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Ms. Donna M. Giliberto
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RE: Statement of Necessity for Exception from Disclosure – ESCO Historic Pricing Data for Residential Customers for 2014 and 2015
Case 12-M-0476, 14-02555 and 14-02554

Dear Ms. Giliberto:

The National Energy Marketers Association (NEM)[1] hereby submits this Statement of Necessity for Exception from Disclosure pursuant to POL §89(5)(b)(1)(2) regarding ESCO pricing information for residential customers for 2014 and 2015. Commission Staff's intention to make the information public was memorialized in your letter dated December 4, 2015. In your December 9, 2015, letter you granted an extension of time to file the Statement of Necessity to January 4, 2016. An additional extension was granted to January 11, 2016.

The Commission's Retail Market Investigation Order of February 25, 2014, required ESCOs to file with the Secretary historic pricing information on a quarterly basis.[2] The reporting includes a separate average unit price for residential fixed price products for a minimum twelve month period as well as residential variable price products, that include no energy-related value-added services,[3] and by geographic area. The requirement for filing this information for small non-residential pricing was stayed. It was clarified in your December 9th letter that staff is not seeking to release customer counts. Subsequent to the Order, ESCOs have been filing the historic pricing information to the Records Access Officer with a request for protection from

[1] The National Energy Marketers Association (NEM) is a non-profit trade association representing both leading suppliers and major consumers of natural gas and electricity as well as energy-related products, services, information and advanced technologies throughout the United States, Canada and the European Union. NEM's membership includes independent power producers, suppliers of distributed generation, energy brokers, power traders, global commodity exchanges and clearing solutions, demand side and load management firms, direct marketing organizations, billing, back office, customer service and related information technology providers. NEM members also include inventors, patent holders, systems integrators, and developers of advanced metering, solar, fuel cell, lighting, and power line technologies. NEM members are serving and intend to serve all classes of electric and natural gas consumers in the service territories of the New York utilities.

[2] Case 12-M-0476 et. al. Order Taking Actions to Improve the Residential and Small Nonresidential Retail Access Markets, at 16-18.

[3] It should be noted that risk management and both financial and physical hedging policies, practices, and investments are in fact and should be recognized by this Commission as value-added products, services and/or technology for regulatory purposes. The difference between ESCOs with and without risk management expertise is an important distinction, which the Commission is reviewing, in a separate docket. See Case 15-M-0180.

disclosure under POL §§87(2)(d) and 89(5)(a) and 16 NYCRR §6-1.3. Accordingly, the Records Access Officer will make a determination under POL §89(5) regarding the ESCOs requests for protection from disclosure of the historic pricing data for residential customers for 2014 and 2015.

NEM submits that the information which is subject to disclosure in this docket is confidential and proprietary intellectual property, and does run a strong likelihood of causing substantial, and potentially irreparable, competitive injury to the disclosing entities.

Given all the tools available to the NYPSC to obtain actual "raw" post-vortex prices for its own investigative and informational purposes, a mandated blanket public disclosure of such sensitive, near current pricing information in a misleading "average" format serves neither the public interest of enhancing truly competitive pricing nor the innovative product development and value-added risk management techniques, practices and business knowledge that is the intent of current Commission policy development in the REV proceeding.

Make no mistake; NEM submits that the New York retail electricity market is one of the most intensely competitive markets in the country. Not only do competing entities fiercely contest each new customer, but they must do so in the shadow of major utility monopolies which have price recovery mechanisms unheard of in competitive "at risk" markets.[4] NEM completely understands and supports the Commission's objective to educate and empower consumers to make properly informed consumption decisions.

NEM commends the Commission on its path breaking "Power to Choose" website and all the Orders issued since the Vortex to ensure the credibility and business ethics of retail marketing practices, as well as the transparency of retail prices, terms and conditions. However, the blanket public disclosure of averages of recent retail prices by supplier, by geographical territory, informs both competitors and monopolies of extremely sensitive internal price formation techniques, methodology, risk tolerances and regressively disadvantages smaller entities and start-ups in favor of larger, more established, sophisticated and regulated entities. Paradoxically, it also incents otherwise lower price offerings to follow higher priced competitors so as not to lose revenues unnecessarily.

Moreover, if this objective is to have current average or benchmark pricing information, such information is available in the marketplace without attribution by very credible research councils, and NEM would consider partnering with the NYPSC to fund the publication of such information to help both consumers understand the competitiveness of any given offer, and inform suppliers as to whether their offerings are, in fact, competitive.

NEM urges the Commission to reconsider this approach of price disclosure based upon the underlying principles of several established bodies of relevant jurisprudence; namely the Antitrust Guidelines used by the federal Department of Justice to determine the anti-competitive impacts of price disclosure among competing entities, the protection of "trade secrets" under

[4] It has been publicly reported that one or more utilities in the state of NY maintained below market pricing during the vortex, and attempted to recover the associated losses with above market pricing during the remainder of the year. While this practice may be lawful, if the losses were determined to be prudently incurred, this practice has serious anti-competitive implications, and belies the heightened regulatory focus directed at non-utility competitors within the State.

New York State Law (and legal principles governing protection of intellectual property), and the consistent historical confidential treatment provided such information by this Commission as well as its ready availability to the Commission in the event such information is needed in conjunction with a properly conducted investigation. For these reasons and those more fully set forth below, NEM urges the Commission to retain the exception from public disclosure for the subject pricing information at issue herein.

I. Application of the Encore Standard Requires that ESCO Historical Pricing Data be Excepted from Public Disclosure

Under Section 87(2)(d) of the Freedom of Information Law (FOIL), an agency, "may deny access to records or portions thereof 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." In determining whether the requested information should be excepted from disclosure, this Commission has applied the two-prong test set forth in Encore College Bookstores, Inc. v. Auxiliary Service Corporation, 87 N.Y.2d 410 (1995), 1) that the information submitting entities be subject to actual competition; and 2) whether the disclosure of the information would be likely to cause substantial competitive injury to the competitive position of the subject enterprise.

A. There is Actual Competition in New York

The first prong of the Encore test examines whether "actual competition" exists to warrant an exception from disclosure. As recently as the March 27, 2014, Determination of Trade Secret Information 14-01, the Records Access Officer found that, "the existence of competition in the electric and natural gas industry in New York State has been established."[5] In October 2008, the Commission found that, "the competitive market has grown into a robust market for non-residential customers and a sizeable market for residential customers."[6] These prior findings support a determination that actual competition exists among the ESCOs submitting confidential Post-Vortex pricing information for residential customers in this matter. NEM submits that competition in New York retail markets is both actual and intense.

B. Public Disclosure of Recent Average Company Specific Prices Creates a Likelihood of Substantial Competitive Injury and Potentially Misleads the Consuming Public

The public disclosure of average Post-Vortex prices charged by each individual competitor in the intensely competitive New York retail market can have significant anti-competitive impacts and damages to both suppliers and consumers.

[5] Citing Case 94-E-0952, In the Matter of Competitive Opportunities Regarding Electric Service, Opinion & Order Regarding Competitive Opportunities for Electric Service, Op. No. 96-12, confirmed 196 Misc.2d 924 (Albany County 1996), aff'd, 273 A.D.2d 708; 93-G-0932, Proceeding on Motion of the Commission to Address Issues Associated with the Restructuring of the Emerging Competitive Natural Gas Market; Case 98-M-1343, In the Matter of Retail Access Business Rules.

[6] Case 98-M-1343, Retail Access Business Rules, Order Adopting Amendments to the Uniform Business Practices, Granting in Part Petition on Behalf of Customers and Rejecting National Fuel Gas Distribution Corporation's Tariff Filing (issued October 27, 2008), page 10.

NEM members submit that there is a strong likelihood of substantial competitive injury attendant with the release of ESCOs pricing information for residential customers for 2014 and 2015. The Encore Court noted that the policy behind POL §87(2)(d) is, "to protect businesses from the deleterious consequences of disclosing confidential commercial information, so as to further the State's economic development efforts and attract business to New York." The Vortex was totally unexpected by all stakeholders. The industry has both learned from and adjusted its risk management, product offerings and trade practices significantly as a result. Blanket disclosure of otherwise confidential, proprietary information and intellectual property will have the opposite effect of the intended policy enunciated in Encore. The NYPSC is relying on the leverage of private capital investments by the newly established Energy Services and Technology Industry to implement its vision of modernizing the New York Grid. Forcing the blanket public disclosure of the proprietary intellectual property upon which this new industry relies will seriously undermine the stated goals of this Commission.

The disclosure of historic pricing information, filed by ESCOs as separate average unit prices, would have a strong likelihood of substantial competitive injury because: 1) the presentation of average unit prices, that are not representative of actual ESCO product offerings, will be providing false information to consumers that they may rely upon in drawing false conclusions about the relative value of competitive offerings; 2) there is a lack of comparability between ESCO pricing and utility pricing (because the Commission has yet to force detailed disclosure of utility cost and functional unbundling) that will be made more pronounced through the reliance on average unit pricing and improperly and incorrectly influence consumer perceptions of ESCO products; and 3) prior determinations of the Records Access Officer and Secretary denying confidential treatment to ESCO historic pricing information are distinguishable from the instant case because of the increased level of granularity, ESCO specificity and timeliness of the data sought to be disclosed.

While apparently well-intentioned, the publication of this most sensitive data discloses too much of the confidential proprietary business practices and risk management techniques as well as supply sources that are closely guarded trade secrets and violations of intellectual property rights of individuals and companies doing business in New York. Sharing this information with the NYPSC as ESCOs have regularly done, while a reporting burden, does not cause a substantial likelihood of competitive injury unless mishandled by the Commission. However, providing the same information directly to competing utilities and private companies unquestionably runs a very high likelihood of competitive injury. Such aggregated data is readily available without competitive impacts in the current marketplace.

1. **Dissemination of Pricing Information about Specific ESCOs Runs a Strong Likelihood of Substantial Competitive Injury**

Disclosing an ESCO's average unit prices does not represent any actual ESCO product offering. The pricing of ESCO products is a dynamic process, changing frequently to reflect market conditions. Consumers would not be able to duplicate the average unit price in the marketplace. Publishing this type of data will necessarily cause consumer misunderstanding and confusion. Indeed, it would, in effect, be the publication of *false information* to consumers.

The Commission's publication of false/inapposite statements about ESCO pricing, in the form of "average unit prices," will actively mislead consumers.[7] The publication of average unit pricing information would cause consumers to draw false conclusions about actual ESCO product offerings in general. This misleading pricing information would also cause consumers to draw false conclusions about the comparability of the value of the specific product that they are enrolled in with that of other ESCO products and to the utility default offering. Damages to ESCOs would begin to accrue at the moment the false/inapposite data is published.

These damages will be compounded as consumers rely on falsely drawn conclusions to break ESCO contracts and/or potentially migrate back to utility default service, which in many ways is even more disingenuous that average ESCO pricing. Consumers trust the Commission to be an objective purveyor of information. The dissemination of these false/inapposite and unavailable prices to consumers by such a trusted source will exacerbate the competitive injury to ESCOs and the competitive retail marketplace. Benchmarked, aggregated prices are readily available, and NEM and its members will be pleased to share these reliable, non-company specific, yet representative, current average prices.

In addition, the exact manner in which the historic average pricing information would be disclosed by the Commission is unclear. Whether the data will be disclosed on the Commission website versus news release, and how frequently the disclosure will occur, will compound the magnitude of the competitive injury to ESCOs. The Commission maintains the Power to Choose website that allows consumers to locate and compare current, active ESCO offers based on zip code, service type and service class. The Power to Choose website is a public and transparent listing of ESCO pricing, and is an important tool for consumers to utilize when shopping for a competitive supplier. The Commission's reasoning in adopting the Power to Choose approach still holds true today - to provide consumers with a snapshot of ESCO products so that they would have a representative idea of the options available but that the reporting would not be so extensive or rigidly constructed so as to prevent ESCO innovation in the marketplace.[8] The disclosure of historic average unit prices would not complement the Power to Choose website information. To the contrary, given the false nature of the historic average pricing information relative to current, actual ESCO offers, it would diminish and degrade the value of the Power to Choose shopping website as well.

2. The Lack of Comparability Between ESCO Pricing Data and Utility Pricing Data Will Subject ESCOs to Substantial Competitive Injury

The disclosure of ESCO historic pricing information based on average unit prices will not facilitate a comparison of ESCO products to the utility default product. In general, there is a lack of comparability between ESCO pricing and utility pricing and it stems from: 1) the nature of a product as fixed or variable and how frequently it may be subject to change; 2) whether the ESCO product includes value-added products and services; 3) the utility rate includes adjustment riders that preclude a transparent comparison and also distort the timeframe over which the commodity costs are charged; and 4) utility delivery rates have not sufficiently unbundled the fully embedded retail

[7] The elements of a defamation claim in New York are, "a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se." See Dillon v. City of New York, 261 A.D.2d 34, 38, citing Restatement Second of Torts § 558.

[8] Cases 06-M-0674 and 98-M-1343, Order Adopting ESCO Price Reporting Requirements and Enforcement Mechanisms, issued November 8, 2006.

commodity costs of default service and therefore the utility default, no notice last resort rate will necessarily be an artificially understated commodity rate.

In the February 2014 Retail Markets Order regarding the ESCO historic pricing data, the Commission said that, "[f]or the category of variable priced products with no energy-related value-added attributes, we anticipate that comparable information regarding utility charges will also be presented. The utility information will be adjusted to account for differences between how ESCOs and utilities charge for bill processing and other charges in order to charges in order [sic] facilitate a direct comparison." The Commission acknowledges in the foregoing that there is a lack of comparability between utility pricing and ESCO pricing. The lack of comparability becomes even more pronounced when the ESCO pricing data that is used for that evaluation is based on average unit prices that do not represent any actual ESCO offering. This data comparison is an unfair and inaccurate representation of the relative value of ESCO offerings. Consumers may change their ESCO shopping decisions and terminate ESCO contracts that provide value in reliance on the inapposite pricing information that ironically includes duplicative charges that have never been unbundled from utility rates when consumers migrate. This will cause substantial competitive injury to ESCOs that risk unjustifiably losing customers.

3. Prior Determinations of the Records Access Officer and Secretary Denying Confidential Treatment to ESCO Historic Pricing Information Are Distinguishable

The December 4, 2015, letter requested that ESCOs challenging disclosure of the pricing data explain why previous decisions of the RAO and Secretary should not be dispositive of the issue. The RAO and NYPSC Secretary made determinations in 2014 that certain ESCO historic pricing data was not entitled to exception from disclosure.[9] In that prior case, utilities had submitted data to Staff comparing bills rendered to residential and small commercial ESCO customers with the bills that would have been rendered by the utility if the customers had not switched to an ESCO and data comparing ESCO and utility supply prices. The data spanned the period of August 2010 and July 2013. ESCO names and enrollment data were not included. PULP submitted a FOIL request for the data. The RAO and the NYPSC Secretary subsequently concluded that disclosure of the data would not result in substantial injury to the competitive positions of ESCOs. The Secretary reasoned that,

> "Section 87(2)(d) of the POL allows agencies to deny access to confidential commercial information, defined by that provision, and also by 16 NYCRR § 6-1.3, as information whose disclosure would cause substantial injury to the competitive position of the affected entities. In Encore College Bookstores, the Court of Appeals reiterated this requirement, holding that the party seeking a confidential commercial information exception must demonstrate that disclosure of the information would be likely to cause substantial competitive injury. In order to meet its burden, the party seeking the exception must present specific, persuasive evidence that disclosure would be likely cause it to suffer a competitive injury. Speculative conclusions that disclosure might potentially cause harm, without factual support, are insufficient to demonstrate that the disclosure of the information would be likely to cause substantial competitive injury such that the information should be excepted from disclosure as confidential commercial information. *Given that (a) the ESCO sources of the bill*

[9] See Matter 11-01661 and Matter 12-00172 – DPS Records Access Officer Determination of Trade Secret 14-01, issued March 27, 2014; and Appeal of Trade Secret Determination 14-01, issued April 28, 2014.

or price information cannot be identified, (b) the bill or price comparisons are based on averages and thus do not represent any individual company's (or customers) actual bills or prices; and (c) the underlying information is stale and thus does not give any information about any ESCO's current business strategy, a likelihood of competitive injury from disclosure has not been shown."[10] (Emphasis added).

The bases identified by the Secretary for denying confidential treatment to the historic data in the prior matter are thus: 1) specific ESCO identities associated with the price information were not disclosed; 2) the aggregated nature of the pricing information; and 3) the staleness of the information. However, **the ESCO historic pricing data that is sought to be disclosed in the instant matter is distinguishable on all three bases**.

The February 2014 Retail Markets Order contemplated the publication of, "a list of the average price billed for each ESCO, separately for consumers in specific geographic areas of a utility service territory."[11] So, unlike the data in the prior determination, each ESCO will be separately identifiable with each average unit price. The pricing information will not be presented in an aggregate fashion, but will be specifically attributed to individual ESCOs. The data sought to be disclosed in the instant case is not stale – it is from 2014 through the present year. For these reasons, the prior determinations of the RAO and the Secretary on the disclosure of ESCO historic pricing data are not dispositive here.

In order to stress the sensitivity of the pricing information and how damaging and potentially anti-competitive the disclosure of recent prices of competing entities are viewed under controlling jurisprudence, NEM references the relevant prohibition included in Section 1 of the Sherman Act[12] against a "contract, combination . . . or conspiracy" that unreasonably restrains trade, which includes certain exchanges of information among competitors. For example, the U.S. Supreme Court held that the direct exchange of price information among competitors posed a competitive risk in *U.S. v. Container Corp*.[13] In this case, sellers of corrugated containers shared price information for a fungible product for which there was inelastic demand and competition for sales was on price.

The Court found, "the exchange of price information has had an anticompetitive effect in the industry, chilling the vigor of price competition. . . . Price is too critical, too sensitive a control to allow it to be used even in an informal manner to restrain competition."[14] The U.S. Supreme Court gave further guidance on the anticompetitive effects of the exchange of price and other data among competitors in *U.S. v. U.S. Gypsum Co.*,[15] citing the factors of the, "structure of the industry involved and the nature of the information exchanged."[16] The Gypsum Court stated that, "***Exchanges of current price information, of course, have the greatest potential for***

[10] Appeal of Trade Secret Determination 14-01, issued April 28, 2014, at 9-10.
[11] Case 12-M-0476 et. al. Order Taking Actions to Improve the Residential and Small Nonresidential Retail Access Markets, at 17.
[12] 15 U.S.C. § 1.
[13] 393 U.S. 333 (1969).
[14] Id. at 337-38.
[15] 438 U.S. 422 (1978).
[16] Id. at note 16.

generating anticompetitive effects and, although not per se unlawful, have consistently been held to violate the Sherman Act."[17] (Emphasis added).

The U.S. Department of Justice and the Federal Trade Commission issued Antitrust Guidelines for Collaborations Among Competitors[18] that address the sharing of information among competitors. The Guidelines explain that,

> Nevertheless, in some cases, the sharing of information related to a market in which the collaboration operates or in which the participants are actual or potential competitors may increase the likelihood of collusion on matters such as price, output, or other competitively sensitive variables. The competitive concern depends on the nature of the information shared. *Other things being equal, the sharing of information relating to price, output, costs, or strategic planning is more likely to raise competitive concern than the sharing of information relating to less competitively sensitive variables. Similarly, other things being equal, the sharing of information on current operating and future business plans is more likely to raise concerns than the sharing of historical information. Finally, other things being equal, the sharing of individual company data is more likely to raise concern than the sharing of aggregated data that does not permit recipients to identify individual firm data*. (Emphasis added).[19]

The Sherman Act case law and federal Antitrust Guidelines address the anticompetitive impacts of collusive data sharing among competitors, in particular, current pricing data, strategic planning information, current operating and future business plans and individual company (as opposed to aggregated) data. However, these principles bear directly on both the likelihood and the substantial nature of the competitive injury that can result from the disclosure and dissemination of the current, ESCO-specific, service territory-specific, residential pricing data in the manner suggested here by the Commission**.**

The disclosure of pricing information at this level of granularity and ESCO specificity subjects ESCOs to substantial competitive injury. The nature of the requested information in this case is confidential and intrinsically linked to energy marketers competitive positioning in the marketplace. Each ESCO develops its own risk management, market analysis, business strategy, resource utilization and execution plan that is the very essence of the business itself, and is extremely confidential, proprietary intellectual property which constitutes a trade secret under relevant New York law.[20]

Each ESCO develops valuable and very confidential individual pricing strategies drawn from proprietary sources, as well as its own unique and very valuable quantitative risk tolerances and analyses, techniques, sources, practices and knowledge accrued over time. Disclosure as

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[17] Id.

[18] Antitrust Guidelines for Collaborations Among Competitors, issued by the Federal Trade Commission and the U.S. Department of Justice, April 2000.

[19] Id. at 15-16.

[20] 16 NYCRR 6-1.3. Restatement of Torts, Section 757, comment b. "A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It differs from other secret information in a business in that it is not simply information as to single or ephemeral events in the conduct of the business . . . . A trade secret is a process or device for continuous use in the operation of the business."

proposed of this proprietary, intellectual property is or should be treated as a misappropriation of a "trade secret" which is or would constitute the basis of a lawsuit for damages under New York law.[21] This fact alone should persuade the Commission to reconsider the disclosure of this confidential, proprietary, and legally protected intellectual property.

The Secretary recognized that, "[i]n general, public disclosure of more current commercial data is more likely to cause competitive harm – if any harm is to be caused – than disclosure of "historical" (older) commercial data. Similarly, data ascribed to a particular competitor are more likely to be protected than data that are not attributed."[22] All of these factors clearly distinguish the degree of competitive injury associated with disclosure of the ESCO pricing data in the instant matter from the prior determinations of the RAO and the Secretary.

II. Conclusion

For the foregoing reasons, NEM urges the Commission to except the requested information from disclosure because of the substantial competitive injury it would impose on ESCOs in the New York market.

Respectfully submitted,

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[21] Restatement of Torts, Section 757, Liability For Disclosure Or Use Of Another's Trade Secret—General Principle
One who discloses or uses another's trade secret, without a privilege to do so, is liable to the other if
(a) he discovered the secret by improper means, or
(b) his disclosure or use constitutes a breach of confidence reposed in him by the other in disclosing the secret to him, or
(c) he learned the secret from a third person with notice of the facts that it was a secret and that the third person discovered it by improper means or that the third person's disclosure of it was otherwise a breach of his duty to the other, or
(d) he learned the secret with notice of the facts that it was a secret and that its disclosure was made to him by mistake.

[22] Case 12-M-0476 et. al. Order Taking Actions to Improve the Residential and Small Nonresidential Retail Access Markets, at 7.