



January 30, 2015

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

Re: 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 12-M-0476

Dear Ms Giliberto:

In accordance with the Commission's determination in its Order Taking Actions to Improve the Residential and Small Non-residential Retail Access Markets issued February 25, 2014, as modified by the Commission's Order Granting Requests for Rehearing and Issuing a Stay issued April 25, 2014, NYSEG Solutions, LLC ("NYSEG") respectfully submits the enclosed confidential and redacted copies of its Historic ESCO Pricing Data Report (the "Report").

NYSEG respectfully requests that the redacted portions of the Report, which provide the number of customers served by NYSEG on each of its various product offerings, (the "Confidential Information") be exempted from public disclosure under New York's Freedom of Information Law ("FOIL"). Disclosure of the Confidential Information would subject NYSEG to competitive injury in violation of the requirements of sections 87(2) and 89(5) of New York's Public Officers Law ("POL") and section 6-1.3 of the Commission's Rules of Procedure, 16 N.Y.C.R.R. § 6-1.3 (2013).

In *Encore Coll. Bookstores v. Auxiliary Serv. Corp.*, 87 N.Y.2d 410 (1995), the New York Court of Appeals held that the "substantial competitive injury" test established in POL § 87(2)(d) must be construed in the same manner as the similar language contained in the federal Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), which governs the disclosure of federal agency records. The Court explained that federal courts construed this provision of FOIA as follows:

[W]hether "substantial competitive harm" exists for purposes of FOIA's exemption for commercial information turns on the commercial value of the requested information to competitors and the cost of acquiring it through other means. Because the submitting business can suffer competitive harm only if the

desired material has commercial value to its competitors, courts must consider how valuable the information will be to the competing business, as well as the resultant damage to the submitting enterprise. Where FOIA disclosure is the sole means by which competitors can obtain the requested information, the inquiry ends here. Where, however, the material is available from other sources at little or no cost, its disclosure is unlikely to cause competitive damage to the submitting commercial enterprise.

87 N.Y.2d at 419. The Court also found that this definition of “substantial competitive harm” was consistent with the legislative policy behind POL § 87(2)(d) “to protect businesses from the deleterious consequences of disclosing confidential information so as to further the state’s economic development efforts and attract business to New York.” *Id.* at 420.

The Commission has substantial experience in applying this exemption from disclosure under FOIL and has promulgated a rule setting out six non-exclusive factors that it considers in determining whether it may require disclosure of materials provided to it by a commercial enterprise. Those factors are:

1. the extent to which disclosure would cause unfair economic or competitive damage;
2. the extent to which the information is known by others;
3. the value of the information to the possessor of the data and its competitors;
4. the difficulty and cost of developing the information;
5. the difficulty of recreating the data without permission; and
6. whether the data is otherwise exempted by law from disclosure.

16 N.Y.C.R.R. § 6-1.3(b)(2) (2013).

In a recent ruling applying these legal requirements to a request for disclosure of the financial information which lightly regulated generators are required to provide to the Commission in their annual reports, you found that disclosure of such information would result in competitive injury:

The companies have shown that the information in question fits within the definition of trade secret, and, by the sum of the submittals, they have shown that release of the information at issue, would put generators and other companies owning delivery facilities in competitive markets at a competitive disadvantage if their competitors had access to the information. The companies have demonstrated that disclosure of the information would be likely to cause substantial injury to the competitive position of a

commercial enterprise and therefore have met the burden of proof they bear pursuant to POL §89(5)(e).<sup>1</sup>

Public disclosure of the Confidential Information would subject NYSEG to competitive injury by allowing its rivals to assess the effectiveness of its product offerings over the past quarter by analyzing the data for increases or decreases in numbers. Using this information, rival suppliers would be able to adjust their own offerings to better compete with NYSEG, causing NYSEG to suffer lost sales and revenues. In addition, NYSEG's suppliers could also use this information to erode NYSEG's bargaining power wholesale market transactions, since it would inform such suppliers as to the actual amounts of electricity NYSEG needs to serve its customers. This would allow such counterparties to extract higher prices from NYSEG, thereby increasing its costs and reducing its profits. The only way to avoid both these forms of competitive injury is by granting trade secret status to the Confidential Information.

The Confidential Information is not available to the public from other sources, nor does it constitute the type of information that NYSEG makes available to its competitors or its suppliers in the normal course of business. Instead, the Confidential Information is the product of a significant investment of NYSEG's time, effort and expense that cannot be replicated by others without assistance from NYSEG. As such, this information is held by NYSEG on a confidential basis and is not disclosed to others except on a confidential basis.

Accordingly, NYSEG Services, LLC respectfully requests that the Confidential Information contained in its Historic ESCO Pricing Report be exempted from public disclosure under FOIL.

Respectfully submitted,

/s/

NYSEG Solutions, LLC

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<sup>1</sup> Matter 13-01288, *Request for Records of Assemblyman Brennan*, Trade Secret Determination 14-02 (issued June 30, 2014).