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VIA ELECTRONIC MAIL

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State of New York Department of Public Service
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**RE: Case 14-E-0270: Petition Requesting Initiation of a Proceeding to
Examine a Proposal for the Continued Operation of the R.E. Ginna
Nuclear Power Plant**

***ATTACHMENTS CONTAIN TRADE SECRET, CONFIDENTIAL
AND CRITICAL ENERGY INFRASTRUCTURE INFORMATION***

Dear Ms. Giliberto:

On July 11, 2014, R.E. Ginna Nuclear Power Plant LLC (“Ginna”) filed a *Petition for Initiation of Proceeding to Examine Proposal for Continued Operation of R.E. Ginna Nuclear Power Plant* with the Public Service Commission (the “Commission”). On November 14, 2014, the Commission issued an order that, among other things, determined that the R.E. Ginna Nuclear Power Plant (the “Ginna Facility”) is necessary to maintain electric system reliability in the Rochester, New York area and directed Rochester Gas and Electric Corporation (“RG&E”) to negotiate and file with the Commission a Reliability Support Services Agreement (“RSSA”) with Ginna by January 15, 2015.¹ This filing date was subsequently extended to February 13, 2015. On February 13, 2015, RG&E filed the executed RSSA and proposed tariff leaves to implement a surcharge mechanism to recover all costs RG&E incurs under the RSSA. RG&E requested that the Commission accept the RSSA and approve full cost recovery by RG&E from its customers of all amounts payable to Ginna under the RSSA utilizing a proposed cost recovery mechanism.

Following extensive process in this proceeding, including discovery, a Notice of Impending Settlement Negotiations was sent to all active parties and other interested persons in this proceeding and filed with the Commission on May 5, 2015. After thorough discussion and negotiation of certain issues, several parties to this proceeding have executed a Joint Proposal, which was filed today with the Commission. Attached to the Joint Proposal are two redacted versions of the RSSA – one clean version reflecting the final RSSA signed by RG&E and Ginna and one redlined version, which compares the final RSSA to the version filed on February 13, 2015.

¹ Case 14-E-0270 - *Petition for Initiation of Proceeding to Examine a Proposal for the Continued Operation of R.E. Ginna Nuclear Power Plant*, Order Directing Negotiation of a Reliability Support Service Agreement and Making Related Findings (Nov. 14, 2014), at 27.

Pursuant to Public Officers Law (“POL”) §§ 89 (5) and 87 (2) and 16 NYCRR § 6-1.3, Ginna submits this request for protection of certain critical energy infrastructure information (“CEII”), trade secret, and confidential commercial information (the “Protected Information”) in the clean and redlined versions of the RSSAs attached to the Joint Proposal. More specifically, the Protected Information for which Ginna requests protection consists of details relating to plant operations and planned outages which, in addition to being CEII, constitutes proprietary, sensitive data related to the management and operations of Ginna, disclosure of which could jeopardize operation of the Ginna Facility and the New York State bulk power system or cause substantial injury to Ginna’s competitive position. Accordingly, Ginna respectfully requests that the Protected Information be afforded the protections from disclosure provided by the POL and the Commission’s regulations.

Basis of Ginna’s Request for Non-Disclosure of the Protected Information

I. The Protected Information Is Critical Energy Infrastructure Information And Should Be Permanently Excepted From Disclosure Under The POL And The Commission’s Regulations

The Protected Information that GNPP is providing contains critical infrastructure information protected from disclosure under POL §§ 87 (2) (f) and 89 (5) (a) (1-a), 89 (5) (a) (2), and 16 NYCRR 6-1.3 (b) (3). The Protected Information, if disclosed, could pose a threat to the Ginna Facility and the reliability of the New York State bulk power system. Accordingly, the Protected Information in the attached filing should be permanently excepted from disclosure under the POL and the Commission’s regulations.

II. The Protected Information Is A Trade Secret And/Or Confidential Information And Should Be Permanently Excepted From Disclosure Under The POL And The Commission’s Regulations

Section 87 (2) (d) of the POL states, in relevant part, that an agency may 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.”² As a court interpreting this provision recently observed, POL § 87 (2) (d) “clearly delineates three types of information to be protected: (1) ‘trade secrets;’ (2) records submitted to an agency by a commercial enterprise;’ and (3) records ‘derived from information obtained from a commercial enterprise.’”³ Ginna requests that the Protected Information be excepted from disclosure under each of these three categories.

² POL § 87 (2) (d) (emphasis added).

³ *Verizon New York Inc v Pub. Serv Commn*, 46 Misc3d 858, 868 (Sup Ct, Alb County 2014).

A. The Protected Information Is A Trade Secret

With respect to the first category, the Commission's regulations define the term "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."⁴ A court recently listed the factors that may be considered in determining whether information constitutes a trade secret:

"(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 by him in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others."⁵

This court further held that "[o]nce a document has been found to be a trade secret under Public Officer's Law § 87 (2) (d), the analysis ends" and the record may not be disclosed.⁶

The Protected Information is a trade secret as it is a compilation of information that is used in Ginna's business in owning and operating the Ginna Facility, and it provides an opportunity for Ginna to obtain an advantage over competitors in the electric generation industry who do not know or use the Protected Information. More specifically, operational information in the attached is not known outside Ginna's business, is closely guarded within the competitive electric markets, is valuable to Ginna as well as its competitors, and could not otherwise be easily acquired or duplicated. Accordingly, the Protected Information in the attached filings should be excepted from disclosure.

B. The Protected Information Is Being Submitted To The Commission By A Commercial Enterprise Or Was Derived From Information Obtained From A Commercial Enterprise And Which, If Disclosed, Would Cause Substantial Injury To The Commercial Enterprise's Competitive Position

With respect to the second and third categories, Section 6-1.3 (b) (2) of the Commission's regulations states:

"A person submitting . . . confidential commercial information to the department . . . 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:

⁴ 16 NYCRR § 6-1.3 (a).

⁵ *Verizon*, 46 Misc3d at 872, fn. 15 (citing Restatement [First] of Torts § 757, Comment b).

⁶ *Id.* at 874 and 877.

- 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.”⁷

The Protected Information in the attached filings satisfies several, if not all, of the Commission's factors that must be considered in determining Ginna's instant request. The Protected Information is not known to others, including Ginna's existing or potential competitors and counterparties. According to the New York State Court of Appeals, “[w]here FOIA disclosure is the sole means by which competitors can obtain the requested information, *the inquiry ends here.*”⁸ In addition, the Protected Information would be highly valuable to Ginna's existing or potential competitors and counterparties, preparation of the Protected Information required considerable work and expense, and others cannot readily duplicate the Protected Information. For these reasons as well, the Protected Information should be excepted from public disclosure.

In assessing whether records are properly withheld from disclosure, the New York State Court of Appeals has held that “[a]ctual competition and the *likelihood* of substantial competitive injury is all that need be shown.”⁹ The RAO and the Secretary have repeatedly determined, “competition in the electric industry in New York State has been established.”¹⁰ Accordingly, all that Ginna is required to show is the “likelihood” of competitive injury. Granting Ginna's competitors in the wholesale energy markets access to their sensitive operational data such as planned outages would certainly provide competitors with valuable insight into Ginna's operations resulting in competitive injury to Ginna.

Settled precedent also supports protection of this type of information. Specifically, the issue of whether information related to an electric generator's production is entitled to confidential/trade secret protection was addressed by the Appellate Division when competition was introduced in New York's wholesale electric markets. In *New York State Elec. & Gas Corp.*

⁷ 16 NYCRR § 6-1.3 (b) (2).

⁸ *Encore College Bookstores v Auxiliary Serv Corp*, 87 NY2d 410, 420 (1995) (citing *Worthington Compressors v Costle*, 662 F2d 45, 51 [DC Cir 1981]) (emphasis added).

⁹ *Id.* at 421 (citing *Gulf & W Indus v United States*, 615 F2d 527, 530 [DC Cir 1979]) (emphasis added).

¹⁰ Case 12-E-0577, *Proceeding on Motion of the Commission to Examine Repowering Alternatives to Utility Transmission Reinforcements*, Determination of the Records Access Officer 13-04 (Oct. 11, 2013), at 12; Case 12-E-0577, *Proceeding on Motion of the Commission to Examine Repowering Alternatives to Utility Transmission Reinforcements*, Determination on Appeal of Records Access Officer's Determination (Nov. 6, 2013), at 4; See also Matter 13-01288, *Request for Records*, Determination - Trade Secret 14-02 (Jun. 30, 2014).

v *New York State Energy Planning Board*, New York State Electric & Gas Corporation (“NYSEG”) filed a Freedom Of Information Law (“FOIL”) request with the State Energy Board seeking certain production data submitted to the New York State Energy Planning Board (the “Board”) by Indeck Energy Services of Silver Springs (“Indeck”).¹¹ When Indeck had submitted the production data to the Board it sought confidential treatment for the data, claiming that disclosure “would cause substantial injury to [its] competitive position.”¹² The Board’s RAO denied NYSEG’s FOIL request, and the RAO’s decision was later upheld by the Board. According to the Board, although NYSEG then purchased electricity from Indeck under a power purchase agreement, competition between NYSEG and Indeck at some point was evident. The Appellate Division upheld the Board’s determination that disclosure of operational data would cause “substantial injury to the competitive position of the subject enterprise.”¹³ The Appellate Division found that the Board’s conclusion “that disclosure could cause competitive damage [was] sound” because “the data sought [was] not public information and that the disclosure of such data could result in competitors, like [NYSEG], inferring essential aspects of Indeck’s production costs fundamental to projecting future costs.”¹⁴ Here, release of information regarding Ginna’s operations, as contained in the attachments, would similarly cause substantial injury to Ginna’s competitive position and should be excepted from disclosure.

The Commission has long recognized this legal precedent and stated its intent to follow it. In 2000, the Commission sought, among other things, “bid data” from the NYISO. The Commission defined “bid data” to include “*operational data* such as ramp rates, costs, levels, and minimum run times.”¹⁵ The Commission recognized the confidential nature of such information stating “[i]n our experience, the courts have consistently upheld withholding from disclosure confidential commercial information of the type at issue here. *We will take all available measures to ensure that this pattern continues.*”¹⁶

Conclusion

In sum, Ginna respectfully requests that the Protected Information in the attached filings be deemed protected from public disclosure in its entirety.

In the event that any person requests a record excepted from disclosure, Ginna respectfully requests that the Department of Public Service inform Ginna of the Department’s intention to determine whether such exception should be granted or continued and permit Ginna to submit a written statement of the necessity, including any supporting affidavit(s), for the granting or continuation of such exception.

¹¹ *New York State Elec & Gas Corp v New York State Energy Planning Bd*, 221 AD2d 121, 125 (3d Dept 1996).

¹² *Id.* at 123.

¹³ *Id.* at 124.

¹⁴ *Id.* at 124-25.

¹⁵ Case 00-E-1380, *The Provision by the New York Independent System Operator, Inc., of Information and Data to Department Staff, Order Clarifying Information and Data to be Provided and Measures Regarding Protection of Confidential Information* (Aug. 23, 2000), at 5 (emphasis added).

¹⁶ *Id.* at 4 (emphasis added).

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HARRIS BEACH PLC
ATTORNEYS AT LAW

Thank you for your attention in this matter.

Respectfully submitted,

/s/ Steven D. Wilson

Steven D. Wilson

Enclosures

cc: Active Party List (via email w/out enclosures)