

August 17, 2018

**VIA ELECTRONIC MAIL**

Ms. Jessica Vigars  
Records Access Officer  
New York State Department of Public Service  
Three Empire Plaza  
Albany, New York 12233-1350

Re: Matter 17-02273 – CleanChoice Energy Community, LLC – **Request for Protection from Disclosure**

Dear Records Access Officer:

CleanChoice Energy Community, LLC (“CCEC”) respectfully requests that the attached documents be treated by Department of Public Service Staff (“Staff”) and the New York State Public Service Commission (“Commission”) as trade secret information and/or confidential commercial information pursuant to Sections 87 and 89 of the Public Officers Law and 16 NYCRR § 6-1.3, and that they be afforded all of the protections against public disclosure available for such information, as provided by law.

The submission includes redlined and clean versions of CCEC’s revised sample mass-market Community Distributed Generation (“CDG”) contract and sample CDG disclosure form (collectively, the “Document”), in connection with CCEC’s business as a CDG provider. The Document is being submitted in response to a July 27, 2018 letter from Staff requesting that CCEC make certain revisions to its sample CDG contract and disclosure form in accordance with the requirements set forth in the Commission’s October 19, 2017 *Order Establishing Oversight Framework and Uniform Business Practices for Distributed Energy Resource Suppliers* in Case 15-M-0180, and the Uniform Business Practices for DER Suppliers (“UBP-DERS”) adopted in that Order. A redacted copy of the Document has been separately submitted to the Commission Secretary for public filing in Matter 17-02273.

For the reasons set forth herein, the Document qualifies for an exception from public disclosure as authorized by Public Officers Law § 87 and 16 NYCRR § 6-1.3 because it falls within the definition of trade secret material and because the public release of the redacted information would likely cause substantial injury to the competitive position of CCEC.

## **ARGUMENT**

Section 87(2)(d) of the Public Officers Law exempts from public disclosure 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.” The Appellate Division, Third Department has held that the “trade secret” and “substantial injury” tests are separate and distinct from each other, and that information satisfying either of the tests is exempt from public disclosure. *Matter of Verizon N.Y., Inc. v. New York State Pub. Serv. Comm’n*, 137 A.D.3d 66, 69-70 (3d Dep’t 2016). CCEC respectfully submits that the Document satisfy each of these standards and must therefore be exempted from disclosure.

### **A. Trade Secret**

16 NYCRR § 6-1.3(a) defines “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.” In determining whether information should be considered trade secret material, the following six non-exclusive factors are to be considered:

- (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 statutes(s) or regulations specifically excepting the information from disclosure. *Id.* at § 6-1.3(b)(2)(i)-(vi).

The Document satisfies the definition of trade secret material, as well as each of the factors identified above. The Document includes proprietary, sensitive information regarding CCEC’s customer sales agreements and disclosure statement that is not readily known to CCEC’s competitors or within the CDG marketplace. Disclosure of this information, which is not easily acquired or duplicated, would provide CCEC’s competitors with insight into CCEC’s business models, customer procedures and protocols, and unique products and services (including pricing), and would put it at an economic and competitive disadvantage relative to other CDG providers. While CCEC has not quantified the value of the information to its competitors, it believes that its competitors would find this business information to have great value.

As to the fourth and fifth factors, CCEC's contract, including the specific terms and conditions therein, and CCEC's unique product and service offerings, are the product of many hours of internal development, as well as significant costs. Redacting the entirety of the Document is warranted because the strategy to include or exclude certain issues from the customer agreement is a distinct business decision and, if disclosed publicly, has the potential to significantly harm CCEC's competitive position. Accordingly, CCEC respectfully submits that the Document should be considered trade secret and confidential in its entirety.

Based on the circumstances described above, the criteria for granting trade secret status are satisfied, and the Document should be exempt from disclosure in its entirety.

## **B. Substantial Injury**

In *Encore College Bookstores, Inc. v. Auxiliary Serv. Corp.*, 87 N.Y.2d 410, 419 (1995), the New York State Court of Appeals held that “[c]ommercial information...is ‘confidential’ if it would...cause ‘substantial harm to the competitive position’ of the person from whom the information was obtained” (citing *National Parks & Conservation Assn. v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974)). Clarifying this point, the Court of Appeals explained that actual competitive harm need not be shown, but instead “[a]ctual competition and the likelihood of substantial competitive injury is all that need be shown.” *Id.* at 421 (citing *Gulf & W. Indus. V. United States*, 615 F.2d 527, 530 (D.C. Cir. 1979)).

The Court established a two-prong test applicable to requests for exemption from disclosure for confidential commercial information. The first element requires a showing of actual competition. The second element requires a showing that disclosure of confidential commercial information would be likely to cause substantial competitive injury. The Document satisfies both elements of the *Encore* test and must be exempted from disclosure as confidential commercial information.

First, CCEC faces substantial competition in New York's market, wherein numerous participants are prepared to participate in CDG. This is demonstrated by the fact that dozens of CCEC's competitors already have registered with the Commission in this docket in accordance with the UBP-DERS. Given that New York's CDG market is still in its nascent stages, CCEC expects many more competitors to enter the marketplace in the near future. Thus, CCEC faces substantial actual competition in New York State, and the first element of the *Encore* test is satisfied.

Second, public disclosure of the Document would certainly cause substantial competitive injury to CCEC given existing competition. Under the *Encore* test, when the information can be obtained from sources other than government, consideration must be given not only to the commercial value of such information but also to the cost of acquiring it through other means. Comparing Article 6 of the Public Officers Law to the federal standard of the Freedom of Information Act (“FOIA”), the Court of Appeals stated:

“Because competition in business turns on the relative costs and opportunities faced by members of the same industry, there is a potential windfall for competitors to whom valuable information is released under FOIA. If those competitors are charged only minimal FOIA retrieval costs for the information, rather than the considerable costs of private reproduction, they may be getting quite a bargain. Such bargains could easily have competitive consequences not contemplated as part of FOIA’s principal aim of promoting openness in government.”

*Id.* at 420 (citing *Worthington Compressors v. Costle*, 662 F.2d 45, 51 (D.C. Cir. 1981)).

CCEC’s competitiveness in the CDG market is directly tied to its ability to provide customers with products and services that have a greater or unique value as compared to the products and services offered by its competitors. The extent to which CCEC’s competitors obtain the redacted information in the Document would provide them with insight into CCEC’s business practices, and in turn enable them to utilize that knowledge and actively compete with CCEC in the CDG marketplace. Indeed, in *Encore*, the Court of Appeals specifically cited to a business’s potential loss of customers to competitors and a corresponding loss of profits as factors that weigh in favor of a finding of substantial injury. *Encore*, 87 N.Y.2d at 421. Moreover, allowing CCEC’s competitors unfettered access to the redacted information would eliminate the need for them to expend considerable resources in developing same or similar products and services as CCEC, and could therefore cause irreparable harm to CCEC’s ability to compete. Thus, the second element of the *Encore* test is satisfied.

### **C. Safeguarding the Materials**

Due to the sensitive nature of the attached Document, pursuant to Public Officers Law Sections 87 and 89 and 16 NYCRR § 6-1.3, CCEC respectfully requests that the following safeguards be adopted:

1. The Document should be deemed exempt from public disclosure;
2. Access should be limited to the Commission and Staff, and disclosure to other individuals or parties be specifically prohibited;
3. In the event any person requests part or all of the Document, Staff should inform CCEC of its intention to determine whether such exemption from public disclosure should be granted or continued and permit CCEC to submit a written statement of the necessity, including any supporting affidavit(s), for granting or continuing such exception;

4. Staff and the Commission should refrain from referencing or including the unredacted Document in orders, rulings, testimony, discovery, or other agency materials unless CCEC's express consent is obtained for use of any of the information; and
5. Staff and the Commission should implement such further measures as it deems necessary for the protection of CCEC's trade secrets and confidential commercial information.

Thank you for your attention to this matter.

Respectfully submitted,

COUCH WHITE, LLP

*Justin J. Fung*

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Counsel for CleanChoice Energy Community, LLC

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Attachments

cc: Hon. Kathleen Burgess (via email; w/ redacted attachment)