



Justin Atkins\*  
Regulatory Counsel

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**VIA E-MAIL**

recordsaccessofficer@dps.ny.gov

Ms. Donna Giliberto  
Records Access Officer  
State of New York  
Department of Public Service  
Three Empire State Plaza  
Albany, NY 12223-1350

Re: 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 – Request for Trade Secret Status

Dear Ms. Giliberto:

New York State Electric & Gas Corporation and Rochester Gas and Electric Corporation (together, the “Companies”), subsidiaries of Avangrid, Inc., respectfully request that certain information requested by Department of Public Service Staff (“Staff”) be accorded confidential trade secret status pursuant to the Commission’s regulations (16 NYCRR § 6-1.3(a)) and commercial confidential information status pursuant to the Commission’s regulations (16 NYCRR § 6-1.3(b)), thereby prohibiting disclosure of such information. Specifically, the Companies seek confidential trade secret and commercial confidential information protection for the Companies’ response to REM-16-005 (the “Confidential Information”). This information was requested by Francis Dwyer.

Public Officers Law (“POL”) Section 87(2) states in relevant part that agencies may deny access to 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.” N.Y. Pub. Off. Law § 87(2)(d)(McKinney 2007). The Commission not only has the power but also the affirmative responsibility to provide for the protection of trade secrets. N.Y. Tel. Co. v. Pub. Serve. Common, 56 N.Y.2d. 213, 219-20 (1982). The New York State Court of Appeals has held that the trade secret exemption in POL Section 87(2)(d) is triggered when public disclosure of the trade secret material would “cause substantial harm to the competitive position of the person from whom the information was obtained.” Encore College Bookstores, Inc. v. Auxiliary Serves. Corp. of the State Univ. of N.Y. Farmingdale, 87 N.Y.2d 410, 419 (1995) (citations omitted). In Encore, the Court held that where government disclosure is the sole means by which competitors can obtain the requested information, the inquiry ends with a consideration of how valuable the information at issue would be to a competing business and how much damage would result to the enterprise that submitted the information. Id. at 420. In contrast, the Court held that, where the material is available from another source at some cost, consideration must be given not only to the commercial value of such information but also to the cost of acquiring it

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through other means, because competition in business turns on the relative costs of opportunities faced by members of the same industry, which might be substantially different if one could obtain information by paying the copying cost rather than the cost of replication. Id. The Court also determined that the party seeking trade secret protection need not establish actual competitive harm; “rather, actual competition and the likelihood of substantial competitive injury is all that need be shown.” Id. at 421 (citations omitted).

The Commission has promulgated regulations to implement the provisions of the POL. See 16 NYCRR § 6-1.1, *et seq.* Section 6-1.3 allows a party to seek confidential trade secret protection for any records submitted to the Commission. Id. § 6-1.3. Section 6-1.3(b)(2) requires the Companies to “show the reasons why the information, if disclosed, would cause substantial injury to [its] competitive position.” Id. § 6-1.3(b)(2).

The Commission defines a “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.” Id. § 6-1.3(a). Factors to be considered by the Commission in determining whether to grant confidential status to trade secrets include, but are not limited to:

- 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. § 6-1.3(b)(2).

The Confidential Information constitutes a trade secret pursuant to the criteria listed above because it: i) is neither generally available to the public nor easy for members of the general public to obtain or duplicate without the Companies’ permission; ii) would be of great value to others; and iii) if disclosed, could cause the Companies to suffer substantial economic harm.<sup>1</sup>

The Confidential Information contains customer-specific information and third party billing information. It is proprietary to the Companies and the third party and contains non-public

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<sup>1</sup> The fact that there are no statutes or regulations specifically excepting the information from disclosure is not dispositive. See Case 06-M-0878, Joint Petition of National Grid PLC and KeySpan Corporation for Approval of Stock Acquisition and other Regulatory Authorizations, First Permanent Protective Order (Nov. 9, 2006) (exempting financial forecasts and information provided to credit rating agencies from disclosure as trade secret information).

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commercially sensitive business information. Customers would not expect this information to be disclosed to the public.

In addition, the Confidential Information would be of great value to others. Competitors of the third parties and the Companies could use the information to the disadvantage of the third parties and the Companies.

In light of the above, the Confidential Information falls within the Commission's trade secret rules. Accordingly, the Companies respectfully request that the Commission grant trade secret protection to the attached Confidential Information.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Justin Atkins", with a horizontal line through it.

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Enclosure

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