

August 21, 2014

**Via E-mail**

The Hon. Kathleen H. Burgess  
Secretary  
New York State Public Service Commission  
Three Empire State Plaza  
Albany, New York 12223

**Re: Case No. 12-E-0577 – Proceeding on Motion of the Commission to Examine  
Repowering Alternatives to Utility Transmission Reinforcements**

Dear Secretary Burgess:

On August 14, 2014, Earthjustice filed an appeal (the “Appeal”) to the Secretary of the Public Service Commission (“Commission”) of the Records Access Officer’s (“RAO”) determination issued on August 13, 2014, in the above-referenced matter (“August 13 Determination”). The August 13 Determination concluded that certain analysis prepared by the New York Independent System Operator (“NYISO”) at the request of Department of Public Service (“DPS”) staff shall remain protected from disclosure pursuant to Section 87 of the Public Officers Law (“POL”).

The NYISO hereby responds in opposition to the Appeal. Notably, Earthjustice does not dispute the RAO’s conclusion that the records submitted by the NYISO, as redacted and re-filed, are properly excepted from disclosure as trade secrets or confidential commercial information within the meaning of POL §87(2)(d). Instead, Earthjustice attempts to force the NYISO—a non-party in this Proceeding—to disclose confidential, market participant information protected by its Federal Energy Regulatory Commission (“FERC”)-approved tariff under a Protective Order that is inapplicable to the confidential material submitted by the NYISO.

The NYISO’s authority to provide otherwise protected confidential information to DPS staff in this proceeding was derived solely from a pair of Commission orders executed in 2000 that expressly assure the NYISO that, when it provides material comprising trade secrets or confidential commercial information to DPS staff, that information will be exempt from FOIL disclosure.<sup>1</sup> Indeed, the Commission even agreed

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<sup>1</sup> See Case No. 00-E-1380, The Provision by The New York Independent System Operator, Inc., of Information and Data to Department Staff, Order Directing Provision of Data and Information (issued August 14, 2000) (hereinafter, “*August 14 Order*”), and Order Clarifying Information and Data to Be Provided and Measures Regarding Protection of Confidential Information (issued August 23, 2000) (hereinafter, “*August 23 Order*”) (collectively, “*August 2000 Orders*”).

to restrict its internal distribution of NYISO confidential material to a limited number of named senior employees, in further acknowledgement of the importance of protecting confidential NYISO market participant information.

Earthjustice now asks that the Commission disclose the NYISO's confidential information pursuant to a Protective Order entered into at the behest of certain parties to this proceeding *after* the NYISO completed and submitted its analysis to DPS staff through the RAO. The NYISO was never ordered by the Commission to make its confidential analysis available to any individual beyond those employees identified by the Commission as authorized to view NYISO confidential material. The RAO duly determined on the basis of a substantial record that the questioned materials are entitled to an exception from disclosure as trade secrets or confidential commercial information within the meaning of POL §87(2)(d). Consequently, the Commission should not disclose the confidential materials that the NYISO submitted pursuant to the procedures set forth in the August 2000 Commission Orders simply because a Protective Order was issued in this proceeding months after the NYISO submitted the requested, confidential material.

The NYISO respectfully requests that the Secretary deny the Appeal and affirm the August 13 Determination.

**I. Background on NYISO Involvement in Repowering Proceeding and the Protective Order Cited by Earthjustice**

By Order dated January 18, 2013, the New York State Public Service Commission ("Commission") instituted the Repowering Proceeding to examine repowering alternatives to utility transmission system reinforcements, and directed National Grid and NYSEG to work with generation owners to evaluate repowering of two power plants in upstate New York.

The NYISO is not a party to the Proceeding, but rather responded to requests by DPS staff that the NYISO perform independent analysis of the repowering proposals put forth by Cayuga Operating Company LLC ("Cayuga") and NRG Energy Inc. ("NRG"). The NYISO performed that analysis, including some subsequent iterations (collectively, "Repowering Analysis"). In acknowledgment of the confidential nature of the analysis performed by the NYISO, DPS staff directed that NYISO should submit the results of its analysis on a confidential basis to the DPS Records Access Officer pursuant to relevant provisions set forth in Section 89(5) of the Public Officers Law and in 16 NYCRR Section 6-1.3, and should identify any information contained in those results that is protected from public disclosure under the NYISO tariff or other provisions of federal or

State law. The NYISO therefore submitted much of the requested analysis through the RAO, as it contained trade secrets and/or confidential commercial information protected by NYISO tariff.

DPS Staff never requested—and the Commission did not order—that the NYISO perform any analysis that would be made available pursuant to a Protective Order. To the contrary, the NYISO prepared and provided its analysis in reliance on the FOIL protection afforded by statute and the *August 2000 Orders* described below.<sup>2</sup> In fact, the NYISO’s final FOIL-exempt confidential submission at issue here occurred on October 8, 2013, while the Protective Order executed by Earthjustice was not introduced into the Proceeding until November 13, 2013. On that date, the RAO issued the Protective Order along with a letter directed to the parties in this Proceeding—the NYISO was not a recipient—suggesting that it was intended to cover *future confidential filings*: “[p]lease be advised that . . . I am issuing a Protective Order in this case because *it is anticipated* that information alleged to be protectable pursuant to the Commission’s Trade Secret Regulations, 16 NYCRR §6-1.3, will be filed in this Case” (emphasis added).

Simply put, the history of this proceeding makes clear that the Commission never intended for the confidential material submitted by the NYISO prior to the entry of the Protective Order in this proceeding—material the RAO has concluded is properly exempted from FOIL disclosure pursuant to POL §87(2)(d)—to be obtainable by Protective Order. Further, as is set forth below, permitting Earthjustice to obtain this material would violate the Commission’s *August 2000 Orders*.

## **II. Prior Commission Orders Requiring FOIL Protection for NYISO Confidential Material**

The NYISO does not have direct authority under its FERC-approved tariff to provide the Commission with information deemed confidential under its Code of Conduct. However, the NYISO does have authority to produce such Confidential

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<sup>2</sup> Had the NYISO been ordered by the Commission here to provide analysis that would be subject to distribution pursuant to a Protective Order, it would likely have taken a more constrained approach to the information provided to DPS staff here to prevent, limit and mitigate, to the greatest degree possible, the possible disclosure of information that the NYISO is required by its FERC tariffs to protect. For instance, as noted in NYISO’s April 2014 Statement of Necessity, confidential, market-sensitive information regarding market participants who are not parties in this proceeding can be derived from some analysis performed here by the NYISO. The NYISO would likely not provide such analysis, or would provide the analysis on a more consolidated or truncated basis, if the NYISO expected its analysis to be distributed beyond those limited DPS staff members authorized to view NYISO confidential information.

Information—subject to appropriate protection—if it “is required to be divulged in compliance with an order or subpoena of a court or regulatory body. . . .” NYISO Open Access Transmission Tariff, Attachment F, Section 12.4. To that end, in the *August 14 Order*, the Commission noted its need for access to confidential information, and concluded that it would therefore “direct the NYISO to provide a limited number of our staff carefully controlled access to confidential data and information.” *August 14 Order*, p. 6. The Commission also stated that, “[p]ursuant to Section 15 of the PSL and the Freedom of Information Law, all steps will be taken to designate [the] information as trade secret and to assure its protection.” *August 14 Order*, p. 6.

In response, the NYISO filed a *Motion for Protective Order, Motion for Clarification and Motion for Stay* on August 18, 2000 (*August 18 Motion*). In that Motion, the NYISO pointed out, among other things, that the information requested by the Commission was commercially sensitive and proprietary and was therefore confidential under the NYISO’s Code of Conduct. The NYISO requested clarification regarding various aspects of the *August 14 Order*, including how the materials would be protected by the Commission from improper disclosure.

Days later, the Commission responded with the *August 23 Order*, which both provided additional detail regarding the data and information the Commission expected to request and—pertinently—undertaking the burden of maintaining the confidentiality of NYISO’s sensitive commercial information, as required by sound public policy and the NYISO’s FERC-approved Code of Conduct. With respect to confidential material furnished to DPS staff, the Commission offered detailed assurances that it would protect and sharply limit access to that material:

NYISO material given to Department staff, or notes of a like nature created by Department staff, shall be protected pursuant to §89(5) of the POL and §15 of the PSL . . . . Pursuant to 16 NYCRR §6-1.3(c)(2), Department staff will provide one list of the names of individuals who may work on-site at the NYISO and another list of individuals, comprising senior staff and Commissioners, who may receive briefings and reports that may contain confidential information. These lists may be updated occasionally. ***Individuals not on these lists may not receive confidential information either orally or in writing.***

*August 23 Order*, p. 6. The Commission continues to adhere to this Order – the NYISO last received such a list of individuals permitted access to confidential information in February 2014.

In sum, the NYISO relies on the Commission’s *August 2000 Orders* for tariff authority to provide DPS staff with confidential information or analysis. The Commission has made clear that access to the confidential information provided pursuant to the *August 2000 Orders* shall be limited to select DPS staff and will not otherwise be made available if it constitutes trade secret and/or confidential commercial information that is excepted from FOIL disclosure. The NYISO therefore requests that the Commission, act consistent with its *August 2000 Orders*, support the NYISO’s efforts to comply with its FERC-approved tariff, and deny the Appeal.

### **III. Conclusion**

For the foregoing reasons, the NYISO respectfully requests that the Secretary deny the Appeal submitted by Earthjustice and uphold the RAO’s August 13, 2014 Determination in its entirety.

Respectfully Submitted,

/s/ Christopher R. Sharp  
Christopher R. Sharp  
Compliance Attorney

cc: Christopher Amato, Esq. – Staff Attorney, Earthjustice – Northeast Office