

Paul A. Colbert
Associate General Counsel
Regulatory Affairs



May 1, 2015

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

Re: Cases 14-E-0318, 14-G-0319, *Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of Central Hudson Gas & Electric Corporation for Electric Service; Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of Central Hudson Gas & Electric Corporation for Gas Service* (Central Hudson's Report Regarding the REV Collaborative and Developing Demonstration Projects).

Dear Ms. Giliberto,

Central Hudson Gas & Electric Corporation ("Central Hudson") is submitting the attached protected material in Cases 14-E-0318 and 14-G-0319 referenced above, which contains information that is trade secret, customer, personal privacy of customers and contractors, and critical infrastructure information, and is therefore, protected material. A redacted version and this letter have been filed with the Secretary in these cases.

Specifically, the protected material includes competitive responses to requests for proposals, maps of customer locations and infrastructure, pricing models and forecasts, estimated project timelines, bidder identities, and other competitively and system critical information. The information includes specifications for specific Demonstration Projects that were used to develop bids from, or bilateral agreements with potential Demonstration Project partners and customers, which may harm customers if released because the release of the information may result in higher prices charged to customers. This information was gathered from the competitive markets by Central Hudson and is a mix of information belonging to third parties and Central Hudson.

The basis for protecting the various types of information discussed includes but is not limited to:

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I. Trade Secrets

The protected material that Central Hudson submits as attachments to its May 1, 2015 Report Regarding the REV Collaborative and Developing Demonstration Projects constitutes a trade secret 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.”¹ The protected material is information submitted to the New York State Public Service Commission (“Commission”), a state agency, by Central Hudson, a commercial enterprise, which if disclosed would cause substantial injury to Central Hudson and its customers.

Disclosure would harm Central Hudson by impairing its ability to gather information from competitive third parties and customers necessary for the development of Demonstration Projects. 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.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.”³ 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 protected material falls within the definition of trade secret material. The information concerns protected material that would damage Central Hudson, its

¹ N.Y. Public Officers Law § 87.2(d) (McKinney 2001).

² 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).

³ *Encore College Bookstores, Inc. v. Auxiliary Services Corporation of the State University of New York at Farmingdale*, 87 N.Y.2d 410 (1995).

customers and competitive third parties by increasing the price to customers of Demonstration Projects and through disclosure of third party competitive information and competitive customer information. None of the information is publicly available. If the information is disclosed it would provide others with a competitive advantage to the detriment of Central Hudson, competitive third party providers and, ultimately, customers.

II. Customer Information and/or Personal Privacy Information

The protected material that Central Hudson submits as part of its May 1, 2015 Report Regarding the REV Collaborative and Developing Demonstration Projects consists, in part, of customer information and personally identifiable information of competitive third parties and customers. Part 6-2 of the Commission's rules permits the protection of data collected by the Commission and consisting of the "name, number, symbol, mark or other identifier, that can be used to identify that data subject."⁴ The information that Central Hudson seeks to protect includes the type of data that may be used to identify the "data subject."

In Case 07-M-0548, in the Commission's Order on Rehearing Granting Petition for Rehearing Issued and Effective December 3, 2010, the Commission recognized that the "[p]rotection of consumer information is a basic tenet of the Public Service Law and our policies. Order on Rehearing at 17. The Commission instituted measures to protect customer privacy as part of that Order. Consistent with the Commission's Order in Case 07-M-0548, in Case 12-M-0192, in its Order Authorizing Acquisition Subject to Conditions Issued and Effective June 26, 2013 ("Order Authorizing Acquisition"), the Commission required Central Hudson to protect consumer information.⁵ The Commission instituted measures to protect customer privacy as part of that Order. Central Hudson's employees, contractors, and consultants, who are also customers, deserve the same consideration and protection. Central Hudson, therefore, requests that the Commission protect from disclosure the customer information and personal privacy information.

III. Critical Infrastructure Information

The protected material that Central Hudson submits as part of its May 1, 2015 Report Regarding the REV Collaborative and Developing Demonstration Projects consists, in part, of critical infrastructure information including Distributed Energy Resources ("DER") that will be connected to Central Hudson's distribution and transmission systems at specified locations. Electric facilities may include solar arrays, storage, combined heat and power, substations and other distribution, transmission and generating facilities. Such facilities represent critical infrastructure that is protected pursuant to New York Executive Law § 713, and New York Public Officers Law §§ 86, 89. New York Public Officers Law § 89 expressly authorizes state agencies, including

⁴ 16 CRR-NY 6-2.2(b).

⁵ Order Authorizing Acquisition at Attachment 1 at 4-6.

the Commission to exempt critical infrastructure information from disclosure under New York Public Officers law § 87(2).

Such facilities are also defined as critical infrastructure facilities under the Homeland Security Act, 6 U.S.C. § 121(d)(5) (See also 18 U.S.C. Appx. § 2B1.1 (Application Notes 13)). Further, 18 C.F.R. § 388.113 is consistent with the federal statutory definition because it defines critical infrastructure as:

(c) Definitions. For purposes of this section:

(1) Critical energy infrastructure information means specific engineering, vulnerability, or detailed design information about proposed or existing critical infrastructure that:

(i) Relates details about the production, generation, transportation, transmission, or distribution of energy;

(ii) Could be useful to a person in planning an attack on critical infrastructure;

(iii) Is exempt from mandatory disclosure under the Freedom of Information Act, 5 U.S.C. 552; and

(iv) Does not simply give the general location of the critical infrastructure.

(2) Critical infrastructure means existing and proposed systems and assets, whether physical or virtual, the incapacity or destruction of which would negatively affect security, economic security, public health or safety, or any combination of those matters.

The Commission is empowered to exempt from public disclosure material that constitutes a trade secret,⁶ is customer information, is personal privacy information, or is critical infrastructure information. The Company, for the reasons stated above, respectfully requests that the protected material be deemed confidential material exempt from public disclosure under Public Officers Law Section 87 and, where applicable, Parts 6-1 and 6-2 of the Commissions Regulations.

Please contact the undersigned at (845)486-5831 or pcolbert@cenhud.com with any questions regarding this matter.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Paul A. Colbert".

Paul A. Colbert
Associate General Counsel
Regulatory Affairs

⁶ *New York Telephone Company v. Public Service Commission*, 56 N.Y.2d 213 (1982).