

VIA E-MAIL

June 3, 2011

Donna Giliberto, Esq.
Records Access Officer
New York State Public Service Commission
Three Empire State Plaza
Albany, New York 12223

Re: Electric Customer Migration Report for the Niagara Mohawk Power Corporation

Dear Ms. Giliberto:

The Niagara Mohawk Power Corporation respectfully requests confidential trade secret protection and exception from public disclosure pursuant to the New York Public Officers Law and Part 6-1 of the Commission's Regulations (16 NYCRR Part 6-1), for the attached May 2011 Electric Customer Migration Report (Migration Report). The Migration Report shows Energy Services Company (ESCO)-specific migration data in the Company's service territory.

The Company requests that the Migration Report be excepted from disclosure pursuant to Section 87 of the Public Officers Law and Part 6-1 of the Regulations. That request is supported by Section 87, as well as the decisions in New York Telephone Company v. Public Service Commission, 58 N.Y.2d 213 (1982) and Matter of Encore College Bookstores, Inc. v. Auxiliary Services Corporation of the State University of New York at Farmingdale, 87 N.Y.2d 410 (1995).

Section 87 provides an exception from public disclosure for 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. Public Officers Law § 87.2(d) (McKinney 2001). The Migration Report is a document submitted to the Commission, a state agency, by the Company, a commercial enterprise, which if disclosed would cause substantial injury to the competitive position of ESCOs, which are also commercial enterprises, and thereby adversely impact the competitive market. The Commission promulgated Part 6-1 of the Regulations to further define what constitutes a trade secret. Section 6-1.3(b)(2) of the Regulations contain the factors the Commission will consider in determining trade secret status.¹

¹ The factors are: 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 or duplicating the information by others without the person's consent; and v) other statute(s) or regulations specifically excepting the information from disclosure. 16 N.Y.C.R.R. § 6-1.3(b)(2).

The Court of Appeals has considered what constitutes trade secret material. The Court held that the trade secret exemption in the Public Officers Law Section 87(2)(d) is triggered when public disclosure of the trade material would “cause substantial harm to the competitive position of the person from whom the information was obtained.” Encore College Bookstores, Inc. v. Auxiliary Services Corporation of the State University of New York at Farmingdale, 87 N.Y.2d 410 (1995). The Court 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.” In determining whether substantial harm exists, the Court determined that the existence of substantial competitive harm depends on the “commercial value of the requested information to competitors and the cost of acquiring it through other means.” The Court concluded, “where FOIA disclosure is the sole means by which competitors can obtain the requested information, the inquiry ends here.”

The Migration Report falls within the definition of trade secret material. The Migration Report captures, on a monthly basis, the number of customers that have migrated to, or from, ESCO service in the Company’s service territory, and the total KWH for each of the ESCOs’ customer classes. Disclosure of the Migration Report would unfairly assist new entrants in deciding on the timing of entry into the New York market, which markets to enter and which market segments to target or to avoid. While ESCO employees and other knowledgeable market watchers are most likely aware of the relative size of the ESCOs operating in New York State, disclosure of the Migration Report would confirm their educated guesses and make clear each ESCO’s exact position in the statewide market. Disclosure to competitors at almost no cost of the customer specific and KWH information in the Migration Report would devalue the efforts of ESCOs in New York as well as undermine the competitive marketplace. All market participants, including the Company, would be negatively impacted by any actions which harm the competitive market.

The Commission is empowered to exempt from public disclosure material that falls within the category of trade secrets. New York Telephone Company v. Public Service Commission, 56 N.Y.2d 213 (1982). The Company, for the reasons stated above, respectfully requests that the Migration Report be deemed to be confidential trade secret material exempt from public disclosure under Public Officers Law Section 87 and Part 6-1 of the Commissions Regulations.

Please contact the undersigned with any questions regarding this letter or the enclosure.

Respectfully submitted,

/s/ Adam L. Benshoff

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