

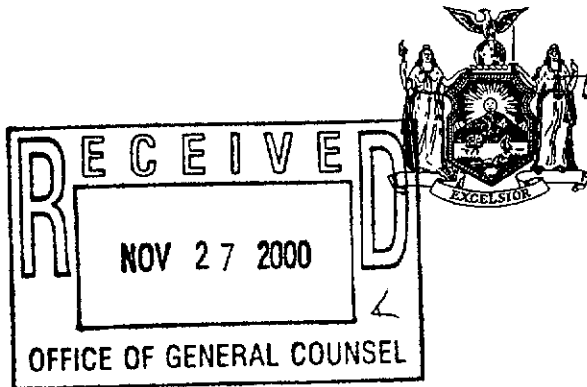
STATE OF NEW YORK DEPARTMENT OF PUBLIC SERVICE

THREE EMPIRE STATE PLAZA, ALBANY, NY 12223-1350

Internet Address: <http://www.dps.state.ny.us>

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November 24, 2000

Robert E. Fernandez
General Counsel
New York Independent System Operator
3890 Carman Road
Schenectady, New York 12303

Ms. Rebecca Smith
Wall Street Journal
6500 Wilshire Blvd., Suite 1500
Los Angeles, California 90048

RE: Appeal of Decision Regarding the Contact Log Received by the Public Service Commission from the New York Independent System Operator, Inc. in Response to the Commission's August 14, 2000 Order .

Dear Mr. Fernandez and Ms. Smith:

This letter constitutes my determination, pursuant to §89(5)(c)(1) of the Public Officers Law (POL), on the entitlement of the Contact Log in the possession of the Staff of the Department of Public Service (Staff) to an exception from disclosure as trade secrets or confidential commercial information. The New York Independent System Operator (NYISO) provided the Contact Log pursuant to a Public Service Commission (Commission) order in Case No. 00-E-1380 (issued August 14, 2000).¹

¹ Case 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).

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On August 18, 2000, the NYISO filed a Motion for Protective Order, Motion for Clarification and Motion for Stay. The Commission then issued a clarifying order.²

By letter dated September 7, 2000, Ms. Smith, on behalf of the Wall Street Journal (WSJ), sought all data provided pursuant to the Commission's August 14, 2000 order. In response to the request of the WSJ, the NYISO filed a "Statement of Necessity and Request for Exemption from Disclosure" with the Records Access Officer on October 2, 2000 (Statement of Necessity), along with supporting affidavits. Several other parties filed statements and affidavits in support of the NYISO filing.

The Records Access Officer issued a determination on October 12, 2000 in which he found that the majority of information made available to the Commission pursuant to the August 14 and August 23 Orders was exempt from disclosure under the provisions for trade secrets and confidential commercial information contained in Section 87(2)(d) of the Public Officers Law. The Records Access Officer stated, however, that he did not have sufficient information to make a determination as to whether the Contact Log is properly exempted from disclosure and directed the NYISO to provide additional details about this document in the context of an appeal to the Secretary of the Commission.

The NYISO filed on October 26, 2000 a "Statement Providing Additional Information Regarding Customer Contact Log" along with several affidavits in support of its filing. Supporting statements were also filed by the Independent Power Producers of New York, Inc. (IPPNY) and NRG Power Marketing, Inc. and affiliated power generation facilities (NRG), along with affidavits in support of those filings.

Arguments

The NYISO, IPPNY, and NRG assert that the Contact Log is properly exempted from disclosure pursuant to POL § 87(2)(d) because it contains the same type of confidential trade secret information that was already determined as material appropriate for exemption from public disclosure in the October 12 decision of the Records Access Officer. The Contact Log, it is explained, records all instances of communication between a market participant and the specific NYISO customer representative who has been assigned previously to that market participant. The information recorded concerns operational and business data such as detailed bid information, unit capacity information, details about generation outages, and detailed unit operational information. NRG asserts that from its knowledge of its communications with the

² Case 00-E-1380, supra, Order Clarifying Information And Data To Be Provided And Measures Regarding Protection Of Confidential Information (issued August 23, 2000).

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NYISO, the Customer Contact Log contains information regarding NRG's unit operational status, including ramp rates, costs, levels, minimum run times, and other data such as equipment availability, performance data, unit commitments, schedules and operating levels, bidding strategies, billing and financial matters, market monitoring discussions and credit data.

The NYISO further argues that disclosure of the Contact Log would undermine market participants' assurance that they could maintain confidential channels of communication with the NYISO: "[D]isclosure would cause more than just immediate economic harm to the affected market participants; it would also adversely impact the market as a whole by limiting market participants' willingness to engage in an information exchange that is critical to market participants' ability to function efficiently in the NYISO-administered markets." Statement at 8.

In addition, the NYISO asserts, disclosure of confidential communications between NYISO customer relations staff and market participants would undermine the goal of creating a workably competitive environment by discouraging participation in substantive discussions regarding market information, including bidding strategies, financial planning, and market monitoring. Although some of the information may not be as easily identifiable as confidential, when viewed in context and along with other information contained in the Contact Log would allow a competitor to infer proprietary and confidential details about bidding strategies, unit performance, financial standing, and corporate planning.

Regarding state law and the standards applicable to trade secret determinations, the NYISO compares the non-exclusive list of factors developed by the Commission with the data at issue and the operation of the NYISO-administered markets. It explains that disclosure of the Contact Log information would improperly allow competitors to develop bidding strategies that would allow competitors to enrich themselves at the expense of other market participants, either individually or in collusion with certain other competitors.

This information, it is further argued, cannot be obtained from any other source, nor can it be developed from publicly-available information. The NYISO notes that even when the bid data is made public after six months, as established by FERC, the identity of bidders is not revealed; the NYISO also does not release data on unit commitments, schedules and operating levels, nor which units set clearing prices. The NYISO contends that the information in question should be excepted from disclosure in view of the Court's holding in New York State Electric & Gas Corp. v. New York State Energy Planning Board, 221 A.D.2d 121 (3d Dept. 1996) that disclosure would allow competitors to infer essential aspects of the generator's production costs.

Statement of Applicable Law

POL §87(2) provides, in pertinent part:

Each agency shall, in accordance with its published rules, make available for public inspection and copying all records except that such agency may

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deny access to records or portions thereof that: ... (d) are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise....

In 16 NYCRR §6-1.3(a), the Commission codified a widely adopted definition of trade secret, as follows:³

A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which provides an opportunity to obtain an advantage over competitors who do not know or use it.

In 16 NYCRR §6-1.3(b)(2), the Commission provided a non-exclusive list of factors which should be considered in explaining whether information constitutes a trade secret, as follows:

- (i) the extent to which the disclosure would cause unfair economic or competitive damage;
- (ii) the extent to which the information is known by others and can involve similar activities;
- (iii) the worth or value of the information to the person and the person's competitors;
- (iv) the degree of difficulty and cost of developing the information;
- (v) the ease or difficulty associated with obtaining or duplicating the information by others without the person's consent; and
- (vi) other statute(s) or regulations specifically excepting the information from disclosure.

As discussed in the determination of the Records Access Officer, the Court of Appeals, in Matter of Capital Newspapers v. Burns, 67 N.Y.2d 562, 566, 570 (1986), held that the exceptions from disclosure in POL §87(2) are narrowly construed and that the person resisting disclosure bears the burden of proof and must demonstrate a particularized and specific justification for denying access.

³ The Commission did so after the Court of Appeals held in Matter of New York Telephone Company v. Public Serv. Comm'n, 56 N.Y.2d 213 (1982), that the Commission has both the power and the duty to protect trade secrets.

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The Court of Appeals in Encore College Bookstores, Inc. v. Auxiliary Service Corp. of the State University of New York at Farmingdale, 87 NY2d 410 (1995) stated that the Legislature had signaled its intent that the "substantial injury to the competitive position" language of POL §87(2)(d) be similar in scope to the "substantial competitive harm" test announced in National Parks and Conservation Association v. Morton, 498 F. 2d 765, 770 (D.C. Cir., 1974), a case arising under the federal Freedom of Information Act (Id. at 419-20). In particular, the Court paraphrased and quoted with approval from another D.C. Circuit Court of Appeals Decision in Worthington Compressors v. Costle, 662 F. 2d 45, 51 (D.C. Cir., 1981). Thus, the Court in Encore, supra, stated that, where government disclosure is the sole means by which competitors can obtain the requested information, the inquiry ends with a consideration of how valuable the information at issue would be to a competing business and how much damage would result to the enterprise that submitted the information.

By contrast, the Court held that, where the material is available from another source at some cost, consideration must be given not only to the commercial value of such information, but to the cost of acquiring it through other means, because competition in business turns on the relative costs and opportunities faced by members of the same industry, which might be substantially different if one could obtain information by paying the copying cost rather than the cost of replication (Id. at 420). The Court observed that the reasoning underlying these considerations is consistent with the policy behind POL §87(2)(d) to protect businesses from the deleterious consequences of disclosing confidential commercial information so as to further the state's economic development efforts and attract business to New York (Id.). Finally, in applying the enunciated test to Encore's request, the Court concluded that the submitting enterprise was not required to establish actual competitive harm; rather, it was required, in the words of Gulf and Western Industries v. United States, supra, to show "actual competition and the likelihood of substantial competitive injury" (Id., at 421).

Application of Pertinent Law

In applying the first prong of the test enunciated in Encore, supra, I agree with the Records Access Officer that the market participants face actual competition. Therefore, the question of whether the information at issue is entitled to an exception from disclosure as trade secrets or confidential commercial information turns on the proper application of the second prong of the test -- whether disclosure would be likely to cause substantial injury to the competitive position of the subject enterprise.

With regard to the second prong of the Court's test, almost all information possessed by a business would have some commercial value to its competitors; however, the question is whether the information at issue is sufficiently valuable that its disclosure would be likely to cause substantial competitive injury. Because the information in question appears to be available almost exclusively through disclosure by the Department, the Department is required to consider the commercial value of such information to competitors and the competitive injury to the commercial enterprise possessing the information that would likely result.

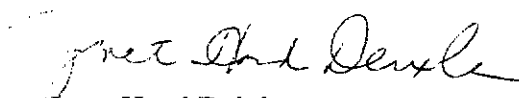
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The NYISO and affected commercial enterprises have, in my view, conclusively shown that the Contact Log is highly valuable to the competitors and that its disclosure would be likely to cause substantial injury to the subject commercial enterprise. I agree that competitors could use the information in the Contact Log to infer bidding strategies, unit operating capabilities, and other proprietary information that would allow a competitor to increase its profits at the expense of other market participants. In many instances, I am persuaded, even if a market participant's question does not contain confidential information on its face, the mere fact that a market participant has asked a question would convey proprietary information about the market participant's business strategy. Similarly, even in cases where an individual question, examined alone, does not contain confidential information, a series or pattern of questions, when viewed in the aggregate, may convey trade secret information.

Conclusion

The Contact Log is entitled to an exception from disclosure as trade secrets or confidential commercial information. Possession of such information affords the affected commercial enterprises an opportunity to obtain a competitive advantage over others that do not possess it (16 NYCRR §6-1.3(a)), because such information has sufficient commercial value that its disclosure would be likely to cause substantial competitive injury (Encore, supra). Further, disclosure would undermine the basis on which the electric markets operate. The NYISO's request for an exception from disclosure is, therefore, granted

Very truly yours,


Janet Hand Deixler
Secretary

cc: Hon. Robert J. Freeman, Executive Director
Committee on Open Government

NRG Power Marketing, Inc.

Independent Power Producers of
New York, Inc.