STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

Case 12-M-0476 – Proceeding on Motion of the Commission to Assess Certain Aspects of the Residential and Small Non-residential Retail Energy Markets in New York State.

Matter 14-02555 – In the Matter of Compliance with ESCO Historic Data Quarterly Reporting.

Matter 14-02554 – In the Matter of Compliance with Annual, Triennial, and Third Party Marketer/Vendor Listing.

DETERMINATION OF APPEAL OF TRADE SECRET DETERMINATION

(Issued June 24, 2016)

The Retail Energy Supply Association (RESA) and the National Energy Marketers Association (NEM) appeal from a Determination of the Records Access Officer (RAO) of the Department of Public Service (Department or DPS) which concluded that certain portions of records submitted by Energy Service Companies (ESCOs) in the above-captioned proceedings are not entitled to an exemption from disclosure as "trade secrets" or confidential commercial information under the Freedom of Information Law (FOIL), Public Officers Law (POL) Article 6.[1] RESA and NEM argue that all of the information at issue meets both the test for "trade secret" status and the likelihood of substantial competitive injury test for exemption of confidential commercial information and, thus, the RAO's determination should be reversed, and the documents should be exempted from disclosure under FOIL. This Determination on Appeal affirms the RAO's determination declining to afford an exemption for "trade secret" or confidential commercial information giving rise to a likelihood of substantial competitive injury under FOIL.

INTRODUCTION AND BACKGROUND

On February 25, 2014, the Public Service Commission issued an Order that "addresse[d] major weaknesses in the residential and small non-residential retail energy markets due to the

[1] CASE 12-M-0476, Proceeding on Motion of the Commission to Assess Certain Aspects of the Residential and Small Non-residential Retail Energy Markets in New York State, Determination of Request for Confidentiality Pursuant to Public Officers Law §87(2)(d) (Determination 16-01) (issued February 1, 2016) (RAO Determination).

lack of accurate, transparent and useful information and marketing behavior that create[d] and too often relie[d] on customer confusion."[2] To help customers make informed purchase decisions, the Commission directed ESCOs to, among other things, file

> "a separate average unit price for products with no energy-related value-added services for each of four groups of customers and by geographic area: i) residential price fixed for a minimum 12 month period; ii) residential variable price; iii) small non-residential price fixed for a minimum 12 month period; and iv) small non-residential variable price."[3]

The Commission noted that it would publish comparative pricing information for the above-identified categories, specifying that:

> "We anticipate development of a list of the average price billed for each ESCO, separately for consumers in specific geographic areas of a utility service territory. We expect to sort the list based on average price, and organize ESCOs into quartiles, based on the average price charged to customers in the historical period. For 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."[4]

Publishing this comparative historic bill information, the Commission explained, will "allow actual and prospective customers to compare the prices of similar services that have been charged by each ESCO offering that type of service."[5]

On April 25, 2014, the Commission stayed the requirement that ESCOs file average prices for products with no energy-related value-added services sold to non-residential customers.[6]

Using a template developed by the Department, ESCOs have been submitting data to the Commission's Secretary, as directed by the Retail Markets Order. Essentially, the data consists

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[2] CASES 12-M-0476 et al., Proceeding on Motion of the Commission to Assess Certain Aspects of the Residential and Small Non-residential Retail Energy Markets in New York State, Order Taking Actions To Improve The Residential And Small Nonresidential Retail Access Markets (issued February 25, 2014), p. 4 (Retail Markets Order).

[3] CASES 12-M-0476 et al., supra, Retail Markets Order, p. 17.

[4] Id.

[5] Id. at 16.

[6] CASES 12-M-0476 et al., supra, Order Granting Requests For Rehearing And Issuing A Stay (issued April 24, 2014), p. 5.

of quarterly reports that include a separate average unit price for products with no energy-related value-added services sold to residential customers by geographic area, and customer counts. More specifically the report contains, among other things, the ESCO name, the year, the quarter, the service class, the utility name, service type (gas or electric), the geographical area, the number of customers for the last quarter, the rate (average price) and the term length (variable (month-to-month) or fixed). ESCOs have also been submitting such information to the RAO with a request that the information be exempted from disclosure as "trade secret" and confidential commercial information under POL §§87(2)(d) and 89(5)(a) and 16 NYCRR §6-1.3.

RAO's Letters regarding portions of the records contemplated for disclosure

On December 4, 2015, the RAO advised ESCOs of the Department's intention to make public the list of the average price billed by each ESCO in 2014 and 2015, as outlined in and directed by the Retail Markets Order. To the extent that ESCOs had requested that their information be exempted from disclosure, the RAO requested that they submit a written Statement of the Necessity for such exception from disclosure within 10 business days. The RAO urged the ESCOs to explain why "previous decisions of the RAO and Secretary are not dispositive of the issue."[7]

Upon the request of certain ESCOs, the RAO subsequently extended the deadline to January 11, 2016. The RAO also clarified that the data submitted by the ESCO would be organized and published in the format described by Retail Markets Order, specifying that customer counts will not be released.[8]

RESA's Statement of Necessity and the affidavit of Anthony Cusati

On January 11, 2016, RESA submitted a Statement of Necessity, with the affidavit of Anthony Cusati, III, the Regulatory Director of an ESCO providing services in New York, as well as other states. In its Statement of Necessity, while RESA acknowledged the RAO's clarification that customer counts would not be released, it nonetheless claimed that all of the information contained in the DPS-developed template would be released by Department, referring to this data as "Pricing Compilation."[9]

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[7] December 4, 2015 RAO Letter, p. 2.

[8] December 16, 2015 RAO Letter, p. 1-2.

[9] RESA's Statement of Necessity, (filed January 11, 2016) pp. 4-5.

According to RESA, the Pricing Compilation should be exempted from disclosure because it constitutes a "trade secret" or its release would cause substantial competitive injury to the ESCOs. Regarding the "trade secret" exemption, RESA argued that "the subject historic pricing and product information, [meets the definition of trade secret because] when taken together, [it] constitutes a 'compilation of information' that is used by ESCOs and reflects their respective critical business plans and operations and provides them with an advantage over competitors who do not currently know it."[10] It further asserted that the information met all six "trade secret" factors, briefly contending that:

> "The Pricing Compilation is not generally available to anyone outside of the individual ESCO; ESCOs take efforts to protect this information internally and, when required to disclose this information, file it with the Commission under the POL; this information is proprietary and important to ESCOs and can be extremely valuable to competitors; each ESCO expends considerable resources to develop a successful product and pricing strategy as it is the fulcrum upon which the successful operation of an ESCO is founded; and this comprehensive information, not otherwise publicly available, could not be acquired or duplicated by others without great difficulty."[11]

As to the exemption for confidential commercial information giving rise to a likelihood of substantial competitive injury, RESA contended that disclosure "will . . . allow a competitor to identify the individual disclosing ESCO's proprietary pricing strategy, proprietary margin strategy, and proprietary hedging strategy. Having obtained this proprietary information, a competitor will be able to predict how a disclosing ESCO will act in response to future or subsequent market conditions."[12] According to RESA, "a competitor will know how each disclosing ESCO will apply its proprietary pricing, margin, and hedging strategies. Such knowledge will be of significant competitive value, and its dissemination will cause substantial competitive harm to the disclosing ESCO."[13] RESA finally asserted that Pricing Compilation was similar to annual financial reports filed with the Commission by lightly-regulated

[10] RESA's Statement of Necessity, p. 9.

[11] RESA's Statement of Necessity, p. 11.

[12] RESA's Statement of Necessity, p. 19.

[13] RESA's Statement of Necessity, P. 19.

generators, which the RAO and Secretary found to be exempted under FOIL.[14] Thus, RESA concluded, the information fell within the "trade secret" and confidential commercial information exemptions of POL §87(2)(d).

The Cusati Affidavit, filed with RESA's Statement of Necessity, claimed that all of the information requested in the DPS template would be released. Mr. Cusati asserted "that disclosure of the historical pricing information filed by ESCOs would provide an opportunity for competitors to obtain a competitive advantage and cause substantial injury to the competitive position of the individual ESCO required to disclose this information,"[15] and described situations which he believed could be harmful. The Cusati Affidavit opined that "[b]ased on the disclosed actual prices and products a competitor can understand how the ESCO varies prices by zone and which zones the ESCO is targeting for increased market penetration; comprehend how the ESCO links their prices to changes in the Price to Compare . . . ."[16] Disclosure of the Pricing Compilation, Mr. Cusati maintained, could provide a competitor or prospective competitor with accurate information regarding "the specific pricing patterns and behavior of existing ESCOs with direct attribution to each ESCO [and enable them to determin[e] how to price a product, how to compete against existing competitors, how to enter a market and potential margins that can be achieved in this market."[17]

Mr. Cusati further asserted that "ESCO-specific customer information . . . could []be used by competitors seeking to enter the marketplace, provide similar services and could be extremely useful in targeting strategic geographic market."[18] He also thought that disclosure had the "potential to affect the ESCO's ability to procure energy supplies on favorable terms because disclosure would provide potential suppliers with knowledge of the ESCO's peculiar supply needs where it provides service, and potentially give suppliers an unfair competitive advantage

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[14] RESA's Statement of Necessity, pp. 13-14 (citing several RAO and Secretary decisions issued in Matter 13-01288, In the Matter of Financial Reports for Lightly Regulated Utility Companies).

[15] January 11, 2016 Cusati Affidavit, ¶2.

[16] Cusati Affidavit, ¶10.

[17] Cusati Affidavit, ¶7.

[18] Cusati Affidavit, ¶13.

by enabling them to seek higher prices from ESCOs based segments."[19] Additionally, he opined, release of the data would create an "unfair advantage to new market entrants who acquire valuable marketing information made available by perusing the PSC web site in lieu of the cost of having to undertake extensive market research. Effective marketing to retail customers is an incremental and costly process that ESCOs have developed over time."[20]

Mr. Cusati did not address whether the information is "trade secret."

NEM's Statement of Necessity

NEM's Statement of Necessity claimed that the information should be exempted from disclosure under POL §87(2)(d). NEM did not specifically address the "trade secret" exemption. It argued that, under Encore's two-prong test,[21] the pricing information for residential customers for 2014 and 2015 should be protected.[22] More specifically, NEM contended that Encore's first prong was met because the Commission had already found that competition in New York retail market is both actual and intense.[23] Moreover, NEM further claimed, Encore's second prong was met for two reasons. First, because consumers trust the Commission as purveyor of objective information, NEM explained, disclosure of "average unit prices," which, NEM believed, "are not representative of actual ESCO product offerings," would mislead and confuse, consumers, causing them to "draw[] false conclusions about the relative value of competitive offerings . . . [and to] break ESCO contracts and/or potentially migrate back to utility default service."[24] Second, although NEM acknowledged that the Commission will adjust utility information to account for differences between how ESCOs and utilities charge for bill processing, among other things, in order facilitate a direct comparison, NEM argued that there was no comparability between ESCO and utility pricing data. Such a lack of comparability,

[19] Cusati Affidavit, ¶14.

[20] Cusati Affidavit, ¶15.

[21] Matter of Encore Coll. Bookstores v Auxiliary Serv. Corp. of State Univ. of N.Y. at Farmingdale, 87 NY2d 410, 421 (1995).

[22] NEM's Statement of Necessity, (filed January 11, 2016) p. 2.

[23] NEM's Statement of Necessity (citing several Commission precedents).

[24] NEM's Statement of Necessity, pp. 4-5.

NEM added, could also cause customer to "change their ESCO shopping decisions and terminate ESCO contracts."[25]

Finally, with respect to the RAO's request that ESCOs explain why previous decisions of the RAO and Secretary disclosing the information of ESCOs were distinguishable, NEM argued that, unlike the previous RAO and Secretary determinations, here "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 [2015]."[26]

Impacted ESCO Coalition's Statement of Necessity

Impacted ESCO Coalition (IEC) supported arguments made by RESA. It nonetheless additionally argued that the pricing information was "trade secret" because, "even though the Commission intends to disclose only average ESCO price data, the average can be used to calculate proprietary ESCO pricing information, which includes pricing as well as hedging and margin strategies."[27] It claimed that, inasmuch as "cost factors are largely fixed and shared by the majority of ESCOs, it is possible to reverse engineer an ESCO's proprietary pricing information from its average price."[28] Moreover, IEC contended, release of ESCO pricing information would be "harmful to the competitive retail market and to the ESCOs themselves," reasoning that, average prices do not accurately reflect ESCO pricing information to the customer because they do "not take into account services and added value products."[29]

Finally IEC claimed that this case is distinguishable from prior RAO and Secretary decisions releasing ESCO information, because disclosure of the 2014 and 2015 ESCO historic pricing would be done in accordance with a Commission Order, rather than a FOIL request.[30]

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[25] NEM's Statement of Necessity, p. 6.

[26] NEM's Statement of Necessity, p. 7.

[27] IEC's Statement of Necessity, (filed January 11, 2016) p. 4.

[28] IEC's Statement of Necessity, pp 3-4.

[29] IEC's Statement of Necessity, pp. 4-5.

[30] IEC's Statement of Necessity, p. 6.

XOOM Energy New York, LLC's Statement of Necessity

XOOM argued that information "contained in the quarterly reports should be exempt[ed] from disclosure either as a "trade secret," or as confidential information which, if disclosed, would cause substantial injury to XOOM's competitive position."[31] Regarding its "trade secret" exemption claim, XOOM alleged that the information constituted "trade secret" because it was not known to or used by XOOM's competitors, which gave XOOM an advantage over them. In support of that assertion, XOOM cited to paragraph 6 of the Affidavit of Andrew Coppola, its Senior Vice President of Energy Supply and Pricing, which states that "XOOM is a privately held company, and maintains all of its financial and operational information completely confidential pursuant to confidentiality agreements, by operation of the NYISO's Code of Conduct, or other provisions of law."[32]

As to the exemption for confidential commercial information giving rise to a likelihood of substantial competitive injury, XOOM asserted that Encore's two prongs were met: the Commission had already found that there was actual competition in the State retail energy market, and as stated in the Coppola Affidavit, disclosure would cause XOOM to suffer a substantial competitive injury.

Mr. Coppola opined that release of the historic pricing information for 2014 and 2015, including "XOOM historic pricing methodology and operational data," would enable competitors "to value XOOM's business as well as assess its financial strengths and weaknesses and generally estimate its -suite of product offerings, positions, and competitive advantages in certain competitive markets. [It would also] . . . give competitors a look at how XOOM prices its products over time which also gives insight to XOOM's hedging strategy."[33] "XOOM's competitors, [Mr. Coppola said,] could too easily use this information to reverse engineer XOOM's marginal costs, which would allow competitors to under cut XOOM's pricing to consumers and otherwise compete to provide products and services."[34] Also, similar to NEM, Mr. Coppola believed that disclosure would mislead consumers, and that ESCO and utility

[31] XOOM's Statement of Necessity (filed January 7, 2016), p. 2.

[32] Affidavit of Andrew Coppola, ¶6 (attached to XOOM's Statement of Necessity).

[33] Coppola Affidavit, ¶¶2, 9.

[34] Coppola Affidavit, ¶9.

pricing data was incompatible, which could harm ESCOs.[35] Finally, XOOM claimed that prior RAO's and Secretary's decisions releasing ESCOs' information were distinguishable, repeating arguments analogous to NEM's.

U.S. Energy Partners LLC's Statement of Necessity

U.S. Energy Partners (USEP) argued that it was entitled to a "trade secret" exemption because "USEP's historical residential pricing information" met the trade secret factors set forth by the Supreme Court, Albany County, in Verizon.[36] USEP stated that its information was not available to persons outside USEP, that "only employees that deal with the operation of USEP have access to the pricing compilation," that the company "takes extensive measures in protecting its pricing compilation, by for example, requesting information be exempted from disclosure whenever required to submit information to the PSC."[37] USEP further claimed that its pricing information would be "very beneficial and valuable to its competitors because such information was "extremely important to USEP and [] critical to its success."[38] Finally, it asserted that, the information, which was "developed over time and [] is key to USEP's success in the industry as an ESCO," was not publicly available; its acquisition or duplication would be difficult.[39]

USEP additionally contended that its information should be exempted from disclosure as confidential commercial information giving rise to a likelihood of substantial competitive injury, because it met the substantial economic injury factors set by 16 NYCRR §6-1.3(b)(2). USEP argued that disclosure of the data, which "ha[d] been costly to develop" and was not publicly available would enable competitors "to determine many important, confidential aspects of USEP's operations, [including] USEP's confidential pricing strategy, [and] predict how USEP will alter its strategy based on the market changes."[40]

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[35] Coppola Affidavit, ¶¶15-16. For these reasons, XOOM urged, the Commission should hold a technical conference "to evaluate whether and how this pricing information should be made available." XOOM's Statement of Necessity, p. 4.

[36] USEP's Statement of Necessity, (filed January 11, 2016) pp. 1-3.

[37] USEP's Statement of Necessity, p. 2.

[38] USEP's Statement of Necessity, p. 3.

[39] USEP's Statement of Necessity, p. 3.

[40] USEP's Statement of Necessity, p. 4.

In support of its request for exemption, USEP submitted the affidavit of Robert J. Kreppel, its President, which focused on the likelihood of substantial competitive injury. According to Mr. Kreppel, who also assumed that all of the data requested in the DPS template would be released to the public, the requirement that ESCOs submit the number of customers in a particular pricing group would permit competitors to know where a particular ESCO is focusing its efforts, revealing the ESCO's weakness.[41] Moreover, Mr. Kreppel said that the pricing data, if disclosed, could be used by competitors to "'backwards engineer' the prices to determine suppliers margins and strategies," giving "competitors and new market entrants a leg up over current suppliers."[42]

Direct Energy Services LLC's and Verde Energy USA New York, LLC's Statements of Necessity

Direct Energy Services, LLC joined in the arguments made by RESA and NEM.[43] While Verde Energy USA New York, LLC's also joined in the argument made by NEM, it summarily claimed that its information should be exempted from disclosure as "trade secret" and confidential commercial information.[44]

Ethical Electric, Inc.'s Statement of Necessity

Ethical Electric, Inc. (Ethical) briefly argued that its information was protected under POL §87(2)(d). It urged that disclosure "would enable competitors to gain access to its "trade secret" information, allowing them insight into Ethical's business strategy. This information, [the ESCO claimed,] is not known to other parties and would allow them to gain an advantage over Ethical in the electric industry."[45]

American Power & Gas, LLC's and Crown Energy Services, Inc.'s Statements of Necessity

American Power & Gas, LLC asserted, without explanation, that the historical pricing information it submitted in 2014 and 2015 should be exempted from disclosure as "trade secret"

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[41] Affidavit of Robert J. Kreppel, ¶5.

[42] Kreppel Affidavit, ¶7.

[43] Direct Energy Services, LLC's Statement of Necessity, (filed January 11, 2016) p. 3.

[44] Verde Energy USA New York, LLC's Statement of Necessity, (filed January 11, 2016) p. 1. (containing a four-sentence affidavit of Anthony Menchaca).

[45] Ethical Electric, Inc.'s Statement of Necessity, (filed January 11, 2016) p. 1.

and confidential commercial information.[46] Likewise, Crown Energy merely claimed that it "concur[ed] that the proposed disclosure of pricing data involves serious and important considerations directly impacting the economic status of ESCOs and [their] ability to effectively compete in the marketplace."[47]

Energy Technology Savings, Inc.'s Statement of Necessity

While Energy Technology Savings, Inc. (ETS) claimed that its 2014 and 2015 historic pricing information should be exempted from disclosure as "trade secret," it provided no explanation.[48] It further argued that, under Encore, its pricing data constituted confidential commercial information, which if disclosed would subject it to substantial competitive injuries. ETS elaborated that release of its data, which it believed was "not known to other parties," would provide its competitors "strategic information regarding the services provided by ETS."[49]

The RAO's Determination

The RAO described the contents of the DPS-developed data submittal template, and reiterated that the template itself would not be published; only some of the data contained therein would be published in the format described in the Retail Markets Order.[50] The RAO also noted that her role was limited to deciding whether the ESCOs' information was entitled to an exemption under FOIL. Therefore, the RAO explained, to the extent some of the participants in the proceeding were attempting to re-litigate issues decided by the Public Service Commission, including the format for reporting average pricing information, the RAO was not the appropriate forum.

Also, although the RAO agreed with the participants that prior decisions finding certain ESCO information non-exempted under FOIL were distinguishable, she determined, nonetheless, that they failed to meet their burden of establishing their entitlement to a FOIL exemption. Regarding the "trade secret" exemption, the RAO found that none of the 11 participants met its burden of proving that the portions of records the Department seeks to disclose are "trade

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[46] American Power & Gas, LLC's Statement of Necessity, (filed January 11, 2016) p. 1.

[47] Crown Energy Services, Inc.'s Statement of Necessity, (filed December 9, 2015) p. 1.

[48] ETS's Statement of Necessity, (filed January 11, 2016) pp. 1-2.

[49] ETS's Statement of Necessity, pp. 1-2.

[50] RAO Determination, p. 2.

secrets," explaining that the ESCOs and their trade associations failed to adequately address the six "trade secret" factors.

Similarly, the RAO determined that the participants failed to meet their burden of establishing that disclosure of certain portions of the 2014 and 2015 historic pricing information, excluding customer counts, would cause substantial injury to the competitive position of the ESCOs. More specifically, while the RAO found that the first prong of Encore was met because there is actual competition in the State's retail energy market, she explained that the second prong was not met, for several reasons, including that the participant merely adduced conclusory allegations, without factual support. The RAO further rejected the argument that some of the ESCOs would be in a better competitive position than others, emphasizing that all ESCOs operating in New York will be on the same level playing field, because the Retail Markets Order required disclosure of the average pricing information of all ESCOs. Indeed, the RAO observed, the prices of gas and electric utilities, which are also subject to DPS reporting requirements, are publicly available on the agency's Power to Choose website. The RAO further rejected as unavailing claims that competitors would reverse engineer ESCOs' prices and marketing strategies, because neither the specific price associated with a specific ESCO nor the customer counts would be released. Finally, the RAO found that the Commission had already rejected as meritless the argument that disclosure would result in consumer misunderstanding and confusion, and therefore substantial competitive harm to the ESCOs.

NEM's Appeal

On March 2, 2016, NEM appealed from the RAO Determination, arguing that the RAO erred in declining to exempt the 2014 and 2015 historic pricing data for residential customers as "trade secret" and confidential commercial information giving rise to substantial competitive injury. Initially, NEM claims that, because ESCOs' pricing formulas and thought processes are "trade secrets" and form the basis for the historic pricing information at issue here, the historic pricing information should be exempted as "trade secret." NEM asserts that "ESCO pricing formulas are closely guarded, confidential information known only to select employees within a company and are not known outside of the business."[51] It further argues that "Pricing formulas, and the related thought process, are developed by specialized employees with specialized skill

[51] NEM's Appeal, (filed March 2, 2016) p. 3.

sets. The development of the pricing formula, including the associated underlying risk management, market analysis, business strategy, resource utilization and execution plan, is costly to develop."[52] According to NEM, "[t]he pricing formulas are reflective of the individual ESCO's cost structure and margin structure, [and are thus valuable to the ESCOs and their competitors] . . . . Because this information is so competitively sensitive and valuable to each individual ESCO, it is closely maintained to prevent its acquisition and duplication by others."[53]

Additionally, NEM argues, its Statement of Necessity sufficiently showed that disclosure of the residential pricing information would cause substantial competitive injury. Contrary to the RAO's contention that any injury would be mitigated because the information of all ESCOs would be disclosed, NEM alleges, "[j]ust because all ESCOs will incur the injury does not mean that it is not substantial."[54] Moreover, NEM adds, "the extent of the injury for smaller ESCOs, with fewer product offerings and smaller customer bases, would be even more significant . . . because their pricing structures and strategies for serving customers in particular service areas will be more transparent when the pricing information is disclosed."[55]

NEM further asserts that, contrary to the RAO's suggestion that ESCOs would not be competitively disadvantaged compared to utilities because utilities' pricing information is also disclosed to the public, utility pricing disclosure does not really ensure a "level playing field" because "the derivation of utility commodity pricing continues to be a virtual black box that bears little resemblance to current market conditions, is artificially subsidized by delivery service rates and is further distorted by out-of-period adjustments."[56] NEM also maintains that there is a causal link between the disclosure and the injury because "[b]ut for the disclosure of the information, this data would not be publicly available thereby causing the resultant injury to ESCOs."[57]

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[52] NEM's Appeal, p. 3.

[53] NEM's Appeal, p. 3.

[54] NEM's Appeal, p. 3.

[55] NEM's Appeal, p. 3.

[56] NEM's Appeal, pp. 3-4.

[57] NEM's Appeal, p. 5.

Relatedly, NEM claims, the RAO's requirement that ESCOs retain outside experts is excessive and unnecessary. According to NEM, ESCOs submitted "affidavits detailing the individualized impacts of the disclosure on respective ESCO businesses. In discounting those affidavits, the Determination effectively decided that ESCOs are not expert in the conduct of their own business and that only 'an economist or other expert' could meet the factual burden."[58]

Lastly, NEM asserts that, because the RAO recognized that prior RAO and Secretary determinations disclosing ESCO information were not applicable here, the RAO should have recognized that releasing residential pricing information for 2014 and 2015 "would be more injurious because each ESCO will be separately identifiable with a price; the pricing data is current data; and it will show ESCO pricing information over time."[59]

RESA's Appeal

On March 2, 2016, RESA also appealed from RAO Determination finding that RESA, similar to the remaining participants, failed to meet its burden of proving its entitlement to an exemption under POL §87(2)(d). RESA argues, generally, that the RAO incorrectly disregarded evidence that RESA submitted and failed to apply the Secretary's and RAO's recent rationale in an analogous matter. More specifically, as to the "trade secret" exemption, RESA contends that, contrary to the RAO's determination, its Statement of Necessity "addressed" each of the six Restatement factors.[60] RESA claims that "[t]he information in the Pricing Compilation is not known outside of each ESCO's business and not widely known by employees and others involved in the business, and ESCOs take significant measures to guard the secrecy of the information in the Pricing Compilation."[61] Relying on the Cusati Affidavit, RESA alleges that "ESCOs take great care to protect the information contained in the Pricing Compilation from disclosure to the public or other competitors," explaining, for instance, that "ESCOs do not publicize their pricing structures. Customers who are interested in switching providers may call and obtain a quote from an ESCO or use a website, but must provide certain qualifying

[58] NEM's Appeal, P. 4.

[59] NEM's Appeal, p. 4.

[60] RESA's Appeal, p. 10.

[61] RESA's Appeal, p. 10.

information first, such as a valid address or zip code."[62] RESA adds that "Customer information, including [customer counts], is kept strictly confidential since ESCOs' marketing and pricing strategies are heavily influenced by this information."[63] Internally, RESA further says, "[o]nly those few individuals who are responsible for developing an ESCO's pricing and marketing strategies are privy to all of the information contained in that ESCO's Pricing Compilation."[64]

To RESA, the historic pricing information "is of great value to ESCOs and their competitors . . . [because it reflects] the specific products offered by an ESCO, the geographic area where those products are offered, by both utility service territory and load zone, and at what price the products are sold."[65] RESA further asserts that the information may be used by competitors to "track an ESCO's historic pricing information and compare that information to market trends to predict that ESCO's pricing, margin, and hedging strategies," thereby reducing the competitor cost of participating in the market.[66]

Furthermore, RESA adds, a significant amount of resources was expended in compiling the historic pricing information because "ESCOs spend a considerable amount of time and money to develop effective marketing strategies to build their retail customer base in New York . . . [because they] conduct extensive market research to identify the geographic areas they want to target, the customer base they want to reach, and the products they want to sell."[67]

RESA believes that the information in the "Pricing Compilation" cannot be easily acquired or duplicated by others because of its level of details. Indeed, RESA argues "the Commission's inability to compile this information without the filing requirement in the Retail Markets Order demonstrates the sensitivity of the information in the Pricing Compilation, the measures ESCOs take to protect the information, and the difficulty of acquiring the information."[68]

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[62] RESA's Appeal, p. 11.

[63] RESA's Appeal, p. 11 (citing its Statement of Necessity and the Cusati Affidavit).

[64] RESA's Appeal. p. 11.

[65] RESA's Appeal, p. 11 (citing its Statement of Necessity, p. 6).

[66] RESA's Appeal, p. 11 (citing its Statement of Necessity and the Cusati Affidavit).

[67] RESA's Appeal, p. 11 (citing its Statement of Necessity, pp. 15-16).

[68] RESA's Appeal, p. 12.

RESA also asserts that a "trade secret" exemption is warranted because, under Encore, disclosure would result in a substantial competitive harm to the ESCOs.[69] The RAO, RESA claims, ignored its argument that disclosure would provide a competitive advantage to "new market entrants," as well as existing ESCOs, who could use "the information to enter the market and offer similar services at below market prices as well as to target specific geographic market segments, all without having to bear the cost of undertaking extensive market research."[70] According to RESA, similar concerns led the RAO and Secretary to protect the "trade secret" and confidential commercial information of lightly-regulated generators in a recent separate case, Matter 13-01288; RESA urges that the RAO should have applied the same reasoning here to the extent that "both situations deal with the disclosure of highly-sensitive financial data that would permit competitors to 'reverse engineer' a competing company's pricing, hedging, and margin strategies."[71]

Regarding the exemption for confidential commercial information giving rise to substantial competitive injury, RESA argues that, while the RAO properly found that the first prong of Encore was met, the RAO erroneously found that the second prong, whether disclosure of the information is likely to cause substantial injury, was not met. RESA asserts that "the information contained in the Pricing Compilation is extremely difficult, if not impossible, to obtain without Staff's contemplated disclosure here. ESCOs vigorously protect such information from being released to competitors because it can be used to forecast an ESCO's pricing, hedging, and margin strategies."[72] RESA further reiterates that disclosure would provide a windfall to new entrants who could enter the market and offer similar services at below market prices without having to consult extensive market research and incur the attendant cost. RESA believes that existing ESCOs could similarly use the pricing information to gain a competitive advantage in the areas in which they do not currently operate by undercutting prices to drive out

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[69] RESA's Appeal, p. 12 (arguing that under Encore, no further analysis is required here because "FOI[L] disclosure is the sole means by which competitors can obtain the requested information") (internal quotation marks and citations omitted).

[70] RESA's Appeal, p. 13 (citing its Statement of Necessity, pp. 15-16).

[71] RESA's Appeal, p. 14 (citing several RAO and Secretary determinations issued in Matter 13-01288, supra).

[72] RESA's Appeal, p. 13 (citing its Statement of Necessity, pp. 8-12 and the Cusati Affidavit).

the competition.[73] RESA concludes that the rationale underlying the exemption of lightly-regulated generators' information in Matter 13-01288 is applicable here.[74]

Finally, RESA contends that the RAO incorrectly rejected the Cusati Affidavit on the grounds that it does not meet the "standard that must be demonstrated."[75] RESA urges that the Cusati Affidavit should have been accepted as relevant evidence because of Mr. Cusati's "deep personal knowledge of the industry."[76]

BlueRock Energy Inc.'s appeal

BlueRock Energy Inc.'s challenge to the RAO's determination incorporates by reference the theories raised by NEM and RESA. BlueRock, however, acknowledges that it did not submit a Statement of Necessity to the RAO.[77]

DISCUSSION

As an initial matter, the list of historic ESCO pricing data, as described in the Retail Markets Order, is being developed by the Department and not ESCOs. The data that each ESCO submits to the Department under the sample information submittal form can be divided into three categories: (1) the products with no energy-related value-added services (products or commodity-only products) that the submitting ESCO sold to residential customers in specific geographical areas, (2) the average price charged by the ESCO for each product, (3) and customer counts. Contrary to some of the participants' erroneous claims that the Department will release all of the information submitted by ESCOs in 2014 and 2015, as explained by the RAO in a December 9, 2015 letter to the ESCOs, the portions of records that the Department contemplates to disclose do not include customer counts.[78] It also does not include prices at which each product was sold.[79] Only the first and second categories of information would be

[73] RESA's Appeal, p. 18 (citing its Statement of Necessity, pp. 15-16).

[74] RESA's Appeal, p. 18 (citing its Statement of Necessity, pp. 15-16).

[75] RESA's Appeal, pp. 8, 15 (internal quotation marks and citations omitted).

[76] RESA's Appeal, p.15. The Public Utility Law Project of New York, Inc., opposes the appeals.

[77] BlueRock's Appeal, pp. 2-3. Because BlueRock did not participate in the proceeding before the RAO, its appeal is deemed to be a filing in support of NEM's and RESA's appeals.

[78] December 9, 2015 Extension of Time Letter.

[79] CASES et al., 12-M-0476, supra, Retail Markets Order, p. 17.

disclosed in the list being developed by the Department. Accordingly, the issues here are whether the participants in the proceeding before the RAO met their burden of establishing that the compilation of average prices of the commodity-only products offered by each submitting ESCO to residential customers in specific geographical areas in 2014 and 2015, without customer counts and actual prices, should be exempted from disclosure under POL §§87(2)(d) and 89(5)(e).

"The Freedom of Information Law requires state and municipal agencies 'to make available for public inspection and copying all records,' subject to certain exemptions."[80] "[T]he entity claiming an exemption must show that the requested material 'falls squarely within the ambit of one of the statutory exemptions,"[81] by "articulat[ing] a particularized and specific justification for denying access."[82] In other words, such entity must provide specific, persuasive evidence, and cannot rely on conclusory, speculative assertions.[83] POL §87(2)(d) contains two "independent and distinct categories of exempt[ion]:"[84] the first, covers records, or portions thereof, that are "trade secret," and the second protects records that "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."[85] For the reasons that follow, the RAO's determination that none of the participants met its burden of establishing its entitlement to an exemption under POL §87(2)(d) is affirmed.

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[80] Matter of Verizon N.Y., Inc. v Mills, 60 AD3d 958, 959 (2d Dept 2009), quoting POL §87(2); see Matter of Data Tree, LLC v Romaine, 9 NY3d 454, 462 (2007).

[81] Matter of Verizon N.Y., Inc. v Bradbury, 40 AD3d 1113, 1114 (2d Dept 2007).

[82] Bradbury, 40 AD3d at 1114, citing Matter of Capital Newspapers Div. of Hearst Corp. v Burns, 67 NY2d 562 (1986).

[83] Matter of Markowitz v Serio, 11 NY3d 43, 51 (2008); Matter of Newsday, LLC v Nassau County Police Dept., 2016 NY App Div LEXIS 979, at *3 (2d Dept 2016) ("Conclusory assertions that certain records fall within a statutory exemption are not sufficient; evidentiary support is needed") (internal quotation marks and citation omitted); Matter of Rose v Albany County Dist. Attorney's Off., 111 AD3d 1123, 1126 (3d Dept 2013) ("Such conclusory assertions fall far short of establishing the requirement of particularity.").

[84] Matter of Verizon N.Y., Inc. v New York State Pub. Serv. Commn., 2016 NY App Div LEXIS 240, at *6 (3d Dept 2016).

[85] POL §87(2)(d).

I. The RAO properly found that the participants in this proceeding failed to meet their burden of showing their entitlement to a "trade secret" exemption.

The Appellate Division established a two-step standard for proving "trade secret" under POL §87(2)(d):

> "First, it must be established that the information in question is a formula, pattern, device or compilation of information which is used in one's business, and which gives [one] an opportunity to obtain an advantage over competitors who do not know or use it. Second, if the information fits this general definition, then an additional factual determination must be made concerning whether the alleged trade secret is truly secret by considering: (1) the extent to which the information is known outside of the business; (2) the extent to which it is known by employees and others involved in the business; (3) the extent of measures taken by the business to guard the secrecy of the information; (4) the value of the information to the business and its competitors; (5) the amount of effort or money expended by the business in developing the information; [and] (6) the ease or difficulty with which the information could be properly acquired or duplicated by others."[86]

As the Secretary recently explained, "[w]hile the Appellate Division held that 'an entity seeking to establish the existence of a bona fide trade secret must make a sufficient showing with respect to each of [the six] factors,' the Court did not hold that information is not trade secret if the proponent of the exemption fails to establish all six factors."[87] To the extent that no one Restatement factor is controlling, the Secretary reasoned, "the entity resisting disclosure must make a sufficient showing with respect to each of [the six] factors; any trade secret factor that is not established would be deemed to weigh against a finding that the information constitutes a trade secret."[88] Accordingly, the Secretary further explained, after a consideration of "each of the individual factors, a balancing of all of the factors is conducted to determine whether the information is a trade secret. The decision-maker, not the entity resisting disclosure, has

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[86] Matter of Verizon N.Y., Inc. v New York State Pub. Serv. Commn., 2016 NY App Div LEXIS 240, at *10-11).

[87] CASE 14-C-0370, In the Matter of a Study on the State of Telecommunications in New York State, Determination of Appeal of Trade Secret Determination (issued March 23, 2016), p. 17 (March 23, 2016 Verizon FOIL Appeal), quoting Matter of Verizon N.Y., Inc. v New York State Pub. Serv. Commn., 2016 NY App Div LEXIS 240, at *10-11.

[88] March 23, 2016 Verizon FOIL Appeal, p. 17 (internal quotation marks and citations omitted).

discretion as to the weight given to each factor."[89] Applying this "trade secret" standard, the RAO's determination is affirmed.

A. The participants failed to establish that the relevant portions of the compilations of average prices of products each ESCO sold in 2014 and 2015 meet the definition of "trade secret."

Both NEM and RESA failed to sufficiently show that the information for which disclosure is contemplated fits the definition of "trade secret." NEM's Statement of Necessity contains no analysis of why the respective compilations of average prices for 2014 and 2015, excluding customer counts, constitute "trade secrets." NEM's appeal similarly contains no explanation of why the information at issue here meets the definition of "trade secret," inasmuch as the NEM appeal simply contains a formulaic reiteration of the "trade secret" definition.

RESA also failed to sufficiently show that each ESCO's compilation of average prices of products sold to residential customers in 2014 and 2015, excluding customer counts, meets the definition of "trade secret." RESA argued in its Statement of Necessity that "the subject historic pricing and product information, when taken together, constitutes a 'compilation of information' that is used by ESCOs and reflects their respective critical business plans and operations and provides them with an advantage over competitors who do not currently know it."[90] In support of its contention, RESA cited to the Cusati Affidavit, which erroneously describes the information to be released by the Department as including "actual prices," and customer counts.[91] Mr. Cusati essentially opines that a compilation of prices for which each ESCO's products are sold, including customer counts, is valuable to the ESCOs and their competition. According to

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[89] March 23, 2016 Verizon FOIL Appeal, pp. 17-18.

[90] RESA's Statement of Necessity, p. 9.

[91] Cusati Affidavit, p. 4. RESA's Statement of Necessity similarly erroneously stated that the Department was contemplating to release all of the information collected through the DPS template. RESA's Statement of Necessity, p. 4-5. Regardless, even if actual prices of the commodity-only products (electric or gas services) at issue here were being contemplated for release, there is no evidence that such prices, which are disclosed to customers in their monthly gas or electric bills, are not known by competitors.

him, while ESCOs use the compilation of actual prices and customer counts for marketing purposes, their competition might use the same information to determine ESCOs' pricing strategy and undercut the submitting ESCOs' prices in order to gain market shares.

But there is nothing in RESA's filings explaining or establishing how the compilation of average prices of products sold (excluding customer counts), which the Department actually contemplates releasing,[92] "gives [each submitting ESCO] an opportunity to obtain an advantage over competitors who do not know or use it."[93] At best, of the two categories of ESCO information that the agency contemplates releasing, only the first, the commodity-only products that the submitting ESCOs sold to residential customers in specific geographical areas, is shown to give ESCOs an opportunity to obtain a competitive advantage because ESCOs make a profit by selling their products. But RESA submitted insufficient evidence that "competitors … do not know or use [these products],"[94] which are sold to the public.[95] Accordingly, NEM and RESA, similar to the remaining submitters, failed to sufficiently establish that the compilation of

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[92] CASES 12-M-0476 et al, supra, Retail Markets Order, p. 17.

[93] Matter of Verizon N.Y., Inc. v New York State Pub. Serv. Commn., 2016 NY App Div LEXIS 240, at *10-11.

[94] Id. at *10-11.

[95] Likewise, to the extent NEM suggests that ESCOs that submitted Statements of Necessity established that their respective compilations of average prices of products sold in 2014 and 2015 fit the definition of "trade secret," NEM's claims are unavailing. XOOM, which also incorrectly asserted that customer counts would be released, simply argued that "reports constitutes a trade secret warranting protection, as it is information that is not known to or used by XOOM's competitors, which gives XOOM an advantage over them," without explaining how the information provides an advantage to XOOM. XOOM's Statement of Necessity, p. 2. The Coppola Affidavit, submitted by XOOM, also does not explain how the information to be released provides an opportunity to obtain a competitive advantage to XOOM. In fact, even if the Coppola Affidavit provided such an explanation, XOOM would not meet its burden because Mr. Coppola incorrectly described the information to be released as including "XOOM's historic pricing methodology and operational data." Coppola Affidavit, ¶2. Moreover, ETS, Ethical Electric, and U.S. Energy Partners only reiterated the definition of "trade secret," but failed to demonstrate how their information fit the definition. Similarly, Crown Energy and American Power & Gas solely summarily claimed that their information constituted "trade secret." And, Impacted ESCO Coalition only reiterated the "trade secret" definition, indicating that it supported RESA's arguments.

average prices of products sold in 2014 and 2015, excluding customer counts, fits the definition of "trade secret." Regardless, as explained below, after balancing all six "trade secret" factors, the submitters did not meet their burden of showing their entitlement to a "trade secret" exemption.

B. In any event, a weighting of the six "trade secret" factors reflects that, on this record, the respective compilations of average prices of products sold in 2014 and 2015, excluding customer counts, do not constitute "trade secrets."

1. <u>The first factor, the extent to which the information is known outside of the business, weighs against a "trade secret" finding.</u>

As already noted, NEM's Statement of Necessity addressed neither the definition of "trade secret" nor the six factors. NEM argues on appeal that the first factor is met because the ESCOs' thought processes and "pricing formulas are closely guarded, confidential information known only to select employees within a company and are not known outside of the business."[96] That contention is unavailing to the extent that the compilation of average prices of products each ESCO sold in 2014 and 2015 does not include pricing formulas or thought processes. Moreover, NEM submitted no evidence in support of that claim.

Similarly, RESA's mere contention that the first factor is met because "[t]he information in the Pricing Compilation, [including customer counts], is not known outside of each ESCO,"[97] is rejected. RESA's claim is conclusory, lacking in particularity and sufficient evidentiary support. RESA's Statement of Necessity equally summarily states that "[t]he Pricing Compilation is not generally available to anyone outside of the individual ESCO."[98] Moreover, the Cusati Affidavit does not address the extent to which the compilation of average prices of products sold is known outside of

[96] NEM's Appeal, p 3.

[97] RESA's Appeal, p. 10.

[98] RESA's Appeal, p.11. Indeed, customer counts will not be disclosed. And, even if it were assumed that, as the Cusati Affidavit claims, the Department contemplates to disclose actual prices, RESA would fail to meet its burden regarding the first factor because actual prices of ESCOs' commodity-only products are disclosed in customers' gas and electric bills.

the business. Accordingly, RESA's evidence in support of the first factor is insufficient.[99]

2. The second factor, the extent to which information is known by employees and others involved in the business, also weighs against a "trade secret" finding.

NEM's Statement of Necessity also did not address the second factor. NEM's new contention that the second factor is established because "ESCO pricing formulas are closely guarded, confidential information known only to select employees within a company," is rejected.[100] Pricing formulas are not at issue in this case. Furthermore, NEM's claims lack evidentiary details.

RESA also failed to sufficiently establish the second factor. RESA's claim that the "Pricing Compilation is not . . . . widely known by employees and others involved in the business"[101] is rejected as conclusory. RESA's Statement of Necessity contains comparable conclusory language, and the Cusati Affidavit fails to address the second factor.[102]

3. The third factor, the extent of measures taken by the business to guard the secrecy of the information, also weighs against a "trade secret" finding.

NEM failed to address this factor in its Statement of Necessity. For the same reasons enunciated above, its new claim that "ESCO pricing formulas are closely guarded"[103] is insufficient to establish the third factor. Not only are NEM's allegations referring to information that is not submitted to the Commission (pricing formulas), they are also conclusory and unsupported by sufficient evidence.

RESA's appeal claims that, "as outlined in the Statement, ESCOs take great care to protect the information contained in the Pricing Compilation from disclosure to the public or

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[99] Also, none of the remaining entities sufficiently showed that the first factor weighed in favor of a "trade secret" finding, as they neither addressed nor submitted evidence in support of the first factor.

[100] NEM's Appeal, p. 3.

[101] RESA's Appeal, p. 10.

[102] None of the remaining entities sufficiently established the second factor, for they did not address it or submit sufficient evidence.

[103] NEM's Appeal, p. 3.

other competitors."[104] For instance, RESA further argues, "ESCOs do not publicize their pricing structures. Customers who are interested in switching providers may call and obtain a quote from an ESCO or use a website, but must provide certain qualifying information first, such as a valid address or zip code."[105] There is, however, insufficient evidentiary support for RESA's contentions. Contrary to RESA's claim that its Statement of Necessity contains a detailed explanation, RESA's Statement of Necessity summarily asserts, without factual details, that "ESCOs take efforts to protect this information internally and, when required to disclose this information, file it with the Commission under the POL."[106] Additionally, similar to the first and second factors, the Cusati Affidavit does not address the extent of measures taken by the ESCOs to guard the secrecy of the information.[107] While RESA's appeal describes some of the steps taken to protect the alleged secrecy, the explanation is insufficient to meet RESA's burden. The Department, which intends to release average prices of commodity-only products, does not collect "pricing structures." Nonetheless, ESCOs do release the actual prices of their products in customer electric and gas bills, and there is no evidence that customers are required to keep such prices confidential. Moreover, to the extent that actual prices are not at issue here, RESA's allegation that customers must submit qualifying information does not show the steps taken to protect the alleged secrecy of the compilation of average prices of products each ESCO sold in 2014 and 2015, excluding customer counts. The appeal further states that "customer information . . . is kept strictly confidential," but it does not explain the type of actions that ESCOs take to protect the claimed secrecy.[108] Accordingly, RESA failed to sufficiently establish the third factor.[109]

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[104] RESA's Appeal, p. 10.

[105] RESA's Appeal, pp. 10-11.

[106] RESA's Statement of Necessity, p. 11.

[107] In fact, contrary to RESA's underlying claim that Cusati explained why the information constituted "trade secret," RESA's Statement of Necessity, p. 12, Cusati said that the purpose of his Affidavit was to support the argument that disclosure would cause substantial competitive injury to the ESCOs. Cusati Affidavit, ¶2.

[108] RESA's Appeal, p. 11.

[109] Similar to RESA and NEM, the remaining entities failed to establish the third factor, for the reason enunciated in the first two factors. XOOM indicated that, as a privately held company, it maintained "all of its financial and operational information completely confidential pursuant to confidentiality agreements, by operation of the NYISO's Code of Conduct, or other provisions of

4. The fourth factor, the value of the information to the business and its competitors, weighs against a finding that the portions of records for which release is contemplated are "trade secret."

NEM did not meet its burden regarding the fourth factors because its Statement of Necessity did not address the six "trade secret" factors. NEM' s new claim that "[t]he development of the pricing formula, including the associated underlying risk management, market analysis, business strategy, resource utilization and execution plan, is costly to develop"[110] is unavailing, as the compilations of average prices of products each ESCO sold in 2014 and 2015 include no pricing formulas. Nevertheless, NEM's assertion that the information is "costly to develop"[111] is insufficient to meet NEM's burden because the assertion lacks particularity and evidentiary support.

Likewise, RESA failed to establish the fourth factor because its assessment of the competitive value is not limited to the portions of records for which disclosure is contemplated. As explained above, RESA has not explained or shown how each submitting ESCO uses the compilation of average prices of products it sells, excluding customer counts and actual prices, to gain a competitive advantage or how the competitors can use that information to obtain a competitive advantage. Arguably, because ESCOs make a profit by selling products, such products are very valuable to the companies. But the central issue in this proceeding is the planned disclosure of the average price of each product sold by ESCOs, and not the disclosure of the products themselves. Thus, because RESA submitted insufficient evidence showing the value of the compilation of average prices of products to each submitting ESCO and their competitors, RESA failed to meet its burden.[112]

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law." Coppola Affidavit, ¶6. But that statement lacks the level of particularity required under FOIL, because XOOM failed to include the legal provision mandating that its information be kept secret, and factual details regarding how the alleged legal mandate was actually being implemented.

[110] NEM's Appeal, p. 3.

[111] NEM's Appeal, p. 3.

[112] Similarly XOOM's filings are insufficient to establish the fourth factor. Contrary to Mr. Coppola's opinion, the information that the Department said it would release does not include "XOOM's historic pricing methodology and operational data." Coppola Affidavit ¶5. Thus, because XOOM's assessment of the competitive value is partially based on documents that are irrelevant and not in the agency's possession, I reject XOOM's filings, including its Statement of

5. Only RESA met its burden of establishing that the fifth factor, the amount of effort or money expended by the business in developing the information, weighs in favor of the "trade secret" finding.

Unlike RESA, NEM and the remaining participants failed to meet their burden of establishing the amount of effort or money expended by the ESCOs in developing the compilation of average prices of products, for the reasons stated in the previous factors.

However, RESA met its burden regarding the fifth factor. ESCOs are not simply averaging the pricing information of third parties. Rather each ESCO is averaging its own actual prices, which derive from the sale of products to customers. In other words, there would be no 2014 and 2015 average prices without ESCO marketing efforts yielding actual sales. The ESCOs' listings of the actual prices of their products, which they disclose in their customers' gas and electric bills, are admittedly not "trade secrets." It appears, however, that the ESCOs' development of average prices from the combination of their customer counts and their prices does become a compilation of information produced at a level of effort sufficient to meet the fifth factor for a "trade secret." Thus the efforts ESCOs expended in selling the products become part of the amount of effort they invested in developing the compilation of average prices. Accordingly, the Cusati Affidavit, which reflects the marketing efforts that ESCOs make to be able to sell their products,[113] is sufficient to show that each ESCOs invest enough effort to develop a compilation of average prices of products it sells to meet the fifth factor.

6. The sixth factor, the ease or difficulty with which the information could be properly acquired or duplicated by others, weighs against a "trade secret" finding.

As with the previous factors, NEM's Statement of Necessity did not address the ease or difficulty with which the information could be properly acquired or duplicated by others. NEM's appeal is insufficient to meet NEM's burden because it refers to pricing formulas, which are not at issue here, and contains neither an explanation nor evidence regarding the difficulty with which the compilation of average prices of products can be acquired or duplicated.

Necessity, which relied on the Coppola Affidavit, as insufficient to meet XOOM's burden. The remaining participants failed to meet their respective burden for the reasons stated in the previous factors.

[113] Cusati Affidavit, ¶6.

Similarly, RESA's Statement of Necessity, which ignores that customer counts would not be released, summarily alleges, with no factual details, that "this information [is] not publicly available [and] could not be acquired or duplicated by others without great difficulty."[114] The Cusati affidavit does not specifically address the difficulty with which each ESCO's compilation of average prices of products sold could be properly acquired or duplicated by others. While RESA alleges on appeal that "ESCOs historical pricing and other information contained in the pricing compilation is only available as a result of . . . a FOIL request,"[115] there is no evidence in the record in support of that contention.[116] Thus RESA failed to establish the sixth factor.[117]

Having considered all six factors, even if it were assumed that the 11 entities that submitted a Statement of Necessity to the RAO met their burden of establishing that the compilation of average prices of commodity-only products each ESCO sold in 2014 and 2015, excluding customer counts, fit within the definition of "trade secret," a balancing of all six factors shows the subject information is not "trade secret." All of the participants, with the exception of RESA, failed to establish all six factors. While RESA sufficiently established that each ESCO invested significant amount of effort to develop a compilation of average prices of products it sells (5th factor), given the insufficiency of evidence regarding the remaining factors, RESA failed to establish its entitlement to a "trade secret" exception.

To the extent RESA argues that it is entitled to a "trade secret" exemption because disclosure would cause a substantial competitive injury to the submitting ESCOs, its claims are meritless. An entity claiming the "trade secret" exemption need not show that disclosure would cause it to suffer a substantial competitive injury. As prescribed by the Appellate Division,

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[114] RESA's Statement of Necessity, p. 11.

[115] RESA's Appeal, p. 12.

[116] RESA argues that, under Encore, the information is "trade secret" because it can only be obtained through FOIL. That claim is meritless. As reflected below, Encore is not a "trade secret" case. Rather, Encore applies to the second exemption contained in POL §87(2)(d), records whose disclosure would cause substantial competitive injury to the entity resisting release. Regardless, given that customer counts will not be disclosed, RESA submitted insufficient factual details in support of its claim that the information can only be obtained through FOIL. Indeed, actual prices, which may be used to determine average prices, are disclosed in customers' electric and gas bills.

[117] The remaining participants failed to meet their burden for the reasons stated in the previous factors.

however, such as entity must establish both the "trade secret" definition and the Restatement factors.[118] Because RESA, similar to the remaining participants, failed to meet its burden under Verizon's two-step approach, RESA failed to show its entitlement to a "trade secret" exemption. In any event, as explained in the next section, RESA also failed to sufficiently establish its substantial competitive injury claims.

II. The RAO properly found that the entities resisting disclosure in this proceeding failed to sufficiently show the likelihood of substantial competitive injury.

An agency may deny a request for disclosure of records in its possession, or portions thereof, that "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." POL §87(2)(d). For this exception to apply, a two-prong test must be met. First, the entity resisting disclosure must establish "[a]ctual competition."[119] Then it must show "the likelihood of substantial competitive injury."[120] Here, the RAO found that the first prong was met.[121] On appeal, RESA and NEM challenge the RAO's finding that the 11 entities that submitted Statements of Necessity failed to meet their burden of showing the second prong. As explained below, the RAO's determination is affirmed.

RESA argues that it met its burden because the information the ESCOs submitted to the Department, including the compilation of average prices of products each ESCO sold in 2014 and 2015, is otherwise "extremely difficult, if not impossible, to obtain"[122] and that its underlying filings detail numerous harmful situations that could result from release of the

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[118] Matter of Verizon N.Y., Inc. v New York State Pub. Serv. Commn., 2016 NY App Div LEXIS 240, at *11.

[119] Encore, 87 NY2d at 421.

[120] Id.

[121] The RAO found that there is actual competition in the retail energy market, and that portion of the RAO Determination is not being challenged on appeal. There have been persistent efforts on the part of the Commission to improve the workability of the ESCO markets, such as those in the Retail Markets Order. For purposes of FOIL, however, the issue is whether a market is sufficiently competitive to give rise to claims of harm, if information is disclosed, not whether a market is workably competitive such that the Commission can presume that prices in that market are "just and reasonable" as result of the operation of competitive forces.

[122] RESA's Appeal, p. 18.

information. Its contentions are unavailing. Initially, RESA's suggestion that the ESCOs' information may only be obtained through FOIL is conclusory. Neither its Statement of Necessity nor the accompanying Cusati Affidavit contains factual details as to why the portions of records for which release is contemplated cannot be duplicated.

In any event, RESA submitted no specific, persuasive evidence that disclosure of the compilation of average prices of commodity-only products each ESCO sold in 2014 and 2015, excluding customer counts and actual prices, would be likely to cause substantial competitive injury to the submitting ESCOs. The Cusati Affidavit explains how competitors might use the compilation of "actual prices" of product and customer counts, to determine ESCOs pricing and marketing strategies and undercut the submitting ESCOs' prices in order to gain market shares. But it does not explain how competitors, including existing and new market participants, can use average prices, without customer counts, to achieve the same result. RESA's Statement of Necessity, which heavily relied on the Cusati Affidavit, similarly failed to limit its assessment of the injury to the portions of records that the Department actually contemplates to release. In any event, given that average prices are not prices at which a product is sold, RESA's filings are insufficient to meet its burden, as they lack evidentiary details regarding how competitors can use the average prices of products each ESCO sold in 2014 and 2015, without customer counts, "to identify the individual disclosing ESCO's proprietary pricing strategy, proprietary margin strategy, and proprietary hedging strategy."[123]

RESA further contends that the determinations exempting information filed by lightly regulated utilities in Matter 13-01288 warrant exemption of the ESCOs' information. RESA maintains that disclosure of the "Pricing Compilation" would, like the information at issue in Matter 13-01288, allow competitors and potential market entrants to forecast a generators' marginal costs and pricing strategies," resulting in harm to market participants as well as the market place.[124] Contrary to RESA's claims, the information filed by lightly regulated generators in Matter 13-01288 was not actual or average commodity prices. The lightly regulated generators sought to protect cost information with respect to the bidding behavior in wholesale markets, which took the form of "their income and balance sheets, unit-specific

[123] RESA's Statement of Necessity, p. 19.

[124] RESA's Appeal, pp. 13-16, 18-19.

operational data, site-specific revenue and expense data."[125] Here, the ESCO seek to exempt the compilation of average prices of products each ESCO sold in 2014 and 2015.[126] Not only is the information at issue different, but the actual prices of products sold by the lightly regulated generators are publicly available. The generators sell electric commodity on a wholesale basis through New York Independent System Operator, Inc. (NYISO) auctions. The NYISO discloses the prices of wholesale generators' products in real time in order to ensure proper functioning of the wholesale generation markets.[127] Significantly, it is not generator prices, but generator bidding information which is protected from disclosure, at least initially. Masked bidding data is, however, subsequently released by the NYISO "three months after the bids are submitted."[128]

More fundamentally, unlike RESA, the lightly regulated generators satisfied their evidentiary burden under FOIL. They submitted expert affidavits and statements of necessity sufficiently explaining why the portions of records related to generator bidding for which disclosure was contemplated could not be replicated and detailing numerous harmful situations

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[125] Matter 13-01288, In the Matter of Financial Reports for Lightly Regulated Utility Companies Determination of Appeal of Trade Secret Determination (Trade Secret 14-02)(issued August 13, 2014), p. 3; see Matter 13-01288, supra, Determination of Appeal of Trade Secret Determination (Trade Secret 15-9)(issued October 27, 2015)(protecting the same categories of information contained in documents filed in or after July 1, 2013).

[126] Unlike the lightly regulated generators, ESCOs do not participate in the NYISO wholesale market. Rather ESCOs participate in the retail market, and as the RAO noted, the commodity prices of gas and electric utilities that compete with ESCOs in that retail market are publicly available on the agency's Power to Choose website. RAO Determination, p. 11.

[127] See NYISO's Market Administration and Control Area Services Tariff, 17.1 MST Attachment B, LBMP Calculation. The immediate disclosure of these prices "ensure(s) that consumer and competitive markets are protected from the adverse effects of potential collusion or other anticompetitive behaviors that can be facilitated by untimely public disclosure of transaction-specific information." 16 U.S.C. §824t(b)(2); see also Id. §824t(a)(2) (giving the Federal Energy Regulatory Commission the authority to prescribe rules that "shall provide for the dissemination, on a timely basis, of information about the availability and prices of wholesale electric energy and transmission service to the Commission, State commissions, buyers and sellers of wholesale electric energy, users of transmission services, and the public.").

[128] NYISO's Market Administration and Control Area Services Tariff, 6 MST Confidentiality; see Wholesale Competition in Regions with Organized Electric Markets, Final Rule, Docket Nos. RM07-19-000 & AD07-7-000, 125 FERC ¶ 61,071 PP. 420-424 (Oct. 2008) (reducing the lag time for the release of offer and bid data to three months).

that could result from release of such information.[129] In contrast, RESA has not made the showing of "likelihood of substantial competitive injury" required for protection of its average prices under FOIL.[130]

Similar to RESA, NEM believes that its Statement of Necessity sufficiently established the likelihood of substantial competitive injury. NEM alleges that the ESCOs' information may only be obtained through FOIL. NEM's arguments are meritless, and the RAO correctly decided that NEM failed to meet its burden for protection of the average prices compiled by staff.

NEM submitted no evidentiary details as to why the respective compilations of average prices of products each ESCO sold in 2014 and 2015, without customer counts, cannot be replicated. Moreover, NEM failed to establish the likelihood of substantial competitive injury because its allegations of injury, as reflected in its Statement of Necessity, are premised on arguments that the Retail Markets Order found to be meritless. Contrary to NEM's arguments that publication of the average price of products would mislead customers, the Retail Markets Order found that disclosure of the average price of similar products would actually help customers make an informed purchase decision.[131] Thus, NEM's allegation that publishing

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[129] Matter 13-01288, supra, Determination of Appeal of Trade Secret Determination (issued August 13, 2014), pp. 11-15; see Matter 13-01288, supra, Determination of Appeal of Trade Secret Determination (issued October 27, 2015), pp. 11-24.

[130] This Determination does not reach whether actual ESCO prices would be protected as either "trade secret" or "confidential commercial information" for which a likelihood of substantial competitive injury has been shown. The issue here is only production of a staff compilation of average ESCO prices.

[131] CASES 12-M-0476 et al, supra, Retail Markets Order, p. 16. Similar to NEM, the Impacted ESCO Coalition alleged that disclosure of average prices would mislead consumers, resulting in a substantial competitive injury to the ESCOs. As already noted, however, the Retail Markets Order already rejected that argument. Indeed, contrary to some of the participants' claims that disclosure would create an unfair competition, "[g]iving customers the ability to consider a comparison of the bills or prices that were charged to ESCO customers with the bills or prices that would have been charged if the same service were provided by the utility [or competing ESCOs] is not unfair competition; it is essential to ensuring effective competition." Matters 11-01661 et al., ESCO contract price information, Determination of Appeal of Trade Secret Determination (issued April 28, 2014), p. 11.

average prices would confuse consumers, causing them to break ESCOs contracts, is essentially an impermissible collateral attack on the Retail Markets Order.[132]

NEM reiterates that here is no comparability between ESCO and utility pricing data, which could cause customers to also break ESCO contracts.[133] In this regard, NEM appears to be speculating that customers might behave inappropriately.[134] As NEM acknowledged in its Statement of Necessity,[135] moreover, the Retail Markets Order provides that the Commission will adjust utility information to account for differences between how ESCOs and utilities charge for bill processing, among other things, in order to facilitate a direct comparison.[136] FOIL is not the appropriate vehicle to challenge the correctness of the information sought to be disclosed; instead the only issue here is competitive injury. Thus, NEM's lack of comparability allegation is insufficient to meet NEM's burden.

NEM further argues that the RAO "significantly understated the extent of the injury by assuming that 'all ESCOs would be at the same level, playing field with respect to disclosure of information,' thereby "presumptively mitigating the competitive injury."[137] That the information of all ESCOs would be released, NEM argues, does not reduce the extent of the injury, particularly for smaller ESCOs. NEM's arguments are erroneous. Contrary to NEM's claims, the RAO did not find that disclosure would result in substantial competitive injury to the ESCOs, which would be mitigated by the release of the information of all ESCOs. The RAO determined instead that all of the participants, including NEM, failed to submit specific persuasive, evidence that disclosure would likely cause a substantial competitive injury, rejecting, in any event, the

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[132] Cf. Public Service Com. v. Rochester Tel. Corp., 55 NY2d 320, 325-326 (1982)(holding that where a utility has failed to challenge a Commission order within the statute of limitations, it may not, in a proceeding challenging a subsequent order, challenge a condition contained in the previous order).

[133] NEM's Appeal, p. 3-4; see also NEM's Statement of Necessity, p. 6.

[134] In contrast, not signing with ESCOs or departing from ESCO service in response to price comparisons is appropriate, and in fact the behavior sought by the Retail Markets Order.

[135] NEM's Statement of Necessity, pp. 5-6.

[136] CASES 12-M-0476 et al, supra, Retail Markets Order, pp. 17-18.

[137] NEM's Appeal, pp. 3-4.

allegation that disclosure would provide an advantage to certain ESCOs and utilities, because ESCOs and utilities are all subject to the disclosure requirement.[138]

To the extent NEM suggests that the evidence before the RAO is sufficient to establish the likelihood of substantial competitive injury, its claim is unavailing.[139] XOOM incorporated by reference NEM's arguments, and its additional claims did not meet XOOM's burden. It argued, without sufficient factual details, that "[d]isclosure of this information could provide XOOM's competitors, an advantage causing injury to XOOM's competitive position."[140] While XOOM recognized that information regarding the number of customers would not be released, the Coppola Affidavit, upon which XOOM relied, erroneously stated that the portions of the records that the Department contemplates to release include "XOOM's historic pricing methodology and operational data."[141] Thus, according to Mr. Coppola, disclosure of the information, including "XOOM's historic pricing methodology and operational data," would provide competitors with the ability to determine XOOM's hedging strategy, "'reverse engineer' XOOM's marginal costs," and therefore, undercut XOOM's prices.[142] Similar to the Cusati Affidavit, which RESA submitted, the Coppola Affidavit failed to limit its assessment of the injury to the portions of records that the Department actually contemplates disclosing. In any event, given that the Department does not collect XOOM's historic pricing methodology and operational data, and that average prices are not prices at which a product is sold, XOOM's filings are insufficient to meet its burden, as they lack evidentiary details regarding how competitors can use the compilation of average prices of products each ESCO sold in 2014 and

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[138] RAO Determination, pp. 10-11.

[139] Notably, of the 11 entities that participated in the proceeding before the RAO, only two, NEM and RESA, appealed. The filings of the entities that did not appeal are being examined solely to refute NEM's incorrect argument that the record before the RAO was sufficient to show that the information of all of the ESCOs must be exempted under POL §87(2)(d).

[140] XOOM's Statement of Necessity, p. 4.

[141] Coppola Affidavit ¶5.

[142] Coppola Affidavit ¶9.

2015, excluding customer counts, to determine XOOM's hedging strategy, "reverse engineer" its marginal costs, or undercut its prices.[143]

Likewise, U.S. Energy Partners (USEP) failed to meet its burden. USEP summarily claimed that disclosure of the information would cause a substantial competitive injury to USEP, by enabling competitors "to determine many important, confidential aspects of USEP's operations, [including] USEP's confidential pricing strategy . . . [and] predict how USEP will alter its strategy based on the market changes."[144] The Kreppel Affidavit, submitted with USEP's Statement of Necessity, opines that disclosure of customer counts would allow competitors to see where a particular ESCO is focusing its efforts, revealing where the ESCO is relatively weak. Moreover, akin to Coppola, Kreppel believes that release of the "pricing data" would enable competitors to "backwards engineer" the prices and determine "suppliers margin and strategies."[145] However, the Kreppel Affidavit is lacking in particularity because, similar to USEP's Statement of Necessity, it contains no details regarding how competitors can use the average prices of products USEP sold in 2014 and 2015, without customer counts, to, among other things, "backwards engineer prices" [146] and determine confidential pricing strategies.

Correspondingly, Ethical Electric, Inc., American Power & Gas, LLC, Energy Technology Savings, Inc., and Crown Energy Services, Inc. failed to show the likelihood of substantial competitive injury because they briefly argued, with no factual details, that disclosure would cause substantial competitive injury. The two remaining submitting ESCOs, Direct Energy Services LLC and Verde Energy USA New York, LLC, joined in the arguments made by NEM and RESA.

NEM and RESA finally assert that the RAO erred in requiring the retention of outside experts. That claim is incorrect. The RAO found that the ESCOs did not meet their burden of proving that the compilation of average prices of products each ESCO sold in 2014 and 2015,

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[143] Coppola additionally opined that the ESCOs would be harmed by the lack of compatibility between ESCO and utility pricing data, and that disclosure would mislead consumers. Coppola Affidavit ¶¶15-16. As noted above, the Retail Markets Order has already rejected that argument, and provides that ESCO and utility prices will be adjusted.

[144] USEP's Statement of Necessity p. 4.

[145] Kreppel Affidavit, ¶¶7-8.

[146] Kreppel Affidavit, ¶¶7-8.

excluding customer counts, constitutes a "trade secret," or that disclosure of that information would be likely to cause substantial competitive injury, because they offered "mere conclusory allegations, without factual support."[147] The RAO did subsequently suggest the type and quality of evidence that ESCOs could have submitted to meet their burden, including detailed expert affidavits. Expert affidavits are not required, however, particularly in order to show that "trade secrets" should be protected. In any event, it has already been explained why the 11 participants failed to meet their burden of establishing their entitlement to a FOIL exemption under POL §87(2)(d). Therefore, NEM's and RESA's appeals are denied.

CONCLUSION

For the reasons discussed above, NEM's and RESA's appeals from the February 1, 2016 RAO Determination are denied. The RAO properly found that the entities that submitted Statements of Necessity failed to meet their burden of establishing that disclosure of the respective compilations of average prices of products each ESCO sold in 2014 and 2015, without customer counts, constitute "trade secrets," or that disclosure of such information would be likely to cause substantial competitive injury, as provided in POL §§ 87(2)(d) and 89(5)(e). Pursuant to POL § 89(5)(a)(3), information required to be disclosed as a result of this Determination "shall be excepted from disclosure and be maintained apart by the agency from all other records until fifteen days after the entitlement to such exception has been finally determined or such other time as ordered by a court of competent jurisdiction."

(SIGNED) KATHLEEN H. BURGESS
Secretary

[147] RAO Determination, p. 11.