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Molly Magnis
Records Access Officer
New York State Department of Public Service
Agency Building 3
Albany, NY 12223-1350

Re: Case 24-T-____ - Application of New York State Electric & Gas Corporation for a Certificate of Environmental Compatibility and Public Need Pursuant to Article VII of the Public Service Law for the Jennison Transmission Solution Project

REQUEST FOR PROTECTION OF CONFIDENTIAL INFORMATION

Dear Ms. Magnis:

At this time, New York State Electric & Gas Corporation (the “Applicant”) is filing with the Secretary of the Public Service Commission (“Commission”) an application (the “Application”) pursuant to Article VII of the Public Service Law (“PSL”) for a Certificate of Environmental Compatibility and Public Need (“Certificate”) that would authorize it to construct, operate, and maintain the Jennison Transmission Solution Project (the “Project”). The Applicant redacted certain confidential information from all public copies of the Application being filed and served on the persons identified on the service list, as well as from hard copies of the Application that it will deliver to Staff of the Department of Public Service.

Specifically, the Applicant redacted certain information required by PSL Section 122 and Parts 86 and 88 of the Commission’s Rules¹ to be included in Exhibits 2, 3, 5, 9, E-2 and E-4, and Appendix D, of the Application because the information contains critical infrastructure information (“CII”) or trade secrets and other confidential commercial information.

¹ 16 NYCRR Parts 86 and 88.

In particular, the redacted information includes:

(a) CII:

- Details of the regional transmission system, including system contingencies;
- Details of the Jennison Substation, including one-line diagrams (existing conditions and proposed modifications);
- Information about power flows in the Applicant's Oneonta Division; and
- Correspondence regarding the need for a New York Independent System Operator System Impact Study; and

(b) Trade secret and/or confidential commercial information:

- Project capital cost estimates.

The Applicant has made a confidential filing on the Commission's Document and Matter Management System of unredacted versions of Exhibits 2, 3, 5, 9, E-2 and E-4, and Appendix D, of the Application, or the relevant portions thereof, marked to indicate the CII and trade secrets/confidential commercial information (the "Confidential Information"). Pursuant to Part 6 of the Commission's Rules, and Sections 87(2) and 89(5) of the New York Public Officers Law ("POL"),² the Applicant hereby respectfully requests confidential treatment and protection of the Confidential Information.

Critical Infrastructure Information

Section 87(2)(f) of the POL provides, in relevant part, that agencies may deny access to records, or portions thereof, that, if "disclosed, could endanger the life or safety of any person."³ In addition, POL § 89(5)(a)(1-a) states:

[a] person or entity who submits or otherwise makes available any records to any agency, may, at any time, identify those records or portions thereof that may contain critical infrastructure information, and request that the agency that maintains such records except such information from disclosure under subdivision two of section eighty-seven of this article.⁴

The POL defines "critical infrastructure" as "systems, assets, places or things, whether physical or virtual, so vital to the state that the disruption, incapacitation or destruction of such systems, assets, places or things could jeopardize the health, safety, welfare or security of the state, its residents or its economy."⁵

The Confidential Information marked as CII (or as Critical Energy/Electric Infrastructure Information ["CEII"]) includes (i) transmission line system diagrams as well as forecasted electric load, system flows and vulnerabilities, based on specific engineering design information, and (ii) details regarding the Jennison Substation (existing conditions and proposed modifications). The Applicant asserts that these materials qualify as CII and the public interest requires that they be protected from public disclosure. The CII could be used by someone with malicious intent to target specific facilities, disrupt service, and, thereby, jeopardize the health, safety, welfare or security of the state, its residents and economy.

²N.Y. Pub. Off. Law § 87(2); N.Y. Pub. Off. Law § 89(5).

³*Ibid.* at § 87(2)(f).

⁴*Id.* at § 89(5)(a)(1-a).

⁵*Id.* at § 86(5).

The Commission has consistently held that this type of information should be protected from disclosure as CII. *See* Case 06-T-0650, *Application of New York Regional Interconnect, Inc.*, Ruling Granting Protection for Critical Energy Infrastructure Information (July 31, 2008) (finding that disclosure “has the potential to lead to disruption of New York’s power system, which could endanger the life and safety of the public”); Case 08-T-0746, *Application of the Village of Arcade and Noble Allegany Windpark, LLC*, Ruling Granting Request for Confidential Status (July 30, 2008) (finding that portions of the System Reliability Impact Study should be exempted from disclosure as CII); Case 08-T-0034, *Application of Hudson Transmission Partners, LLC*, Ruling Granting Protection for Critical Energy Infrastructure Information (April 25, 2008) (protecting CII from public disclosure); Case 07-T-0140, *Application of Nobles Wethersfield Windpark, LLC*, Ruling Granting Protection from Disclosure for Critical Infrastructure Information (March 15, 2007) (finding that the information presented was CII and should be excepted from public disclosure); Case 10-T-0139, *Application of Champlain Hudson Power Express, Inc.*, Ruling Granting Protection and Approving Protective Order (June 12, 2012) (granting protective treatment and issuing a protective order on an expedited basis).

In one such ruling, Case 06-M-0878, *Trade Secret Determination* (July 10, 2008), the Commission found:

[I]nformation concerning specific structures, potential weakness in the system, maps and drawings of the existing electric system (including configurations of various components), overhead transmission standards, structure work lists, and ratings on certain circuits constitutes critical infrastructure information that should be excepted from public disclosure because such information, if disclosed, could endanger the life or safety of people. This is so because the information would allow particular parts of the electric system to be targeted by those planning harm to the State’s electric grid.

Accordingly, the Confidential Information marked as CII falls within the Commission’s confidentiality rules as CII and must be protected from public disclosure.

Trade Secrets and Confidential Commercial Information

POL Section 87(2)(d) provides for an exception to disclosure of trade secrets or other confidential information “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.” Furthermore, Section 87(2)(c) of the POL exempts from disclosure “records or portions thereof that ... if disclosed would impair present or imminent contract awards or collective bargaining negotiations.”

The Commission has not only the power, but also the affirmative responsibility, to provide for the protection of trade secrets. *N.Y. Tel. Co. v. Pub. Serv. Comm’n*, 56 N.Y.2d 213, 219-20 (1982). The New York Court of Appeals has held that the trade secret exemption in POL § 87(2)(d) is triggered when public disclosure of the trade secret material would “cause substantial harm to the competitive position of the person from whom the information was obtained.” *Encore College Bookstores, Inc. v. Auxiliary Servs. Corp. of the State Univ. of N.Y. at Farmingdale*, 87 N.Y.2d 410, 419 (1995) (citations omitted). In *Encore*, the Court held that where government disclosure is the sole means by which competitors can obtain the requested information,

the courts must consider 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. *Id.* at 420. Where the material is available from another source at some cost, consideration should also be given to whether allowing a competitor to obtain the materials for minimal FOIL retrieval costs would result in an unfair windfall to the competitor. *Id.* The Court also determined that the party seeking trade secret protection need not establish actual competitive harm; “rather, actual competition and the likelihood of substantial competitive injury is all that need be shown.” *Id.* at 421 (citations omitted).

The Commission has promulgated rules and regulations to implement the provisions of the POL relating to the disclosure of documents submitted to a public agency. *See* 16 NYCRR 6-1.1, *et seq.* Section 6-1.3 allows a party to seek trade secret or confidential commercial information protection for any records submitted to the Commission. The Commission defines a “trade secret” as “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.” *Id.* § 6-1.3(a). The Commission has identified the following, non-exclusive, factors to be considered in determining whether to grant trade secret or confidential commercial information status:

- (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”;
- (vi) “other statute(s) or regulations specifically excepting the information from disclosure.”

Id. § 6-1.3(b)(2)(i)-(vi).

The trade secrets and/or confidential commercial information sought to be protected consist of the Applicant’s capital cost estimates for the right-of-way, surveys, materials, labor, engineering and inspection, administrative overhead, fees for legal and other services, interest during construction, and contingencies. This information meets either the trade secret or confidential commercial information requirements because: (1) if disclosed, it could cause the Applicant to suffer substantial economic harm; (2) it is neither generally available to the public nor easy for members of the general public to obtain or duplicate without permission; and (3) it would be of great value to others.

Release of the trade secrets included in the Applicant’s capital cost estimates sought to be protected here would cause economic harm to the Applicant because it could be used by future bidders and vendors to unfairly influence their bid prices for construction of the Applicant’s facilities. Disclosing the above information could impair the Applicant’s negotiating leverage. Thus, disclosing the capital cost estimates could result in exposing the Applicant to an unreasonable risk of harm as it contains non-public commercially sensitive business information. The Applicant does not release this type of information to the public when it has not been shared with persons outside of the Applicant except for such agents, counsel, and other individuals who are under an obligation to hold such information in confidence.

Based on the foregoing, the Applicant believes that the information redacted from the Application is critical energy/electric infrastructure information and trade secrets or confidential commercial information that should be exempt from public disclosure under the POL. Accordingly, the Applicant respectfully requests that the Confidential Information be treated as confidential, maintained apart from other agency records, and otherwise protected pursuant to POL §§ 87(2) and 89(5).

Respectfully submitted,

/s/ David T. Metcalfe

David T. Metcalfe
Cullen and Dykman LLP
Counsel for the Applicant

Enclosures

cc (w/o enclosures): Hon. Michelle L. Phillips