



VIA ELECTRONIC MAIL

March 15, 2016

Hon. Kathleen H. Burgess,
Secretary
NYS Public Service Commission
Three Empire State Plaza
Albany, NY 12223

Re: Case 12-M-0476 and Matters 14-02555 and 14-02554 - Disclosure of 2014 and 2015 Historic Pricing Information for Residential Service Provided By ESCOs; Appeals of RAO Determination 16-01, Determination of Request for Confidentiality Pursuant to Public Officers Law §87(2)(d)

Dear Secretary Burgess:

The Public Utility Law Project of New York, Inc. (“Utility Project”), submits these comments for your consideration in deciding appeals of Determination 16-01 of the Records Access Officer (“RAO”) in the above-numbered case.¹ The RAO determined that certain price reporting of charges for utility service required by order of the Public Service Commission (“PSC”) to be filed by “energy services companies” (“ESCOs”)² is not subject to the “trade secret” or “confidential information” exceptions to the Freedom of Information Law (FOIL), and is available for release to the public. The Utility Project welcomes and supports the RAO’s decision to release the limited price information filed by ESCOs with the Commission, as it represents a significant step toward the requisite price transparency necessary to enable consumers to make reasoned choices among rival providers of electricity and natural gas utility service.³

¹ RAO Determination 16-01 is at

<http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={0B43812D-7159-402D-B90C-6B7CBD579DE3}>.

² 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), at <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={6828AC15-33E4-4C97-87B2-97E35D83C407}>. The Commission stayed the requirement for ESCOs to submit historic pricing data for non-residential customers. Case 12-M-0476, *Order Granting Requests for Rehearing and Issuing a Stay* (issued April 25, 2014). As a consequence, it is not possible to examine publicly the extent to which nonresidential ESCO customers experience any savings, whether ESCOs charge them more, or the extent to which a sales tax break on delivery service to ESCO customers leads to inefficient bypass of lower priced but higher taxed bundled services from the distribution utility. See NY Utility Project, *New York City Closes Esco Electric Service Sales Tax Loophole; Will Other Localities And New York State Be Next?*, at <http://bit.ly/1UijEnl>.

³ The Commission required ESCOs to file “quarterly reports including a separate average unit price for products with no energy-related value-added services for each of four groups of customers

The Utility Project agrees that *RAO Determination 16-01* correctly applies the standard currently followed by the Commission in determining whether information in the possession of the Department of Public Service received from entities under its jurisdiction can be withheld from the public under the statutory exemptions for “trade secrets” and other “confidential information”. We concur that the objecting ESCOs have not substantiated either their claim that their prices are genuine “trade secrets” or that disclosure of their rates and charges to customers amounts to cognizable injury under FOIA.⁴

Further, the information required to be filed publicly with the Commission is well within the Commission’s statutory powers. The Public Service Law clearly provides that that the Commission shall:

Have power to require every gas corporation, electric corporation and municipality hereinafter in this subdivision called a utility to file with the commission and to print and keep open to public inspection schedules showing all rates and charges made, established or enforced or to be charged or enforced, all forms of contract or agreement and all rules and regulations relating to rates, charges or service used or to be used, and all general privileges and facilities granted or allowed by such utility.... PSL § 66. 12(a).

The Order requiring ESCOs to file their price reports anticipates that the information about ESCO rates and charges will be made public, and states “we direct ESCOs to file certain historic pricing information for dissemination to the public.”⁵ This falls within the powers granted by statute, which gives the PSC power to require filing of all utility rates and charges “open to public inspection.” PSL § 66.12(a).

ESCOs may argue they are not “utility corporations” subject to public rate filing requirements

⁴ It is thus not necessary to determine whether the prices of ESCOs are “trade secrets” under the narrower definition utilized by federal courts under identical FOIA provisions, which differs from the common law definition used in private litigation and summarized in the Restatement of Torts, which has been used by the Commission. See *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1288 (D.C. Cir. 1983); *Ctr. for Auto Safety v. Nat’l Highway Traffic Safety Admin.*, 244 F.3d 144, 150-51 (D.C. Cir. 2001); and *Anderson v. HHS*, 907 F.2d 936, 944 (10th Cir. 1990). The New York Court of Appeals, in *dictum* contained in *New York Tel. Co. v. Public Service Commission*, 56 N.Y.2d 213, 219, n. 3 (1982), that the Restatement of Torts definition of “trade secret” is “helpful”, and relied on the Restatement definition in private litigation in *Ashland Management v. Janien*, 82 N.Y.2d 395 (1993). but has not actually considered the narrower FOIA standard squarely in a FOIL case. When deciding the meaning of substantial injury from release of confidential commercial information under FOIL, POL §87(d)(2), the Court of Appeals did look to federal decisions under FOIA and followed the FOIA standard. *Encore College Bookstores v. Auxiliary Serv. Corp.*, 87 N.Y.2d 410 (1995).

⁵ 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), at 16 <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={6828AC15-33E4-4C97-87B2-97E35D83C407}>.

under PSL § 66.12(a).⁶ Because the Commission believes it has authority to assure that all rates, charges, contracts, terms and conditions of ESCO service are just and reasonable through derivative regulation of ESCOs through utility tariffs containing the UBPs, it is not necessary to reconsider whether ESCOs are “electric corporations” or “gas corporations” under direct jurisdiction of the Commission, whose rates must be publicly filed under PSL 66.12(a).⁷ The Commission has until now allowed ESCOs to operate under filed tariffs of the distribution utilities which incorporate the Commission’s “Uniform Business Practices”. The February 25, 2014 price reporting order is based on the Commission’s exercise of its powers under PSL § 66.12(e) to modify distribution utility tariffs.⁸ Those tariffs now incorporate the revised “Uniform Business Practices” (“UBPs”) applicable to ESCO access to utilities and their customers, and the revised UBPs in turn require ESCOs to make price reports, which the

⁶ It was once argued that Article 2 of the Public Service Law (the Home Energy Fair Practices Act) did not apply to ESCOs, but that interpretation was rejected by the Legislature with enactment of the Energy Consumers Protection Act of 2002 (“ECPA”). ECPA clarified that ESCOs are utilities under Article 2 of the Public Service Law. PSL § 53. ESCOs may attempt to argue they are not “utility corporations” under other Articles, including Section 66.12, which is in Article 4, but again their argument has no basis, and should not require further clarification by the Legislature. It would be absurd for ESCOs to be considered as “utility corporations” under PSL Article 2, with the power, for example, to suspend or shut off utility service for nonpayment of charges, but not be “utility corporations” whose rates, charges, contracts and practices must be just and reasonable, and publicly filed under Article 4.

⁷ Although to date the Commission has not considered ESCOs to be “utility corporations” under PSL Article 4, under an interpretation of “facilities” under the Federal Power Act, (analogous to “gas plant” and “electric plant” under PSL § 2(10) and (12)), the Federal Energy Regulatory Commission extended its direct jurisdiction over wholesale energy marketers as jurisdictional utilities, because their contracts for the sale of electricity and gas are “facilities”, even though – analogous to ESCOs – the wholesale energy marketers do not own or operate wires or pipes for delivery of the commodities. Just as contracts and other “paper facilities” make energy marketers public utilities under FERC jurisdiction, ESCO contracts and paper “plant” make them “gas corporations” and “electric corporations” as defined under PSL § 2(11) and (13), and they may be subjected to direct regulation by the Commission, if derivative regulation through utility tariffs is not sufficient to protect the public interest. See *Hartford Electric Light Co. v. Federal Power Commission*, 121 F.2d 953, 955 (1942) (paper “facilities” conferred jurisdiction). *Automated Power Exchange v. FERC*, 204 F.3d 1144 (D.C. Cir. 2000) (definition of FERC jurisdictional utilities not limited “to those entities that take title to power”).

⁸ Paragraph 1 of the February 25, 2014 Order requires:

“Revisions to the Uniform Business Practices, as set forth in Appendix B to this Order, are adopted in accordance with the discussion in the body of this Order. Energy Service Companies (ESCOs) eligible to operate in New York are directed to comply with the revised Uniform Business Practices.”

Paragraph 3 of the same Order required utilities to modify their tariffs to include the requirement. The UBP modifications include the price reporting requirement:

“An ESCO shall file with the Secretary, a separate average unit price for products with no energy-related value added services for each of four groups of customers and by load zone: i) residential price fixed for a minimum 12-month period; ii) residential variable price; iii) small commercial price fixed for a minimum 12-month period and iv) small commercial variable price. The averages should be weighted by the amount of commodity sold at each price within each customer category.” UBP Section 2(d)(3), attached to February 25, 2014 Order.

Commission in its Order clearly intended to be public.⁹

In sum, the claims of ESCOs that the reports of their rates and charges are “trade secret” or “confidential commercial” information are baseless.

Thank you for your consideration.

Respectfully submitted,

/s/

Richard Berkley, Esq.

⁹ Indeed, the ESCOs’ claim that the price reports they are required to file under the UBP revisions approved in the 2014 Order amounts should not be public amounts to a tardy effort to re-litigate before the RAO and Secretary a matter decided long ago by the Commission, and beyond the parameters for timely rehearing petitions and Article 78 proceedings.