

November 1, 2016

BY E-MAIL

Honorable Dakin D. Lecakes
Honorable Ben Wiles
Administrative Law Judges
New York State Department of Public Service
Three Empire State Plaza
Albany, NY 12223-1350

Re: Case 16-E-0060 – Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of Consolidated Edison Company of New York, Inc. for Electric Service.

Dear Judges Lecakes and Wiles:

Pursuant to the New York State Freedom of Information Law (“FOIL”) (N.Y. Pub. Off. Law §§ 84, et seq.; Part 6 of the New York State Public Service Commission’s (“Commission”) Regulations; and Paragraphs 2, 11, 12 and 13 of the Protective Order¹ issued in this proceeding, Energy Spectrum, Inc. (“Energy Spectrum”) submits this letter in support of its request to protect from public disclosure the following limited information:

Prepared Testimony of David Ahrens, Director, Energy Spectrum, October 2016
Page 4, line 21

Pursuant to Paragraph 13 of the Protective Order, a redacted version of the Confidential Information is provided herewith. A copy of the unredacted version was provided to the Records Access Officer on October 13, 2016² with an express reservation of the right of confidentiality.

I. LEGAL STANDARD

¹ Case 16-E-0060 and Case 16-G-0061, Ruling Adopting Protective Order (March 23, 2016) (“Protective Order”).

² Transmitted by Robyn Frank, General Counsel and Executive Vice President of Regulatory Affairs, Great Eastern Energy, on October 13, 2016.

The Confidential Information should be protected from public disclosure because it qualifies as “confidential commercial information”, exempt from disclosure pursuant to FOIL §87(2). *See also* 16 NYCRR § 6-1.1 and 1.3.

Section 87(2) (d) of the New York State Public Officers Law (“POL”) states that agencies may deny access to documents that are submitted to an agency by a commercial enterprise, the disclosure of which would cause substantial injury to submitting parties competitive business position; *Verizon New York, Inc. v. New York State Pub. Serv. Comm’n*, 46 Misc.3d 858 (3d Dep’t 2016) .

The Information Should Be Protected Because It Constitutes Confidential Commercial Information

The New York Court of Appeals has established a two-prong test for determining whether confidential commercial information may be exempt from disclosure. *Verizon*, Id; see also: *Encore Coll. Bookstores, Inc. v. Auxiliary Servs. Corp. of the State Univ. of N.Y. at Farmingdale*, 87 N.Y.2d 410, 419-421 (1995).

First, the party seeking exemption must show the existence of “actual” competition and must establish the extent to which competitors can use FOIL to obtain information without cost. *Encore*, 87 N.Y.2d at 420-21.

Second, the party must show that disclosure would likely cause substantial harm to its competitive position. *Encore* at 421; see also 16 NYCRR § 6-1.3(b)(2); *Verizon*.

Factors to be considered by the Commission in determining whether disclosure would likely cause substantial competitive harm include:

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 statute(s) or regulations specifically excepting the information from disclosure.

16 NYCRR § 6-1.3(b)(2).

The competitive harm in question does not have to be limited to the submitting entity. As the Secretary to the Commission has stated:

In order to meet its burden, the party seeking the exemption must present specific, persuasive evidence that disclosure will likely cause it, or *another affected enterprise*, to suffer competitive injury.

Case 13-01288 - In the Matter of Financial Reports for Lightly Regulated Utility Companies, Determination of Appeal of Trade Secret Determination at 11 (Aug. 13, 2014) (emphasis added) (citing Markowitz v. Serio, 11 N.Y.3d 43, 51 (2008)).

II. ARGUMENT

Energy Spectrum provides energy management services to Riverbay Corporation. In the opinion of Energy Spectrum, disclosure of the confidential non-public Standby Performance Credit obtained by Riverbay Corporation, would place Energy Spectrum at a competitive disadvantage.

III. CONCLUSION

The Confidential Information contained on page 4, line 21 of the pre-filed testimony of David Ahrens, consisting of specific dollar values, is non-public commercially sensitive information exempt from disclosure under the Freedom of Information Act and the Regulations of the Public Service Commission.

Disclosure of the actual dollar amounts would cause a competitive disadvantage to Energy Spectrum in providing its competitors with non-public information.

As such, it is respectfully requested that your Honor's issue an Order exempting the Confidential Information from public disclosure.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "David M. Ahrens", written over a horizontal line.

David Ahrens

