Study 2013, Solution Study Report (Aug. 31, 2013). Together, these two documents are referred to as the 2013 Study. The 2013 Study includes information the Company considers CII that should be protected from disclosure.

The Company submitted a revised redacted version of the 2013 Study that eliminates some of the redactions included in the prior filing. The revised redacted document still redacts information the Company considers CII. Section 3 of the Needs Assessment redacts information on generation and municipal customer loads. Section 4 describes results of extreme contingency analyses as well as transient stability results. Section 5 redacts information regarding generation and municipal load conditions that would produce the indicated thermal results, as well as details of the results of extreme contingency testing. Section 11 includes detailed system load flows under a variety of cases. Section 17 identifies non-public interconnection points for several individual customers, which the Company is not authorized to disclose. Regarding the Solution Study, Section 4 redacts information regarding generation and municipal load conditions that would produce the indicated thermal results.

The information obscured in the revised redacted 2013 Study includes information regarding electric system vulnerabilities under different generation operating conditions and contingencies. Disclosing such information would highlight important system assets the disruption of which could have significant adverse effects on electric service and reliability in western New York, and jeopardize the health, safety, welfare or security of the state, its residents or its economy. The redacted information also identifies interconnection locations of several individual customers, as well as the system loads of some customers and municipal utilities. The Company is not authorized to disclose customer-specific information publicly and such information should be protected.

DISCUSSION

Statement of Applicable Law

POL §87(2) provides, in pertinent part: 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. . . or (f) if disclosed could endanger the life or safety of any person.

[15] Referred to infra as request "k".

POL §86(5) provides: "Critical infrastructure" means 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 §89(5)(a)(1-a) provides, in pertinent part: A person or entity who submits or otherwise makes available any records to any agency, may, at any time, 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 subdivision (2) of section 87 of this article.

Pursuant to 18 CFR §388.113(c) (2) critical infrastructure is defined as: existing and proposed systems and assets, whether physical or virtual, the incapacity or destruction of which would negatively affect security, economic security, public health or safety, or any combination of those matters.

The Federal Freedom of Information Act (FOIA) also contains an exemption that permits the non-disclosure of records or information compiled for law enforcement purposes that "could reasonably be expected to endanger the life or physical safety of any individual".[16]

In Living Rivers, Inc. v. Bureau of Reclamation (BOR),[17] the Court held that BOR had established that non-disclosure of inundation maps was warranted.[18] In another case[19] the Court concluded that blueprints of buildings and grounds of an agricultural research center were exempt from disclosure under FOIA; it also, cited Homeland Security Presidential Directive Seven to the effect that facilities such as waste-water treatment plants, water distribution stations and power transfer stations are considered critical infrastructure.

The Court of Appeals, in Matter of New York Telephone Co. v. Public Service Commission,[20] held that the Commission had not only the power but also the affirmative responsibility to provide for the protection of trade secrets and cited the definition of "trade secret" contained in Restatement of Torts §757, comment (b) (1939).[21] Thereafter, the Commission adopted a virtually identical definition of "trade secret".

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16 5 U.S.C. §552[b][7][F].

17 272 F. Supp 2d 1313 (D. Utah, 2003).

18 The Court credited the declaration of BOR's Director of Security, Safety and Law Enforcement, to the effect that the inundation maps associated with Colorado River Dams would give terrorists information about the amount of damage that could be caused by destroying a dam, including populated areas and critical infrastructure, such as power plant sites.

19 Elliot v. US Department of Agriculture, 518 F. Supp 2d 217 (D.D.C. 2007).

20 56 N.Y.2d 213, 219 – 220 (1982).

21 Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1973) in which the Court discussed what might constitute a "trade secret", citing Restatement of Torts, §757, comment b (1939).

According to 16 NYCRR §6-1.3(a): "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."

In Matter of Capital Newspapers v. Burns,[22] the Court of Appeals held that the exceptions from disclosure in POL §87(2) are to be narrowly construed, that the party resisting disclosure bears the burden of proof, and that such party must demonstrate a particularized and specific justification for denying access.

The Court of Appeals, in Matter of Ashland Management, Inc. v. Janien,[23] again cited the Restatement of Torts definition of "trade secret." In addition, the Court noted that Restatement §757, comment b suggested the following factors be considered in deciding a trade secret claim:

1. the extent to which the information is known outside of his business;
2. the extent to which it is known by employees and others involved in his business;
3. the extent of measures taken by him to guard the secrecy of the information;
4. the value of the information to him and to his competitors;
5. the amount of effort or money expended in developing the information; and
6. the ease or difficulty with which the information could be properly acquired or duplicated by others.

The explicitly non-exclusive list of factors to be considered in explaining whether information constitutes a trade secret that is set forth in 16 NYCRR §6-1.3(b)(2) is similar, though not identical, to the Restatement list. The only substantial dissimilarities between the two lists are that the list adopted by the Commission does not explicitly contain a factor like the third factor quoted above and that it does include two additional factors, as follows: "(i) the extent to which the disclosure would cause unfair economic or competitive damage; [and] (vi) other statute(s) or regulations specifically excepting the information from disclosure."[24]

The Court of Appeals, in Encore Coll. Bookstores v Auxiliary Serv. Corp. of State Univ. of N.Y.,[25] stated that the Legislature had signaled its intent that the "substantial injury to the competitive position" language of POL §87(2)(d) should be similar in scope to the "substantial competitive harm" test announced in National Parks and Conservation Association v. Morton,[26] a case that arose under the federal Freedom of Information Act.[27] In particular, the Court

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[22] 67 N.Y.2d 562, 566, 570 (1986).
[23] 82 N.Y.2d 395, 407 (1993).
[24] 16 N.Y.C.R.R. §6-1.3(b)(2) also provides: "In all cases, the person must show the reasons why the information, if disclosed, would cause substantial injury to the competitive position of the subject commercial enterprise."
[25] 87 N.Y.2d 410 (1995).
[26] 498 F.2d 765, 770 (D.C. Cir., 1974).
[27] Encore at 419 – 420.

paraphrased and quoted with approval from another D.C. Circuit Court of Appeals decision in Worthington Compressors v. Costle.[28]

Thus, the Court in Encore stated that, where government disclosure is the sole means by which competitors can obtain the requested information, the inquiry ends with a consideration of how valuable the information at issue would be to a competing business and how much damage would result to the enterprise that submitted the information. By contrast, the Court held that, where the material is available from another source at some cost, consideration must be given not only to the commercial value of such information but also to the cost of acquiring it through other means, because competition in business turns on the relative costs and opportunities faced by members of the same industry, which might be substantially different if one could obtain information by paying the copying cost rather than the cost of replication.

The Court also observed that the reasoning underlying these considerations is consistent with the policy behind POL §87(2)(d) to protect businesses from the deleterious consequences of disclosing confidential commercial information to further the state's economic development efforts and attract business to New York. Finally, in applying the enunciated test to Encore's request, the Court concluded that the information submitting enterprise was not required to establish actual competitive harm. Rather, it was required, in the words of Gulf and Western Industries v. United States, to show "actual competition and the likelihood of substantial competitive injury".[29]

While "competitive injury" is not defined by the statutes, regulations, or case law, the Court of Appeals has interpreted the phrase on various occasions since its 1995 decision in Encore. In 2008, the Court appears to have "raised the bar" as to what is necessary to sustain the burden of proof required to exempt information from public disclosure in Markowitz v. Serio,[30] a case involving the New York State Insurance Department and the issue of "redlining." There the Court stated that "to meet its burden, the party seeking exemption 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."[31]

In at least one lower court case since Markowitz, the evidence offered to sustain a finding of competitive injury was quite extensive and sophisticated. In Saratoga Harness Racing, Inc. v. Task Force on the Future of Off-Track Betting,[32] petitioners Saratoga Harness Racing, Inc. (Saratoga) and Finger Lakes Racing Association, Inc. (Finger Lakes) sought exemption from disclosure of information contained in their 2004-2008 year-end financial statements. Petitioners provided this information to the New York State Racing and Wagering Board (RWB), which compiled it into chart form and provided it to respondent, Task Force on The Future of Off-Track Betting (FOTB). The FOTB planned to publish the chart on its website. The Court found

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[28] 662 F.2d 45, 51 (D.C. Cir., 1981).
[29] 615 F. 2d 527, 530 (D.C. Cir., 1979).
[30] 11 N.Y.3d 43(2008).
[31] Markowitz, supra at 51; Encore, supra.
[32] Saratoga Harness Racing, Inc. v. Task Force on the Future of Off-Track Betting, 2010 N.Y. Misc. LEXIS 2531 (Sup. Ct. Albany Co. 2010).

that petitioners had demonstrated that the information they sought to prevent from disclosure was not publically available and exhausted their administrative remedies challenging disclosure.

Saratoga submitted affidavits of its executives and of experts in gaming market analysis and labor negotiations. The affidavit submitted by Saratoga's General Manager established the competitive pressures Saratoga faces. It detailed Saratoga's racing and gaming competitors, outlined Saratoga's food and beverage competitors, set forth Saratoga's current and future labor negotiations (union and nonunion) and the potential for outside competitors to enter the market that Saratoga serves. The injuries that the disputed information would cause Saratoga were detailed by its General Manager, along with a gaming market analysts' expert opinion affidavit. The injury Saratoga would suffer by the disclosure of the disputed information was detailed by its Human Resources Director and an expert in labor negotiations. The court found that Saratoga demonstrated "specific, persuasive evidence" that Respondents' dissemination of its financial data falls "squarely within a FOIL exemption."[33]

Likewise, the court found that Finger Lakes demonstrated the applicability of Public Officers Law § 87(2)(d)'s exemption. Its Director of Labor Relations detailed the competitive pressures of Finger Lakes' labor market, and the injury that Finger Lakes would suffer if the disputed financial information were released. Finger Lakes submitted the affidavit of a Vice President of its parent company which oversees its financial performance. That affidavit set forth the specific racing and gaming venues Finger Lakes competes against, explained the potential for competition from national gaming companies, and corroborated Finger Lake's labor market pressures. Finger Lakes also submitted affidavits of a gaming market analyst and an expert in labor negotiations. The court found that Finger Lakes outlined the competitive pressures facing it, and the injury it would face if the disputed financial information were released, and therefore, demonstrated that the trade secret exception squarely applied.[34]

Application of Pertinent Law

Critical Infrastructure Information – National Grid

With respect to the information redacted from the Dunkirk Part 2 Reliability Study filed by National Grid, I agree with National Grid's assertion that the redactions in Section 3 regarding information on certain outage scenarios and their respective significance should remain protected from disclosure, specifically the redactions in Tables 1-16, 18-22, 26, 29-32, and 34-36, and the redactions in Sections 5-9 which remove more detailed information regarding the impacts of various contingencies on important elements of the transmission system. This information constitutes critical infrastructure information and should remain redacted because if disclosed, it could be used to target important system assets, the disruption of which could have significant, adverse effects on electric service and reliability in western New York, and jeopardize the health, safety, welfare or security of the state, its residents or its economy.

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[33] Markowitz, supra.
[34] POL§87(2)(d).

Concerning the information redacted from (what the Company refers to as) the 2013 Study filed by National Grid, I agree with the Company's assertions that the redactions as identified should remain protected from disclosure as constituting critical infrastructure information. The Company makes a persuasive case that disclosure of this information, including information on generation and municipal customer loads; the results of extreme contingency analyses and transient stability results; detailed system load flows under a variety of cases; and non-public interconnection points for several individual customers could result in its use to target important system assets, the disruption of which could have significant, adverse effects on electric service and reliability in western New York, and jeopardize the health, safety, welfare or security of the state, its residents or its economy.

Trade Secrets or Confidential Commercial Information - Cayuga

First, it should be noted that this proceeding was prompted by notice to the Commission[35] by Dunkirk[36] and Cayuga[37] of their intent to retire or "mothball" their generating plants due to lack of economic viability. In response, the Commission commenced this notice and comment proceeding under SAPA §202(1)(i) for the limited purpose of directing the transmission operators to work with the two generation owners to evaluate repowering of their power plants and to examine repowering alternatives to utility power plant reinforcements. National Grid and NYSEG were directed to file with Staff projected costs of transmission alternatives that they propose to evaluate, solicit bids from the current owners of the two plants for the level of support required to finance repowering of their respective facilities, and file reports analyzing repowering alternatives in terms of reliability and other impacts and make recommendations to the Commission. Submissions were made by the transmission operators and the generators and all seek out-of- market support, or, stated differently, all have submitted proposals that compete for ratepayer dollars not private investment. The documents filed by the TOs and generators were heavily redacting making public comment difficult at best. While there are only four parties involved, they all claim that, at a minimum, their cost and pricing information is entitled to protection from disclosure as trade secret.

That being said, on the issue of trade secrets or confidential commercial information, the two-pronged test established by the Court in Encore is applicable. In applying the first prong of the Encore test, (in which the Court implicitly assumed the non-public nature of the information in question), the existence of competition must first be established. In general, the existence of

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[35] Case 05-E-0889, Proceeding on Motion of the Commission to Establish Policies and Procedures Regarding Generating Unit Retirements, Order Adopting Notice Requirements for Generation Unit Retirements (issued December 20, 2005).

[36] Case 12-E-0136, Petition of Dunkirk Power LLC and NRG Energy, Inc. For Waiver of Generator Retirement Requirements. March 14, 2012.

[37] Case 12-E-0400, Petition of Cayuga Operating Company, LLC to Mothball Generating Units 1 and 2. July 20, 2012.

competition in the electric industry in New York State has been established.[38] The fact that this Determination is being made in a limited scope case involving the mothballing and repowering of two generators make this a unique factual situation in which the question of competition, in this limited instance, could be debated, however, for purposes of reaching the second prong of the Encore inquiry, I will assume the existence of competition in this particular case.

The question of whether the information at issue is entitled to an exception from disclosure as trade secrets or confidential commercial information turns on the proper application of the second prong of the test — whether disclosure would be likely to cause substantial injury to the competitive position of the subject enterprise. In this regard, I first note that almost all information possessed by a business would have some commercial value to its competitors; however, the question is whether the information at issue is sufficiently valuable that its disclosure would be likely to cause substantial competitive injury. Because the information in question appears to be available solely through disclosure by DPS, I must consider only the commercial value of such information to competitors and the competitive injury to the commercial enterprise possessing the information that would likely result.

Because the overall purpose of FOIL is to ensure that the public is afforded greater access to governmental records, FOIL exemptions are interpreted narrowly.[39] To meet its burden, the party seeking the exemption 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.[40] Here, Cayuga failed to meet this burden. The arguments suggesting that it will suffer competitive disadvantage is theoretical at best. Cayuga's key argument is that if it is forced to reveal certain cost and pricing information, competitors might use this information to gain an advantage in the transmission or generation market. It has not been shown that release of the information at issue, without more, would necessarily put the transmission operators or the generators at a competitive disadvantage.

While, arguably, Cayuga has shown that the information in question fits within the definition of trade secret, they have not shown what might happen if its competitors had access to the information. Cayuga has not demonstrated that disclosure of the information would be likely to cause substantial injury to the competitive position of a commercial enterprise and therefore has not met the burden of proof it bears pursuant to POL §89(5)(e). In order to meet this burden, the Company must provide the necessary causal link between the disclosure of the information and the likelihood that it would cause substantial injury to the competitive position of a commercial enterprise. Cayuga did not accomplish this. Mere conclusory allegations,

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[38] 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.2d 924 (Albany County 1996), aff'd, 273 A.D.2d 708.

[39] Washington Post Co. v New York State Ins. Dept., 61 NY2d 557, 564 (1984).

[40] Markowitz, supra at 51.

without factual support, are insufficient to sustain non-disclosure.[41] The party resisting disclosure must demonstrate a particularized and specific justification for denying access.[42]

Although Cayuga provided an affidavit of its Chief Operating Officer in support of its arguments, the statement simply reiterated the assertions already made in the Company's Statement of Necessity and repeated the existence of the Ventyx confidentiality agreement. An affidavit of an economist or expert can help the party seeking protection from disclosure meet the burden of proof they bear pursuant to POL §89(5)(e), but only if it contains more compelling facts and stronger arguments. Even if Cayuga had conclusively proved that the trade secret test cited in New York Telephone and Ashland had been met on the basis of the factors set forth in 16 NYCRR §6-1.3(b)(2), it has not shown that public disclosure of the information would be likely to cause substantial injury to the competitive position of a commercial enterprise.

The party seeking protection from disclosure must satisfy both prongs of the test enunciated in Encore. Cayuga did not satisfy the second prong. The Encore Test must be met before an exception from disclosure may be granted because that test is essentially reflected in the Commission's regulations. Furthermore, the Court in Bahnken v. New York City Fire Department,[43] implicitly concluded that the Encore Test is the one to be used in determining whether portions of records should be excepted from public disclosure pursuant to POL §87(2)(d).

Confidentiality/Non-Disclosure Agreement

To the extent that Cayuga included information in its Revised Comments and Revised Repowering Proposal provided by a third party – Ventyx, Inc. – with which it allegedly entered into a confidentiality or non-disclosure agreement, the Court of Appeals has held that a request for or a promise of confidentiality is all but meaningless unless one or more of the grounds for denial appearing in FOIL may appropriately be asserted, the record sought must be made available.[44] The reasoning set forth herein also applies to a confidentiality or non-disclosure agreement between National Grid and NRG. In Washington Post v. Insurance Department,[45] the controversy involved a claim of confidentiality with respect to records prepared by corporate boards furnished voluntarily to a state agency. The Court of Appeals reversed a finding that the documents were not "records" subject to FOIL, thereby rejecting a claim that the documents "were the private property of the intervenors, voluntarily put in the respondents' "custody" for convenience under a promise of confidentiality".[46]

With regard to Cayuga's confidentiality agreement with Ventyx, following the issuance of Determination 13-03, Ventyx, submitted such a Statement as discussed herein. However, the Statement of Necessity was not compelling and simply stated the existence of the confidentiality

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[41] See, Church of Scientology of New York v. State of New York, 46 N.Y.2d 906 (1979).
[42] Capital Newspapers v. Burns, 67 N.Y.2d 562, 566, 570 (1986).
[43] 17 A.D.3d 228 (1st Dept., 2005).
[44] FOIL-AO-14038, May 15, 2003.
[45] 61 NY2d 557 (1984).
[46] Id. at 564.

agreement. It did not provide arguments in support of its agreement and the need for protection of this information from disclosure to the RAO. Therefore, the information redacted as subject to the third-party confidentiality agreement is not entitled to protection from disclosure. If Cayuga appeals this Determination, it is recommended that at that time Ventyx provide stronger arguments and substantiation beyond the affidavit offered here to support its claims.

CONCLUSION

In light of all the forgoing, the information claimed by Cayuga to be trade secrets or confidential commercial information do not warrant an exception from disclosure. The information claimed as Critical Infrastructure Information by National Grid warrant exceptions from disclosure.

Review of my determination may be sought, pursuant to POL §89(5)(c)(1), by filing a written appeal with Kathleen H. Burgess, Secretary at the address given above, within seven business days of receipt of this determination. Unless a contrary showing is made, receipt will be presumed to have occurred on October 11, 2013, so the deadline for the receipt of any such written appeal is October 23, 2013.

Sincerely,

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