

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

CASE 15-M-0127 - In the Matter of Eligibility Criteria for
Energy Service Companies.

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
New York State.

CASE 98-M-1343 - In the Matter of Retail Access Business Rules.

RULING ADOPTING PROTECTIVE ORDER AND NOTICE TO NON-PARTIES

(Issued February 17, 2017)

ASHLEY MORENO and DAVID R. VAN ORT, Administrative Law Judges:

A protective order can facilitate and expedite the discovery process of information alleged to be confidential. It permits parties to receive such information without having to wait for an advance decision on whether the information is protected from disclosure.¹

At the January 26, 2017 procedural conference, Judge Moreno advised the parties that she would circulate a draft protective order for their comment and invited those who were considering participating in these proceedings to contact her if they wished to review and provide comment on the draft protective order. Comments were received from the City of New York, jointly from National Energy Marketers Association (NEMA) and Retail Energy Supply Association (RESA), the Office of the New York State Attorney General (NYAG), Public Utility Law Project (PULP), the Joint Utilities² and Family Energy, Inc. The

¹ 16 NYCRR §6-1.4.

² Consolidated Edison, Orange & Rockland, Central Hudson, National Grid, New York State Electric & Gas, Rochester Gas & Electric and National Fuel Gas Distribution Corporation.

attached Protective Order adopts certain clarifications and corrections recommended by the parties; however, it contains only minor substantive modifications from the draft previously circulated for comment.

We rejected certain recommendations presented by commenters, for example, that the Protective Order should allow the party providing information (Providing Party) to require the party receiving information (Receiving Party) to give a written description of the method(s) used to safeguard the information by each person receiving it. Allowing a Providing Party to require a description of methods to safeguard information is not acceptable because it would effectively permit the Providing Party to unilaterally decide whether or not to provide the Protected Information based on the Providing Party's confidence in the adequacy of the Receiving Party's planned method(s) for protecting the information. The parties in these proceedings will be presumed to employ reasonable methods to safeguard the Protected Information until such time as a different showing is made.

We also rejected the requests that we eliminate the provisions a) requiring a certification that Protected Information was destroyed within one year after a case is completed, and b) assigning to a party's counsel or other authorized representative (collectively, "counsel") with the responsibility for ensuring that its client complies with the Protective Order, which some parties asserted would create an undue burden. Requiring a certification to the destruction of protected information would not present an unreasonable burden on counsel. Such certification is simply counsel's representation, after conducting due diligence, that it reasonably believes all Protected Information previously received in these proceedings has been destroyed. Similarly,

counsel's responsibility to ensure those individuals acting on behalf of its client (officers, employees, consultants, etc.) comply with the Protective Order requires that counsel adequately and timely advise its client regarding their obligations under the order.

Several other recommendations were rejected as unnecessary for these proceedings. Some examples include incorporating a definition of competitor, designating and providing separate treatment for information considered highly sensitive, including a definition of excluded employees and limiting their access to information and adopting a specific process to allow parties to access aggregate data. We expect the parties to use their best efforts to resolve issues related to discovery. In the event they are unable to resolve discovery disputes, despite those efforts, we may consider adopting additional provisions governing discovery, which could include provisions that were previously rejected. Several other recommendations were presented, but failed to put forth a specific proposal for our consideration.

The Protective Order underscores our roles in making an independent determination as to eligibility for protection, under 16 NYCRR Part 6, of any material entered into the record, even if the confidentiality claim is uncontested. It also requires preparation of redacted discovery responses to send to parties not entitled access to protected information, where the redactions would not render the document meaningless. We hereby adopt the Protective Order annexed hereto as Appendix A.

Parties that execute a Protective Agreement will be entitled to access information that would otherwise be exempt from disclosure. That access will be subject to the terms and conditions of the Protective Order and will be authorized solely for purposes of the party's participation in these proceeding.

The party representative who executes the Protection Agreement will be held responsible for ensuring that party's full compliance with the terms of the Protective Order.

Final Notice

Please note that documents related to Track I of these proceedings, namely the Notice of Evidentiary and Collaborative Tracks and Deadline for Initial Testimony and Exhibits, issued December 2, 2016, subsequent notices and the Ruling on Schedule and Procedure issued February 8, 2017, were served on all ESCOs, by U.S. mail, because their interests may be affected by any decision in these proceedings. This is notice that this ruling is the final document that will be provided to those ESCOs who are not parties to these proceedings or are not currently on the service list for the proceedings. To continue receiving documents issued by the Commission in these proceedings, you will be required to subscribe to the service list in these proceedings or, if you are interested in actively participating in these proceedings, you may seek to intervene by requesting party status. The following link to the Department of Public Service website describes the different ways interested persons or entities may monitor or participate in Commission proceedings and provides instruction about how to register for the service lists or request party status:

<http://www3.dps.ny.gov/W/PSCWeb.nsf/All/EC36B65739ED90B9852578BD0067EDB0?OpenDocument>.

Should the Commission render a decision that directly impacts ESCOs, the decision will be served directly on all

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ESCOs, regardless of whether an individual ESCO is on the service lists or is a party to these proceedings.

(SIGNED)

ASHLEY MORENO

(SIGNED)

DAVID R. VAN ORT

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PROTECTIVE ORDER

Purpose

The purpose of this Protective Order is to make Protected Information available to the parties promptly, in order to facilitate their participation in and the expeditious conduct of these proceedings, without adversely affecting any legitimate interests in either maintaining or challenging the confidentiality of the Protected Information.

Protected Information

1. For purposes of this Protective Order, “Protected Information” is information that is claimed to be protected from public disclosure under the Freedom of Information Law (FOIL), Public Officers Law, §§84 et seq., as implemented by Part 6 of the Rules of the Public Service Commission (16 NYCRR §6-1.1 et seq.). In order to qualify as Protected Information, such information must be submitted by a party (Providing Party) to the Administrative Law Judges, clearly and specifically identifying what information it believes should receive such treatment, together with a brief description of how the information meets the criteria for exemption from public disclosure under the Commission’s rules and the State Freedom of Information Law. The submitted information will thereafter be treated as confidential information and retain its protected status until, at a minimum, 15 days after the Providing Party’s claim has been finally denied (16 NYCRR §6-1.4(a)(3)).
2. If there is a request for public disclosure or a challenge to the claim of exemption from disclosure under FOIL or if the Administrative Law Judges in their discretion wishes to rule on the confidentiality claim, the Providing Party will be given an opportunity to provide a more detailed brief justifying its claim before the Administrative Law Judges rule. Any party may object to the designation of particular documents or other materials as Protected Information. A party objecting to the designation of documents or materials as Protected Information must notify the Providing Party, other parties to these proceedings entitled to access to the information in question, and the Administrative Law Judges of its objection. Upon

such an objection, within seven days the Providing Party must submit the documents or materials in question, with its comprehensive brief justifying the claim for confidential treatment, to the Administrative Law Judges in conformance with the provisions of 16 NYCRR §6-1.4(a)(1) and (a)(2) or as otherwise directed by the Administrative Law Judges. It is expected that the Administrative Law Judges will interpret exemptions from public disclosure in a narrow fashion, as required by law.

3. Protected Information is subject to and must be treated in accordance with the Freedom of Information Law and this Protective Order by all persons who are given access to such information unless and until the Providing Party's claims of protected status are rejected by an administratively final order or withdrawn by the Providing Party.

Access to Protected Information

4. The following parties are entitled to access to Protected Information: any party that (a) has requested the information or would normally be entitled to be served with it under the Commission's Rules of Procedure; (b) has acknowledged in writing its familiarity with the terms of this Protective Order by executing and filing with the Secretary to the Commission a copy of the protective agreement (Protective Agreement) set forth in Exhibit 1; and (c) is not a party that would benefit from access to the Protected Information by reason of being a competitor or having an adverse business interest to the Providing Party (except as provided in Paragraph 6 below). Parties may be found to be prohibited from accessing Protected Information for competitive reasons. Trial Staff of the Department of Public Service (Staff), the Utility Intervention Unit of the New York Department of State (UIU) and New York State Attorney General (NYAG) are subject to and familiar with the provisions of Public Service Law §15, or Public Officers Law §74, or both. These statutes provide for disciplinary action, fine, or prosecution for the disclosure of confidential information. Therefore, Staff, the UIU and NYAG are not required to execute the Protective Agreement in this Protective Order to have access to Protected Information, but are bound by the terms of this Protective Order. Parties receiving Protected Information under this Protective Order are "Receiving Parties."
5. A Receiving Party's (i) consultant, (ii) outside counsel, or (iii) other expert who is not an employee or agent of a competitor and is retained to assist the Receiving Party in its participation in these proceedings is an "Outside Consultant." If an Outside Consultant desires to obtain access to Protected Information for use in connection with these proceedings, the Receiving Party shall : (a) provide the Outside Consultant with a copy of this Protective Order; (b) obtain an executed Protective Agreement from the Outside Consultant; (c) file a copy of the executed Protective Agreement with the Secretary to the Commission; (d) notify the Providing Party of its intention to make Protected Information available to the Outside Consultant; and (e) obtain the consent of the Providing Party, which consent may not be unreasonably withheld. If the Providing Party does not object to the notice within

five (5) business days following service of the Protective Agreement, consent to such access will be deemed granted. If the Providing Party does object to any or all of its Protected Information being given to the Outside Consultant, the presiding Administrative Law Judges will establish procedures to resolve the objection expeditiously.

6. If a party has been denied access to Protected Information by reason of being a competitor or having an adverse business interest to the Providing Party, that party's Outside Consultant may nevertheless be granted access to Protected Information of a competitor for use in these proceedings under the following circumstances. The party that has been denied access to Protected Information shall: (a) provide the Outside Consultant with a copy of this Protective Order; (b) obtain an executed Protective Agreement from the Outside Consultant, including an affirmation that the Outside Consultant will not share Protected Information with the party denied access to the Protected Information, or any other person, firm, or corporation to whom disclosure is not permitted under this Protective Order; (c) file a copy of the executed Protective Agreement with the Secretary to the Commission; and (d) request that the Providing Party give the Protected Information to the Outside Consultant. The Providing Party may not unreasonably withhold such information. The Providing Party has five (5) business days following service of the Protective Agreement, to object to the Outside Consultant's receipt of Protected Information. If the Providing Party objects to giving any or all of its Protected Information to the Outside Consultant, the presiding Administrative Law Judges will establish procedures to resolve the objection expeditiously.
7. To access Protected Information as a Receiving Party, an authorized representative of the party seeking access must execute the Protective Agreement, file the signed Protective Agreement with the Secretary to the Commission, and serve it on all other parties. All parties, including officers, principals, employees, and agents, are bound by this Protective Order with respect to Protected Information submitted by any Providing Party at any time during these proceedings. Counsel or other authorized representative that has signed the Protective Agreement on behalf of the Receiving Party is responsible for compliance of the party, including providing the terms of this Protective Order to its officers, principals, employees, agents, and consultants, so that they are familiar with the terms of this Protective Order. Except as provided under this Protective Order, such party will not disclose, copy or otherwise reproduce, and/or use Protected Information for any purpose other than that authorized by this Protective Order.
8. When executing the Protective Agreement, a party may indicate that it does not want to receive all Protected Information automatically. The purpose of this provision is to relieve parties with limited interests in these proceedings from the obligation to safeguard unwanted information. In lieu of the Protected Information itself, the Providing Party will send parties that have elected this option a notice of the

availability of Protected Information and a brief description of the nature of the information. Parties who receive this notice may request all or some of the described information at any time during these proceedings. The Providing Party has no obligation to make it available until such request is received.

9. Counsel of record or authorized representative of a Receiving Party may, on a need-to-know basis and solely for the purposes of these proceedings, provide access to Protected Information to the following persons, subject to the conditions set forth in this Protective Order: (a) persons not employed by the Receiving Party but who are identified by that party as Outside Experts participating in these proceedings on behalf of that party, provided that each such person has executed the Protective Agreement and a copy of that agreement has been filed with the Secretary to the Commission and served on all other parties pursuant to Paragraph 5 above; and (b) employees of the Receiving Party.
10. A Providing Party may opt not to supply Protected Information to parties that have executed the Protective Agreement if the Providing Party has a good faith belief that such parties are not qualified to be Receiving Parties, as described in Paragraph 4 of this Protective Order. To exercise this option, the Providing Party shall provide a written statement of justification for its belief that such parties are among the persons for whom exceptions to disclosure of the particular Protected Information are or should be established. If such certain parties have objections to the withholding of the Protected Information by the Providing Party and such certain parties have attempted to resolve the objections on an informal basis but cannot reach agreement, the matter may be brought to the Administrative Law Judges for resolution.
11. To facilitate the review and inspection of Protected Information subject to this Protective Order, a Receiving Party will be provided with Protected Information promptly by electronic means. If it is impractical to provide that Protected Information by electronic means, it must be provided by overnight mail. The provisions of this paragraph do not limit or change in any way the provisions of the Commission's Rules relating to the time within which interrogatories or other discovery requests must be answered.

Safeguarding Protected Information

12. No duplication or reproduction of the Protected Information may be made beyond that which is necessary to give access to the persons authorized by the provisions of this Protective Order. Persons who are provided with access to Protected Information pursuant to this Protective Order may take limited notes regarding such information to the extent necessary in connection with these proceedings. The protections afforded to Protected Information apply not only to the originally provided document or file in which it was contained, but also to any subsequent documents, notes, recordings, electronic files, or other media in which it may be incorporated, including

copies generated by automated back-up systems for computer workstations and network data storage devices.

13. All parties in possession of Protected Information will safeguard it from public disclosure in accordance with the terms, purposes, and intent of this Protective Order. To this end, persons having custody of any Protected Information shall keep all copies and notes of Protected Information segregated physically under lock, electronically under password protection or encryption, or otherwise properly secured when they are not being reviewed and must not disclose Protected Information except as permitted by the provisions of this Protective Order, unless and until such Protected Information is released from the restrictions of this Protective Order, either through agreement of the parties or pursuant to a ruling of the Administrative Law Judges.
14. No person entitled to receive or afforded access to any Protected Information by reason of this Protective Order may either use or disclose the Protected Information for any purpose other than preparation for and conduct of these proceedings and then solely as contemplated in this Protective Order. As explained in paragraphs 2 and 27-30, all parties retain the right to challenge the status of Protected Information if they believe it should be publicly available.

Use of Protected Information in These Proceedings

15. Whenever documents or other materials containing Protected Information are to be provided to a Receiving Party, the Providing Party must produce two versions of the documents or materials, an “Unredacted Version” including the Protected Information, and a “Redacted Version” from which the Protected Information has been omitted or blacked out. The versions will be identical in pagination and formatting, differing only in the presence or absence of the Protected Information. The cover page of any document or report covered by this Protective Order shall be clearly marked “CONFIDENTIAL SUBJECT TO PROTECTIVE ORDER IN NY PSC CASES 15-M-0127 et al.” and each subsequent page should be clearly marked “CONFIDENTIAL – CONTAINS PROTECTED INFORMATION.” Where it would be unreasonably difficult to place this notation on each page of the document on which Protected Information appears, because the document is voluminous or for other good cause shown, the notation may be placed only on the first page of that document. Any document produced with such notation will be deemed to be subject to the terms of this Protective Order.
16. Discovery: Any response to an information request that requires the production of Protected Information will be supplied only to Staff, UIU, NYAG and the parties entitled to receive the information pursuant to Paragraph 4, except as described in Paragraph 6. An Unredacted Version of the response, together with the request for protected status, must be submitted to the Administrative Law Judges. In lieu of the

Protected Information itself, a Providing Party must send other parties a Redacted Version of the response. A Receiving Party may request all or some of the redacted information at any time during these proceedings, subject to the terms of this Protective Order.

17. Discovery: If there is a condition placed upon the disclosure of Protected Information produced by an Outside Consultant to protect the confidentiality of the Outside Consultant's proprietary model, or for some other similar reason necessary to protect the Outside Consultant's legitimate commercial interests, the Providing Party may condition the release of the Protected Information to the other parties, other than Staff, UIU and NYAG, upon their agreement to sign a separate confidentiality agreement designed to protect the Outside Consultant's legitimate commercial interests. Any such agreement shall not impose unreasonable restrictions on the ability of the party to use such information in these proceedings. If any parties have objections to any such agreement, and the Providing Party and such objecting parties have attempted to resolve the objections on an informal basis but cannot reach agreement, the matter may be brought to the Administrative Law Judges for resolution.
18. Pleadings: Subject to any special protection granted, parties may refer to Protected Information in briefs, motions, testimony, exhibits, or other materials filed in these proceedings (collectively, "Pleadings"), provided that separate versions of such Pleadings are prepared that include and omit the Protected Information (the Unredacted Version and the Redacted Version, respectively). The versions must be identical in pagination and formatting, differing only in the presence or absence of the Protected Information. If the Protected Information included in a pleading has not previously been the subject of a request for protected status, the Providing Party must include such request with its pleading, consistent with Paragraph 1 of this Protective Order. If the filing party is a registered user of the DPS Document and Matter Management (DMM) system, then both the Redacted and Unredacted Versions of the Pleadings are to be filed electronically in these proceedings. If the filer is not registered for electronic filing within DMM, only the Redacted Version of the Pleading and the request for protected status are to be filed with the Secretary. Under no circumstances should Protected Information be included in copies of Pleadings that are filed with the Secretary to the Commission for inclusion in the Commission's public files. The Unredacted Version of a Pleading must bear a conspicuous notation on the cover page and on each page bearing Protected Information, as set forth in paragraph 15 of this Protective Order. The Unredacted Version of any Pleading will be treated as Protected Information pursuant to this Protective Order. The Unredacted Version should be served only upon those parties entitled to receive Protected Information under the terms of this Protective Order, while the Redacted Version, and the request for protected status, should be served on all other parties.

19. Pleadings: If a party intends to include Protected Information in Pleadings, the party will notify the Administrative Law Judges, and, where applicable, the Providing Party, on a confidential basis. Absent good cause shown, such notice must be provided at least seven days prior to including the information in Pleadings.
20. Hearing/Conference: At any hearing or conference in these proceedings, no person other than those who would be entitled access to Protected Information pursuant to the terms of this Protective Order may be permitted to hear or review testimony given or discussion held with respect to Protected Information.
21. Hearing/Conference: At any hearing or conference in these proceedings, no witness may be questioned with respect to any Protected Information unless that person would be entitled access to Protected Information pursuant to the terms of this Protective Order. In order to facilitate the management of such disclosures, counsel or the authorized representative of a party will advise the parties and the Administrative Law Judges as far in advance as possible, and, absent good cause shown, no less than 72 hours in advance, that particular testimony, questioning, discussions or presentations are expected to include Protected Information. If Protected Information is included in Pleadings that have been pre-filed and are subject to cross-examination, the Administrative Law Judges will consider the extent to which such information must be protected in the context of public hearings and methods for providing such protection, if needed.

Unauthorized Release of Protected Information

22. If a party believes that it may have disclosed Protected Information to a person not entitled to receive it under the terms of this Protective Order, it will notify the Providing Party immediately and will give detailed information concerning all steps taken or being taken to reverse or minimize the impacts of the improper release. If the Providing Party agrees to share its Protected Information with persons not previously entitled to receive it, it will inform the Administrative Law Judges promptly.
23. Persons who use or disclose Protected Information contrary to the terms of this Order will be subject to such sanctions as may be imposed by the Administrative Law Judges or the Commission, which may include limitation or termination of the responsible individual's, or party's participation in these proceedings. Such persons and the parties they represent may also be liable criminally or civilly under relevant federal and State statutes and regulations.

Return or Destruction of Protected Information

24. The obligation of a party in possession of Protected Information to safeguard it from public disclosure does not end with these proceedings. It continues as specified in 16 NYCRR §6-1.4(a)(3).
25. Within one year following completion of these proceedings, including the periods for administrative or judicial review of these proceedings, a person in possession of Protected Information shall return it to the Providing Party or certify to the Providing Party that the Protected Information has been destroyed. The certification will describe how the Protected Information was destroyed and address the destruction of any subsequent documents, notes, recordings, electronic files, or other media in which it may be recorded, including copies generated by automated back-up systems for computer workstations and network data storage devices. Notwithstanding the foregoing, Staff may retain Protected Information provided that confidentiality is maintained consistent with the terms and conditions of the Protective Order. Other parties may retain Protected Information beyond the one-year period only if given express permission to do so by the Providing Party.
26. Nothing in this Protective Order imposes any obligations upon a Providing Party with respect to the handling of its own Protected Information.

Rights Not Waived by Acceptance of this Protective Order

27. This Protected Order does not constitute a substantive ruling that the Protected Information is entitled to confidential status pursuant to FOIL, POL §§ 84 et seq. or 16 NYCRR Part 6.
28. Nothing in this Protective Order limits in any way the right of any party to question, challenge, or object to the admissibility of any and all Protected Information furnished under the terms of this Protective Order on any grounds available by law, including relevancy, materiality and jurisdiction.
29. Nothing in this Protective Order limits or expands in any way the applicable law concerning the permissible scope of discovery.
30. This Protective Order shall in no way constitute a waiver of the rights of any party in these proceedings to contest any assertion, or to appeal any finding, that specific information is or is not Protected Information or that such information should or should not be subject to the protective requirements of this Protective Order. This Protective Order in no way constitutes any waiver of the rights of a party to appeal, in accordance with 16 NYCRR §6-1.4 or Freedom of Information Law §87, a ruling

of the Administrative Law Judges or to appeal a final order of the Commission as to the status as Protected Information of any information sought in connection with these proceedings.

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EXHIBIT 1

PROTECTIVE AGREEMENT

On behalf of:

(Name of Party)

I acknowledge receipt of a copy of, and have read, the Protective Order adopted in a ruling issued February 17, 2017, in Cases 15-M-0127, 12-M-0476 and 98-M-1343 before the Public Service Commission of the State of New York (Protective Order) and affirm that I have read and understand its contents, terms and provisions.

I understand that certain information to which the party I represent is to be given access is Protected Information within the meaning of that term under the Protective Order and that the use or disclosure of that Protected Information, other than as permitted by the Protective Order, may cause substantial commercial harm to a Providing Party.

Check one:

- ☐ I certify that I am an attorney for or other authorized representative of the Party identified above and have full authority to execute this document on its behalf (Receiving Party). I understand the party I represent is bound by the terms and conditions of the Protective Order and, except as specifically permitted in the Protective Order, its officers, and employees understand they cannot disclose Protected Information to any person, firm, or corporation, copy or otherwise reproduce Protected Information, or use Protected Information for any purpose for its benefit or the benefit of any other person, firm, or corporation. I assume responsibility for ensuring such compliance.

- ☐ I certify that I, and any firm identified below in which I am a principal or employee, have been retained by the party identified above as an Outside Consultant for the purposes of participating in these proceedings as defined in Paragraph 5 of the Protective Order and I have full authority to execute this document on behalf of any firm identified below. I and any firm identified below will comply with and be bound by the terms and conditions of the Protective Order and, except as specifically permitted in the Protective Order, will not disclose Protected Information to any person, firm, or corporation, or copy or otherwise reproduce such information, or use such information for any purpose for its benefit or the benefit of any other person, firm or corporation. I assume responsibility for ensuring such compliance.
- ☐ I certify that I, and any firm identified below in which I am a principal or employee, have been retained by the party identified above as an Outside Consultant for the purposes of participating in these proceedings as defined in Paragraph 6 of the Protective Order and I have full authority to execute this document on behalf of any firm identified below. I and any firm identified below will comply with and be bound by the terms and conditions of the Protective Order and, except as specifically permitted in the Protective Order, will not disclose Protected Information any person, firm, or corporation, or copy or otherwise reproduce such information, or use such information for any purpose for its benefit or the benefit of any other person, firm or corporation. I affirm that I, and any firm identified below, will not disclose Protected Information to any party denied access to Protected Information by reason of being a competitor or having an adverse business interest to a Providing Party pursuant to Paragraph 6.

NAME (PRINTED):

TITLE (PRINTED):

FIRM (if applicable):

SIGNATURE:

DATE:

The party named above elects (check one):

- ☐ To receive all Protected Information as soon as it is made available pursuant to the Protective Order.
- ☐ To receive notice of the availability of Protected Information.