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February 11, 2020

**BY ELECTRONIC DELIVERY**

Ms. Jessica Vigars  
Records Access Officer  
State of New York  
Department of Public Service  
Three Empire State Plaza  
Albany, NY 12223-1350

Re: Case 03-T-1385 - Application of Rochester Gas and Electric Corporation for Amendment of the Certificate of Environmental Compatibility and Public Need Issued in Case 03-T-1385 for Construction of Rochester Transmission Project Enhancement in Monroe County.

**REQUEST FOR PROTECTION OF  
CONFIDENTIAL INFORMATION**

**ENCLOSURES CONTAIN CONFIDENTIAL INFORMATION**

Dear Ms. Vigars:

On February 11, 2020, Rochester Gas and Electric Corporation (“RG&E” or the “Applicant”) filed with the Secretary of the Public Service Commission an application to amend the Certificate of Environmental Compatibility and Public Need issued to RG&E in Case 03-T-1385 (the “Application”). The Applicant redacted certain confidential information from all copies of the Application filed and served on the persons identified on the service list, as well as from copies of the Application that it will deliver to Staff of the Department of Public Service.

Specifically, the Applicant redacted certain confidential information required by Section 86.10 of Title 16 of the New York Codes, Rules, and Regulations (“Commission’s Rules”) to be included in Exhibit 9 of the Application because this information contains competitive cost information, as explained below. The specific information redacted includes general capital cost estimates set forth in Table 9-1.

The Applicant also redacted information required by Sections 86.6, 88.2 and 88.4 of the Commission's Rules to be included in Exhibits 5, E-2 and E-4 of the Application, respectively, because the information contains critical infrastructure information ("CII"), as explained below. The redacted information includes:

- Figures 5-6: System One-Line Diagram for Station 48;
- Figure 5-8: System One-Line Diagram for Station 418;
- Figure E-2-1: One-Line Diagram of Project Modifications within Station 48;
- Figure E-2-2: One-Line Diagram of Project Modifications within Station 418;
- Critical contingency information included in Exhibit E-4;
- Figure E-4-1: One-Line Diagram of the Project; and
- Attachment E-4-A: SIS Correspondence.

Pursuant to Part 6 of the Commission's Rules and Sections 87(2) and 89(5) of the New York Public Officers Law ("POL"), the Applicant hereby requests confidential treatment and protection of such competitive cost information and CII (collectively referred to herein as the "Confidential Information"). An unredacted version of the Confidential Information is attached hereto.

### **Confidential Commercial Information**

Section 87(2) of the POL states, in relevant part, that agencies may deny access to records that "are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise." POL § 87(2)(d).

The Commission not only has 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 State 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 Services 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 the same 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 information. *See* 16 N.Y.C.R.R. § 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. *Id.* § 6-1.3. Section 6-1.3(b)(2) requires the Applicant to “show the reasons why the information, if disclosed, would cause substantial injury to the competitive position of the subject commercial enterprise.” *Id.* § 6-1.3(b)(2). 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). Factors to be considered by the Commission in determining whether to grant trade secret or confidential commercial information status include, but are not necessarily limited to:

- (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.
- Id.* § 6-1.3(b)(2).

The competitive cost information redacted from Exhibit 9 of the Application as filed consists of highly sensitive proprietary information related to cost and pricing information which meets the trade secret or confidential commercial information requirements because: (1) if disclosed, it could cause the Applicant to suffer substantial economic and competitive 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 cost information would cause economic and competitive harm to the Applicant because it could be used by competitors, future bidders and vendors to, *inter alia*, unfairly influence their bid prices for construction of the transmission project proposed in the Application. Disclosure of the redacted cost information could impair the Applicant’s negotiating leverage and undercut efforts to obtain maximum value for ratepayers. Disclosure could thus result in exposing the Applicant to an unreasonable risk of harm to its competitive position as it contains non-public commercially sensitive business information regarding the cost of the proposed transmission project. The Applicant does not release this type of information to the public when it could negatively influence its competitive position. The information has not been shared with persons outside of RG&E and/or its affiliates except for such agents, counsel, and other individuals who

are under an obligation to hold such information in confidence or who have agreed to keep it confidential.

In light of the above, the enclosed information marked as protected cost information in Table 9-1 falls within the Commission's confidentiality rules as trade secrets or confidential commercial information and must be protected from public disclosure.

### **Critical Infrastructure Information**

Pursuant to Section 6-1.3(b)(3) of the Commission's Rules, the Applicant must state a reason why CII should be exempted from public disclosure as provided in POL § 87(2). Section 87(2) 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." POL § 87(2)(f). 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 [POL § 87(2)]...  
POL § 89(5)(a)(1-a).

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." POL § 86(5).

The enclosed documents marked as CII (or as Critical Energy Infrastructure Information ["CEII"]) contain (i) transmission line system information, (ii) details regarding RG&E's substations, and (iii) system planning analyses. 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 in order to target specific facilities, disrupt service, and, thereby, jeopardize the health, safety, welfare or security of the state, its residents and economy.

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); Case 10-T-0139, *Application of Champlain Hudson Power Express, Inc.*, Ruling Granting Protection and Approving Protective Order (June 12, 2012).

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.

*Id.* at 4.

In light of the above, the enclosed information marked as CII falls within the Commission's confidentiality rules as CII and must be protected from public disclosure.

### **Conclusion**

For the foregoing reasons, 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) and the Commission's Rules.

Respectfully submitted,



David T. Metcalfe  
Cullen and Dykman, LLP  
Attorney for the Applicant,  
Rochester Gas and Electric Corporation

cc: Secretary Phillips (w/o enclosures)

Enclosures