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Via E-Mail

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RE: Case 15-E-0560 – Complaint of Glenwyck Development, LLC against Niagara Mohawk Power Corporation d/b/a National Grid Regarding Underground Residential Distribution Provisions Contained in Rule 16 of PSC Tariff No. 220. Determination of Request for Confidentiality Pursuant to Public Officers Law §89(5)(b)(3). RAO Determination 16-05.

Dear Mr. McLaughlin, Ms. Krueger, and Mr. Kim:

This is a determination of the Department of Public Service (DPS) Records Access Officer (RAO) under Public Officers Law (POL) §89(5)(b)(3). It determines that certain information filed with DPS by National Grid (the Company) is entitled to an exception from disclosure under the Freedom of Information Law (FOIL).¹

BACKGROUND

On December 14, 2016, National Grid submitted an Implementation Plan in accordance with Ordering Clause No. 3 of the PSC's Order Granting Relief and Ordering Tariff Changes issued and effective October 17, 2016 in Case 15-E-0560. The Implementation Plan sets forth National Grid's plans for refunding developers affected by its earlier reimbursement policy

¹ N.Y. Public Officers Law, Article 6.

and provides a list of projects identified by National Grid that will receive reimbursement, but redacts the names of the developments and the developer company names. On December 15, 2016, National Grid requested trade secret protection and confidential treatment of the redacted information pursuant to POL §§87, 89(2)(b), and 16 NYCRR §6-1.3.

On December 21, 2016, Mr. McLaughlin requested that the Commission reject National Grid's request for trade secret protection, as presented in National Grid's letter of December 14, 2016, and direct National Grid to provide a full listing of affected developments and respective developer names.

In response to Mr. McLaughlin's letter, the Company, sent a letter to the RAO on December 21, 2016, stating that the confidential information should be exempt from disclosure under POL §§ 87, 89(2)(b), and 16 NYCRR § 6-1.3 because the information, as compiled in the document, is not available to the public at large and would require a third party substantial resources to compile a list of all developers, their developments/subdivisions, and the trench reimbursements received for those subdivisions. Further, that the Company asserts that it does not generally publicly disclose developer/development information in other proceedings nor does it provide public access to developer URD records. Additionally, it argued that since protection of customer information is a basic tenet of the Public Service Law and the Commission's policies, the Company's assertion of confidentiality is appropriate where the information is not readily available to the public and could violate personal privacy expectations of the developers under POL§89(2)(b).

The RAO informed Mr. McLaughlin and Ms. Krueger that DPS would determine the entitlement of the information contained in the record described above in accordance with POL §89(5), and gave Ms. Krueger the opportunity to submit a Statement of Necessity.

On January 9, 2017, Ms. Krueger sent a Statement of Necessity to the RAO recounting that it complied with the Commission's October 17, 2016 Order by submitting the names of developers and their respective developments/subdivisions in connection with trench reimbursement amounts to be provided in accordance with the Order. Ms. Krueger explained that the Company submitted a request for confidential treatment of the identity of the developers and their developments under POL §§ 87, 89(2)(b), and 16 NYCRR § 6-1.3 to protect customer information. She also noted that the Company did not have the developers' permission to make their information public.

STATEMENT OF APPLICABLE LAW

Pursuant to POL §89(5)(b)(3), the RAO is required to issue a written Determination granting, continuing, or terminating a FOIL exception and stating the reasons therefor.

National Grid seeks protection for the information based on the trade secret exception, generically citing POL § 87 and 16 NYCRR 6-1.3(b)(2). For trade secret protection to attach, it must be established first, that the information in question is a formula, pattern, device, or compilation of information which is used in one's business, and which gives one an opportunity to obtain an advantage over competitors who do not know or use it.² Second, if the information fits this general definition, then an additional factual determination must be made concerning whether the alleged trade secret is truly secret by considering:

- (1) the extent to which the information is known outside of the business;
- (2) the extent to which it is known by employees and others involved in the business;
- (3) the extent of measures taken by the business to guard the secrecy of the information;
- (4) the value of the information to the business and its competitors;
- (5) the amount of effort or money expended by the business in developing the information; and
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.³

These trade secret factors are non-exclusive, and not all factors must be established to prove that a trade secret exists.⁴

National Grid also asserts that the information should be withheld under the personal privacy exception of POL §§ 87(2)(b) and 89(2)(b). POL §89(2)(b) states that an unwarranted invasion of personal privacy includes, but shall not be limited to:

- i disclosure of employment, medical or credit histories or personal references of applicants for employment;
- ii disclosure of items involving the medical or personal records of a client or patient in a medical facility;
- iii sale or release of lists of names and addresses if such lists would be used for solicitation or fund-raising purposes;
- iv disclosure of information of a personal nature when disclosure would result in economic or personal hardship to the subject party and such information is not relevant to the work of the agency requesting or maintaining it;
- v disclosure of information of a personal nature reported in confidence to an agency and not relevant to the ordinary work of such agency;
- vi or information of a personal nature contained in a workers' compensation record, except as provided by section one hundred ten-a of the workers' compensation

² Verizon New York, Inc. v. New York State Public Service Commission, 137 A.D.3d 66, 72 (3d Dept. 2016).

³ Verizon, at 72-73, citing Restatement of Torts § 757, Comment b.

⁴ 16 N.Y.C.R.R. §6-1.3(b)(2).

- law; or
- vii disclosure of electronic contact information, such as an e-mail address or a social network username that has been collected from a taxpayer under section one hundred four of the real property tax law.

Finally, National Grid asserts that customer information should be protected as basic tenant of the Public Service Law, without citation to a specific section. We note that records are excluded from disclosure under FOIL where they “are specifically exempted from disclosure by state or federal statute” (POL 87[2][a]). Under PSL §65(7), gas and electric corporations may not “sell or offer for sale any list of names of its customers.”

NATIONAL GRID’S STATEMENT OF NECESSITY

The Company states the importance of upholding the basic tenant of the Public Service Law and the Commission’s policies to protect customer information. It asserts that the developers have not consented to disclosure of their personal information and that developer and developer names, when coupled with the other information in the Company’s submittal, should be exempt from disclosure as an unwarranted invasion of personal privacy. The Company’s primary objective in seeking confidential treatment is to ensure that its customers can continue to expect their personal information, which is not submitted to the Company with the intent or purpose of disclosure to third parties, will not be freely disclosed to the public without prior consent.

With respect to its trade secret arguments, the Company cites the Commission’s regulations at set forth at 16 NYCRR 6-1.3(b)(2)(i-vi) which list the six non-exclusive factors used in determining whether information should be granted confidential treatment. Additionally, the Company argued that it expended substantial internal resources to compile the confidential information and that this information is part of a list that outlines all residential developments energized in the Company’s service territory over the past few years. The list was compiled using information developers submitted to facilitate their electric and gas service requests. The Company asserts that this list is not readily available to the public at large, and, absent the Commission’s Order, would not have been published externally. The Company also argues that it would require a third party substantial effort and resources to compile the information in the format in which the Company has provided. According to National Grid, the list could be used by or sold to a third party for unsolicited marketing efforts targeted at these developers or the residential occupants of the subject subdivisions and developers did not anticipate or intend for such disclosure when they submitted their service requests to National Grid.

DISCUSSION

FOIL requires state and municipal agencies to make available for public

inspection and copying all records, “subject to certain exemptions.”⁵ Here, the Company’s trade secret arguments do not support an exemption from disclosure. Considering all the facts provided by the Company, I find no basis upon which to grant trade secret protection for this information. Creating a list of developers that have sought service from the Company and now require reimbursement is not the type of compilation of information that is contemplated by this exception. In particular, the Company fails to articulate how the list of developers is a compilation of information “which gives one an opportunity to obtain an advantage over competitors who do not know or use it.” The Company’s papers provide no discussion of competitive advantage to be gained by public disclosure of the names of developers in its service territory. Accordingly, the first prong of the trade secret test is not met and no further analysis is warranted.

Next, the Company cites the personal privacy exception created by POL §89(2)(b)(iii), indicating that it traditionally protects the names of customers, such as these developers. Arguably, we could conclude that this information is being sought, as required by the exception, “for solicitation or fund-raising purposes,”⁶ simply because we can discern no other reason that the requestor would need the information. In any event, it is unnecessary to decide whether POL §89(2)(b)(iii) would apply, because find that the Companies broader assertions that customer lists warrant protection under the Public Service Law have merit.

As discussed above, FOIL provides an exception from disclosure where a different state or federal law protects the information (POL §87[2][a]) and the Public Service Law addresses the release of customer lists by gas and electric corporations such as National Grid (see PSL §65[7]). Section 65(7) states that utilities shall not “sell or offer for sale” customer lists. PSL § 65 does not define the term “sale” and, in New York State, a “sale” is generally defined as a “[a]ny transfer of title or possession or both . . . rental, lease or license to use or consume . . . in any manner or by any means whatsoever for a consideration, or any agreement therefor.”⁷ Although this broad definition still includes a showing of some form of consideration, an even broader definition is appropriate in interpreting Section 65(7). The prohibition on selling lists of customer names was enacted as Chapter 114 of the Laws of 1978. The sole stated purpose of the legislation was the protection of privacy of customers. Notably, in memoranda in support of the law, several utilities – including National Grid’s predecessor -- specifically noted that the law would not change their practices because they already treat customer names as confidential information.⁸ Whether consideration is given in

⁵ Matter of Verizon N.Y., Inc. v Mills, 60 AD3d 958, 959 (2nd Dep’t 2009), quoting PSL §87(2); see Matter of Data Tree, LLC v Romaine, 9 N.Y.3d 454, 462 (2007).

⁶ POL § 89(2)(b)(iii).

⁷ Matter of EchoStar Satellite Corp. v Tax Appeals Tribunal of the State of New York, 20 N.Y.3d 286, 290 (2012), quoting Matter of Albany Calcium Light Co. v. State Tax Commission, 44 NY2d 986, 987 (1978, citing N.Y. Tax Law § 1101(b)(5); see also N.Y. Uniform Commercial Code § 2-106(1).

⁸ Letter in Support from Niagara Mohawk Power Corporation, dated April 24, 1978; Letter in Support from Brooklyn Union Gas Corporation, dated May 1, 1978.

exchange for a customer list or not, the same privacy concerns emerge. It makes no sense, therefore, to construe Section 65(7) to prohibit the exchange of customer lists for consideration, but nonetheless permit the release of the same lists in other contexts.

Finally, although PSL § 65(7) prohibits the release of customers lists by utilities, where the list has been provided to this agency by the utility by our mandate, we must treat the list with the same degree of customer privacy as if it had remained in the possession of the utility. Indeed, under PSL §15, employees and agents of the Department of Public Service are precluded from disclosing confidential information that comes into their possession in the course of their employment. A violation of that duty is a criminal offense.⁹

Accordingly, I find that PSL § 65(7) prohibits National Grid from publicly releasing customer lists and, therefore, that under POL § 87(2)(a), those lists are exempted from disclosure.

CONCLUSION

The information filed with DPS by National Grid described in the body of this Determination, is entitled to an exception from disclosure as confidential customer information.¹⁰ Review of my Determination may be sought, pursuant to POL §89(5)(c)(1), by filing a written appeal with Kathleen H. Burgess, Secretary to the Commission, at the address given above, within seven business days of receipt of this Determination. Receipt will be presumed to have occurred on February 2, 2017, accordingly, the deadline for the receipt of any such written appeal by the Secretary is February 13, 2017. Any requests for an extension of time in which to file a written appeal of this Determination should be directed to Secretary Burgess.

Sincerely,

Donna M. Giliberto
Assistant Counsel & Records Access Officer

CC: Robert Freeman – COOG

⁹ PSL §15.

¹⁰ See POL §87(2)(a); PSL 65(7).