



October 13, 2008

Via Electronic Mail

Steven Blow, Esq.
Records Access Officer
New York State Public Service
Commission
3 Empire State Plaza
Albany, New York 12223

Re: Gas Customer Migration Report for The Brooklyn Union Gas Company
and KeySpan Gas East Corporation.

Dear Mr. Blow:

As per the October 20, 2006 letter decision issued by Secretary Brillling regarding a "Request for Certain Information in Unredacted ESCO Gas Flow-Through Data Reports for November and December 2005 (Trade Secret (06-1)," The Brooklyn Union Gas Company and KeySpan Gas East Corporation (collectively, the Company) hereby seek 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 Gas Customer Migration Reports (Migration Reports), dated October 2008. The Migration Reports show ESCO-specific migration data in the Company's service territory.

The Company requests that the Migration Reports 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 Reports are documents 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

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 Reports fall within the definition of trade secret material. The Migration Reports capture, on a monthly basis, the number of customers that have migrated to ESCO service in the Company’s service territory, the annualized load and the total volume of gas for each of the ESCOs’ customer class. Disclosure of this information would adversely affect ESCOs’ ability to procure natural gas supplies because suppliers could demand higher prices if suppliers knew the volume of gas ESCOs needed on a particular utility’s system. In addition, since ESCOs use available information concerning their competitors when creating their marketing plans, disclosure of the Migration Reports 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 Reports 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 customer specific and volumetric information in the Migration Reports would devalue the efforts of ESCOs in New York as well as undermine the development of the competitive market. All market participants, including the Company, would be negatively impacted by any actions which harm the competitive market.

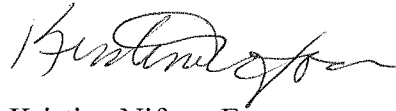
Disclosure of the number of customers and associated gas volumes on a statewide basis would distort the perspective of potential customers and also hurt the competitive market. A public disclosure of this information would not take into account that ESCOs can enter and exit a utility market for different reasons or an ESCO may focus its

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).

marketing efforts in a specific geographic area of the state, which has nothing to do with the ESCOs' reliability or price offerings. Customers or potential customers may incorrectly perceive an ESCO that has fewer customers or delivers less volume as not being financially, operationally or otherwise capable of providing service, when in fact, the ESCO just entered the 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 the Migration Reports 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.

Yours truly,

A handwritten signature in dark ink, appearing to read 'Kristina Nifora', with a stylized flourish at the end.

Kristina Nifora, Esq.

cc: Frances Hart, DPS
Honor Kennedy, DPS
Christine Bosy, DPS

Frank Zyckowski
Mike Bauer