



October 23, 2013

Donna Giliberto, Esq.
Records Access Officer
New York State Public Service Commission
Three Empire State Plaza
Albany, New York 12223

Re: Staff's review of Central Hudson Gas & Electric Corporation's cyber security implementation plan pursuant to the New York State Public Service Commission's Order in Case 13-M-0178.

Dear Ms. Giliberto:

Pursuant to the New York State Public Service Commission's ("Commission") Order in Case 13-M-0178, issued and effective August 19, 2013, Central Hudson Gas & Electric Corporation ("Central Hudson") formulated an implementation plan to address recommendations made by Dell SecureWorks in the wake of a cyber security incident that occurred in February of 2013. The Department of Public Service Staff ("Staff") has requested information associated with Central Hudson's implementation plan. Central Hudson is submitting the attached confidential material pursuant to Staff's request that resulted from its review of Central Hudson's implementation plan. The confidential material concerns an incident that remains under a New York State Police criminal investigation, contains trade secrets and concerns critical infrastructure. Central Hudson seeks confidential treatment of the confidential material pursuant to 16 NYCRR Part 6-1.

The requested information constitutes a trade secret pursuant to Section 87 of the Public Officers Law and Part 6-1 of the Regulations. That request is supported by Section 87, as well as the decisions in *New York Telephone Company v. Public Service Commission*, 58 N.Y.2d 213 (1982) and *Matter of Encore College Bookstores, Inc. v. Auxiliary Services Corporation of the State University of New York at Farmingdale*, 87 N.Y.2d 410 (1995).

Section 87 provides an exception from public disclosure for 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."¹ The confidential material is information submitted to the Commission, a state agency, by Central Hudson, a commercial enterprise, which if disclosed would cause substantial injury to Central Hudson and/or customers.

¹ N.Y. Public Officers Law § 87.2(d) (McKinney 2001).

Disclosure would harm Central Hudson by impairing its ability to protect its confidential information, including the personal information of its employees, customers and contractors. The Commission promulgated Part 6-1 of the Regulations to further define what constitutes a trade secret. Section 6-1.3(b)(2) of the Regulations contain the factors the Commission will consider in determining trade secret status.²

The Court of Appeals has considered what constitutes trade secret material. The Court held that the trade secret exemption in the Public Officers Law Section 87(2)(d) is triggered when public disclosure of the trade material would “cause substantial harm to the competitive position of the person from whom the information was obtained.”³ The Court determined that the party seeking trade secret protection need not establish actual competitive harm; “rather, actual competition and the likelihood of substantial competitive injury is all that need be shown.” In determining whether substantial harm exists, the Court determined that the existence of substantial competitive harm depends on the “commercial value of the requested information to competitors and the cost of acquiring it through other means.” The Court concluded, “where FOIA disclosure is the sole means by which competitors can obtain the requested information, the inquiry ends here.”

The attached confidential material falls within the definition of trade secret material. The information concerns material that would permit unauthorized persons, including competitors an opportunity to improperly obtain information concerning Central Hudson, its employees, competitors and customers. None of the information is publicly available. If the information is disclosed it would provide others with a competitive advantage in the market and the ability to perform criminal mischief to the detriment of Central Hudson and its customers.

The confidential information constitutes Critical Infrastructure Information and therefore, is protected confidential material. Specifically, the confidential material consists of information technology security.

Section 87 of the New York Public Officers Law provides an exception from public disclosure for records that “are specifically exempted from disclosure by state or federal statute.”⁴ The material submitted to the Commission, a state agency, by Central Hudson contains Critical Infrastructure Information. The Commission promulgated Part 6-1 of the Regulations to, in part, permit the protection of Critical Infrastructure Information.

Public Utility facilities, such as the information technology facilities at issue, have been recognized as Critical Infrastructure pursuant to New York Executive Law § 713, and New York Public Officers Law §§ 86, 89. New York Public Officers Law § 89 expressly authorizes state

² The factors are: 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 or duplicating the information by others without the person’s consent; and v) other statute(s) or regulations specifically excepting the information from disclosure. 16 N.Y.C.R.R. § 6-1.3(b)(2).

³ *Encore College Bookstores, Inc. v. Auxiliary Services Corporation of the State University of New York at Farmingdale*, 87 N.Y.2d 410 (1995).

⁴ N.Y. Public Officers Law § 87.2(d) (McKinney 2012).

agencies, including the New York Public Service Commission (“Commission”) to exempt Critical Infrastructure Information from disclosure under New York Public Officers law § 87(2).

Information technology facilities are also defined as critical infrastructure facilities under the Homeland Security Act, 6 U.S.C. § 121(d)(5) (*See* also 18 U.S.C. Appx. § 2B1.1 (Application Notes 13)). Further, 18 C.F.R. § 388.113 is consistent with the statutory definition because it defines critical infrastructure as:

(c) Definitions. For purposes of this section:

(1) Critical energy infrastructure information means specific engineering, vulnerability, or detailed design information about proposed or existing critical infrastructure that:

(i) Relates details about the production, generation, transportation, transmission, or distribution of energy;

(ii) *Could be useful to a person in planning an attack on critical infrastructure;*

(iii) Is exempt from mandatory disclosure under the Freedom of Information Act, [5 U.S.C. 552](#); and

(iv) Does not simply give the general location of the critical infrastructure.

(2) *Critical infrastructure means 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 (emphasis added).*

The confidential material provides the Commission with critical infrastructure information including but not limited to critical information technology systems. Such Critical Infrastructure Information is protected by North American Electric Reliability Corporation (“NERC”) Critical Infrastructure Protection (“CIP”) Policy. Disclosure of this Critical Infrastructure Information could harm Central Hudson and its customers by assisting those with sinister intentions.

In addition, the Homeland Security Act and NERC Standards are intended to protect Critical Infrastructure Information by prohibiting disclosure. Central Hudson requests that the Commission protect from disclosure Central Hudson’s critical infrastructure.

The protected material does not directly consist of confidential employee or customer data; release of the material could, however, result in unauthorized third parties obtaining such data. Part 6-2 of the Commission’s rules permits the protection of data collected by the Commission and consisting of the “name, number, symbol, mark or other identifier, can be used to identify that data subject.”⁵ The information that Central Hudson seeks to protect would contribute toward the release of precisely the type of data that may be used to identify the “data subject.”

⁵ 16 CRR-NY 6-2.2(b).

In Case 07-M-0548, in the Commission's Order on Rehearing Granting Petition for Rehearing at 17, Issued and Effective December 3, 2010, the Commission recognized that the "[p]rotection of consumer information is a basic tenet of the Public Service Law and our policies. The Commission instituted measures to protect customer privacy as part of that Order. Central Hudson's employees, who are also customers, deserve the same consideration and protection. Central Hudson, therefore, requests that the Commission protect from disclosure the confidential material.

The Commission is empowered to exempt from public disclosure material that is part of a criminal investigation, constitutes a trade secret,⁶ or consists of critical infrastructure. The Company, for the reasons stated above, respectfully requests that the confidential material be deemed exempt from public disclosure under Public Officers Law Section 87 and Part 6-1 of the Commissions Regulations.

Please contact the undersigned at (845)486-5831 or pcolbert@cenhud.com with any questions regarding this matter.

Respectfully submitted,



Paul A. Colbert
Associate General Counsel
Regulatory Affairs

Cc: John Sennet
Keith Haugen

⁶ *New York Telephone Company v. Public Service Commission*, 56 N.Y.2d 213 (1982).