



159 20th St., Suite 1B  
Brooklyn, NY 11232

P. 212 590 0145

info@fellerenergylaw.com  
www.fellerenergylaw.com

January 11, 2016

Via Electronic Mail  
[recordsaccessofficer@dps.state.ny.us](mailto:recordsaccessofficer@dps.state.ny.us)

Donna M. Giliberto, Esq.  
Assistant Counsel and Records Access Officer  
New York State Public Service Commission  
Three Empire State Plaza  
Albany, NY 12223

Re: 12-M-0476, 14-02555, and 14-02554 – Disclosure of 2014 and 2015 Historic Pricing Information for Residential Service Provided by ESCOs

Dear Ms. Giliberto:

The Impacted ESCO Coalition (“IEC”)<sup>1</sup> files this Statement of Necessity, pursuant to Public Officers Law (“POL”) § 89(5)(b)(2) for the dual purposes of protecting the competitive marketplace, and to ensure the accuracy of ESCO pricing data made available to consumers.

Disclosure of ESCO pricing information is harmful to the competitive retail market and to the ESCOs themselves; the pricing data should continue to be protected by trade secret law.

Disclosure of ESCO pricing information in the manner proposed, without reference to value added and community driven products, provides an incomplete and inaccurate picture of ESCO service offerings to consumers. The IEC respectfully requests that the Commission exempt from disclosure ESCO price information from 2014 and 2015.

The IEC further lends its support to the Statement of Necessity filed by the Retail Energy Supply Association on January 11, 2016.

---

<sup>1</sup> The Impacted ESCO Coalition, formed in 2015, currently represents small-to-medium sized licensed ESCOs, many of whom have their primary business in New York. The IEC seeks to strengthen New York’s competitive energy markets, preserve customer choice and ensure an equal playing field for all ESCOs.

## I. RELEVANT 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 secret or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosure would cause substantial injury to the competitive position of the subject enterprise.”

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.<sup>2</sup> Factors used to determine whether information is subject to disclosure under POL § 87(2)(d) 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.<sup>3</sup>

Even for information that does not rise to the level of trade secret, the party asserting an exemption from disclosure must show “actual competition and the likelihood of substantial competitive injury.”<sup>4</sup> As the existence of competition in the electric and natural gas markets is established, a party requesting exemption from disclosure need only prove the likelihood of

---

<sup>2</sup> 16 NYCRR § 6-1.3(a).

<sup>3</sup> 16 NYCRR § 6-1.3(b)(2).

<sup>4</sup> *Encore Coll. Bookstores v. Auxiliary Serv. Corp. of State Univ. of N.Y.*, 87 N.Y.2d 410, 419-420 (1995); See *Verizon New York Inc. v. Christopher Bradbury, as Records Access Officer*, 10 M.3d 785 (Sup. Ct., Westchester City, 2005).

substantial competitive injury.<sup>5</sup> Additionally, the party requesting exemption from disclosure must demonstrate a particularized and specific justification for denying public disclosure of the information.<sup>6</sup>

## **II. HISTORIC ESCO PRICE DATA SHOULD BE EXEMPTED FROM DISCLOSURE**

Disclosure of ESCO historic price filings will cause particularized substantial injury to ESCOs in two ways. First, disclosure of pricing information, even price averages by ESCO, amounts to disclosure of proprietary pricing information that can be used by other ESCOs to the detriment of their competitors, and therefore should not be disclosed. Second, the disclosure of information by the Commission fails to accurately inform the customer on the benefit of affinity programs, value added products, and associated discounts on related services offered by ESCOs, and therefore damages the overall competitive market.

### **A. Incomplete disclosure of pricing information amounts to disclosure of proprietary pricing information.**

The Commission's intended disclosure of ESCO price information satisfies the requirements of NYCRR and POL and constitutes a trade secret which should not be disclosed to the public.<sup>7</sup> ESCO pricing information, which includes pricing as well as hedging and margin strategies, is tightly guarded by ESCOs and is not shared with other market participants or the public. Great care is taken by ESCOs to prevent the disclosure of this information to the public, and whenever possible, price disclosures are filed with the Commission with trade secret protection. In this instant proceeding, even though the Commission intends to disclose only

---

<sup>5</sup> See Case 94-E-0952, 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; Case 93-G-0932, Proceeding on Motion of the Commission to Address Issues Associated with the Restructuring of the Emerging Competitive Natural Gas Market; Case 98-M-1343, In the Matter of Retail Access Business Rules.

<sup>6</sup> Matter of Capital Newspapers v. Burns, 67 N.Y.2d 562, 566, 570 (1986).

<sup>7</sup> See POL § 87(2)(d) and 16 NYCRR 6-1.3(b)(2).

average ESCO price data, the averages can be used to calculate proprietary ESCO pricing information, which includes pricing as well as hedging and margin strategies. Since cost factors are largely fixed and shared by the majority of ESCOs, it is possible to reverse engineer an ESCO's proprietary pricing information from its average price. Margins in the retail energy industry are already extremely thin – if an ESCO were to calculate a competitor's pricing calculation, it would amount to a complete disclosure of an ESCO's marketing, pricing, and hedging strategies, and this in turn would significantly damage an ESCO's edge in the competitive market. Furthermore, even if the Commission determines that ESCO price data does not rise to the level of trade secret, it should be exempted from public disclosure based on the “substantial harm” test, articulated above.<sup>8</sup>

**B. Disclosure of inaccurate average pricing information is damaging to the competitive market, and paints an incomplete picture for the consumer**

The disclosure of information by the Commission does not accurately reflect ESCO pricing information to the customer. Average price data does not take into account services and added value products such as airline miles, award points, discounts, or sweepstakes. Nor does average price data take into account community driven products, such as charitable matches or affinity program benefits. Additionally, for ESCOs that provide combined commodity services, the price does not reflect this added value either. For example, ESCOs that combined product offerings to consumers may have higher electric prices, but offer customers free HVAC service; or may provide discounts on other commodity services such as fuel oil. In such a case, the ESCO may be “ranked” poorly according to price, but in truth that ESCO's customer is saving money across multiple commodities.

---

<sup>8</sup> See supra, note 4.

By listing average price, the Commission's planned disclosure puts ESCOs providing these additional services at a disadvantage by listing prices that do not reflect the actual value to the customer. Additionally, listing price averages does not show the appropriate distinction between product types (for example, green product offerings or product bundling). As a result, this will not assist the customer "in assessing whether their current energy supplier meets their needs" as is intended by the Commission.<sup>9</sup> In an already complicated market for customers, presenting pricing information that does not accurately reflect the cost to the customer does not satisfy the aims of the Commission to assist customers in making informed decisions regarding their energy.

### **III. THIS PROCEEDING DIFFERS FROM PREVIOUS DECISIONS OF THE RAO AND SECRETARY**

The instant proceeding differs from previous decisions of the RAO and Secretary, which found that certain disclosures of historic pricing information were appropriate.<sup>10</sup> First, this proceeding is not pursuant to FOIL request. FOIL requests are interpreted narrowly as a matter of public policy, in order to ensure that the public is afforded access to government records.<sup>11</sup> As this disclosure is being requested pursuant to Commission Order, and not a FOIL request, broader consideration should be given to the exemption requests.

Second, in this proceeding, not only does the Commission intend to disclose average price data, but the ESCOs will be identified with their average price information. This direct link between the ESCOs and their pricing information was not at issue in previous proceedings. This

---

<sup>9</sup> Case 12-M-0476, Proceeding on Motion of the Commission to Assess Certain Aspects of the Residential and Small Non-Residential Retail Energy Markets in NYS. Order Taking Actions to Improve the Residential and Small Non-Residential Retail Access Markets (issued February 25, 2014) (Retail Markets Order) at 17.

<sup>10</sup> See Matter 11-01661 and Matter 12-00172 – DPS Records Access Officer Determination of Trade Secret 14-01, issued March 27, 2014; and Appeal of Trade Secret Determination 14-01, issued April 28, 2014.

<sup>11</sup> Washington Post Co. v. New York State Ins. Dept., 61 N.Y.2d 557, 564 (1984).

speaks directly to the issue discussed above; ESCOs are able to calculate proprietary pricing information of their competitors based on the average pricing data.

#### **IV. CONCLUSION**

In view of the above, the Impacted ESCO Coalition respectfully requests that Historic ESCO Pricing Data from 2014 and 2015 be exempted from public disclosure, pursuant to POL § 87.2(d) and 16 NYCRR § 6-1.3.

Respectfully Submitted,

#### **Impacted ESCO Coalition**

By: /s/ Natara G. Feller  
Natara G. Feller, Esq.  
Managing Member

By: /s/ Ann Marie Bermont  
Ann Marie Bermont, Esq.  
Associate Attorney

*Feller Energy Law Group, PLLC*

Dated: January 11, 2016