

**STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION**

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**In the Matter of Eligibility Criteria for  
Energy Service Companies.**

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**Case 15-M-0127**

**Proceeding on the Motion of the Commission to  
Assess Certain Aspects of the Residential and  
Small Non-Residential Retail Energy  
Markets in New York State.**

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**Case 12-M-0476**

**In the Matter of Retail Access Business Rules.**

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**Case 98-M-1343**

**REQUEST FOR RULING DIRECTING  
COMPLIANCE WITH PROTECTIVE ORDER**

Direct Energy Service, LLC, on behalf of itself and its affiliates doing business as Energy Service Companies (“ESCOs”) in New York State (collectively, “Direct Energy”), respectfully submits this Request for a Ruling Directing Compliance with the Protective Order in these proceedings pursuant to Rule 3.6 of the Commission’s Procedural Rules, 16 N.Y.C.R.R. § 3.6 (2018).

**BACKGROUND**

Section 6-1.4(1) of the Commission’s Procedural Rules provides that in Commission proceedings in which a presiding officer has been appointed, requests for exemption from the disclosure requirements of New York’s Freedom of Information Law (“FOIL”) must be directed to the presiding officer rather than to the Commission’s Records Access Officer (“RAO”). 16

N.Y.C.R.R. § 6-1.4(1) (2018). Section 6-1.4(2) of the Commission’s Procedural Rules requires the party submitting such information to the presiding officer to also submit “a comprehensive brief specifying in detail the reasons why such information should be accorded confidential status.” 16 N.Y.C.R.R. § 6-1.4(2) (2018).

The Protective Order adopted by Administrative Law Judges Moreno and Van Ort further requires: (1) that parties seeking confidential treatment must prepare two versions of the materials in question, a “redacted” version and an “unredacted version;”<sup>1</sup> and (2) that such parties serve their brief and the redacted version of their materials on all parties in these proceedings. In their Ruling Modifying Protective Order on Temporary Basis issued April 19, 2017, Administrative Law Judges Moreno and Van Ort further directed that confidential information should not be provided directly to DPS Staff or to other state agency parties and that such confidential information should only be provided to all of those state agency parties indirectly through the presiding ALJs:

Until further notice, Providing Parties should not provide Protected Information directly to Staff and the State Agency Intervenor Parties. Protected Information must be provided directly to the ALJs and we will provide the Protected Information to Staff counsel.

As we discussed in our Ruling Regarding Procedures for Protecting Information Obtained by State Agency Intervenors, we continue to review the appropriate processes for providing State Agency Intervenor Parties with Protected Information. As stated above, until further notice, Providing Parties should not provide Protected Information to State Agency Intervenor Parties until we further address this matter.

Providing Parties should continue to provide Protected Information to the other Receiving Parties in conformance with the Protective Order and our subsequent rulings.

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<sup>1</sup> Ruling Adopting Protective Order and Notice to Non-Parties, Appendix A at p. 5 (issued February 17, 2017).

To date, these procedures have been modified only by the adoption on June 29, 2017, of Your Honors' Ruling Clarifying State Agency Party Obligations With Respect to Protected Information, which established certain procedures for sharing confidential information with state agencies other than the Department of Public Service and its staff, while once again directing that "providing Parties shall submit Protected Information to us and, in turn, we will provide the information to the State agency parties that have executed Exhibit 2."<sup>2</sup>

### **RELIEF REQUESTED**

With the sole exception of National Fuel Gas Distribution Corporation ("NFGD")<sup>3</sup>, none of the utilities responding to DPS Trial Staff's Information Request DPS-Utility 12 to date<sup>4</sup> have complied with these clear requirements. Because each utility departed from these requirements in different ways, each utility's responses will be addressed separately below. Direct Energy respectfully requests that Your Honors issue a ruling requiring each of these utilities to comply with the requirements of Your Honors' prior rulings described above.

### **ANALYSIS**

#### **1. NYSEG AND RG&E**

On February 6, 2019, NYSEG and RG&E submitted their confidential ESCO keys to Ms. Jessica Vigars in her capacity as the Commission's RAO. Since Your Honors have been appointed as the presiding officers in these proceedings, that submission was improper under Rule 6-1.4(1). By email dated February 15, 2019, NYSEG and RG&E partially corrected this

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<sup>2</sup> Ruling Clarifying State Agency Party Obligations With Respect to Protected Information, slip op at 12.

<sup>3</sup> NFGD's submission complied with these requirements because it employed the confidential ESCO key previously provided in compliance with these requirements.

<sup>4</sup> Orange & Rockland Utilities, Inc. has requested additional time to prepare its response to this request.

defect by sending their confidential information to Your Honors and to the other parties entitled to receive that information under the Protective Order.

Unfortunately, NYSEG and RG&E also provided their confidential responses directly to DPS Trial Staff counsel Steven Kramer and Francis Dwyer, in violation of Your Honors' directive that confidential information should not be provided "directly to Staff." Fortunately, NYSEG and RG&E did not also provide this confidential information to the other state agency parties in these proceedings and instead properly requested that Your Honors do so. NYSEG and RG&E also failed to provide copies of their requests for confidential treatment and redacted copies of their confidential ESCO keys to all parties as required by the Protective Order.

Direct Energy respectfully submits that compliance with Your Honors' rulings in these proceedings can be restored by Your Honors: (1) requiring NYSEG and RG&E to serve their requests for confidential treatment, along with redacted versions of their confidential ESCO keys, on all parties; (2) directing DPS Staff to return all confidential materials received from NYSEG and RG&E in response to DPS-Utility 12; and (3) providing that confidential information directly to DPS Staff and the other eligible state agency parties in conformance with the rulings discussed above.

## **2. CON EDISON**

Con Edison correctly provided the confidential portion of its response to DPS-Utility 12 directly to Your Honors, correctly provided a copy of its request for confidential treatment to all parties, and correctly left it to Your Honors to provide that confidential information to the other state parties. Con Edison incorrectly included Mr. Kramer and Mr. Dwyer on its email message transmitting that confidential information and also failed to provide a redacted version of its confidential information along with its request for confidential treatment.

Once again, this situation should be remedied by Your Honors; (1) requiring Con Edison to supplement its request for confidential treatment to include a redacted copy of its confidential information; (2) directing Mr. Kramer and Mr. Dwyer to return this confidential information to Con Edison; and (3) providing that information directly to DPS Trial Staff, as well as to the other state agency parties eligible to receive that information.

### **3. CENTRAL HUDSON AND NATIONAL GRID**

Central Hudson and National Grid each correctly provided their confidential response to DPS-Utility 12 and request for confidential treatment to Your Honors, and each provided their request for confidential treatment to all parties, but failed to also provide a redacted version of their confidential materials as required by the Protective Order. More importantly, both of these utilities also provided their confidential materials not only to Mr. Kramer and Mr. Dwyer (and in the case of Central Hudson, to seven other members of DPS Trial Staff as well), but also to representatives of the New York Attorney General and the Utility Intervention Unit of the Department of State.

The failure of these two utilities to comply with the provisions of the Protective Order requiring that such materials be provided indirectly through Your Honors rather than directly by the disclosing party should also be corrected. Specifically, all members of DPS Staff, NYAG and UIU receiving confidential materials from Central Hudson and/or National Grid should be required to return those materials and should instead receive those materials from Your Honors. In addition, these utilities should also be directed to provide all parties with the redacted version of their confidential materials as required by the Protective Order.

## **CONCLUSION**

**WHEREFORE**, Direct Energy Services, LLC respectfully requests that Your Honors issue a ruling directing each of the utilities referenced above to take the steps required to properly comply with the Protective Order and Your Honors' prior rulings in these proceedings.

Respectfully submitted,

/s/

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Dated: February 19, 2019