

BEFORE THE  
STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION

-----X  
PROCEEDING ON MOTION OF THE COMMISSION TO

EXAMINE REPOWERING ALTERNATIVES TO UTILITY  
TRANSMISSION REINFORCEMENTS

Case 12-E-0577

**NOTICE OF  
MOTION**

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**PLEASE TAKE NOTICE**, that Earthjustice, on behalf of the Ratepayer and Community Intervenors, Citizens Campaign for the Environment, and Environmental Advocates of New York (the “Moving Parties”), hereby moves pursuant to New York Public Commission regulation 16 N.Y.C.R.R. § 3.6 for an Order granting the Moving Parties access to complete and unredacted copies of the documents, records and communications specified herein, and granting such other and further relief as the Commission deems just and proper.

Dated: New York, New York  
September 16, 2013

Respectfully submitted,

\_\_\_\_\_/s/\_\_\_\_\_  
Christopher Amato, Esq.  
EARTHJUSTICE  
156 William Street, Suite 800  
New York, NY 10038-5326  
Tel: 212-845-7390  
Fax: 212-918-1556  
[camato@earthjustice.org](mailto:camato@earthjustice.org)

*Counsel for Ratepayer and Community  
Intervenors, Citizens Campaign for the  
Environment, and Environmental Advocates  
of New York*

TO: Service List, Case 12-E-0577

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STATE OF NEW YORK  
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**MOTION ON BEHALF OF RATEPAYER AND COMMUNITY INTERVENORS,  
CITIZENS CAMPAIGN FOR THE ENVIRONMENT, AND ENVIRONMENTAL  
ADVOCATES OF NEW YORK FOR ACCESS TO CRITICAL DOCUMENTS  
SUBMITTED IN THIS PROCEEDING**

**PRELIMINARY STATEMENT**

Earthjustice, on behalf of the Ratepayer and Community Intervenors, Citizens Campaign for the Environment, and Environmental Advocates of New York (the “Moving Parties”), hereby moves pursuant to 16 NYCRR § 3.6<sup>1</sup> for an order granting the Moving Parties access to complete and unredacted copies of:

1. The twelve (12) documents identified herein which have already been filed in this proceeding by or on behalf of Niagara Mohawk Power Corporation, New York State Electric and Gas Corporation, Cayuga Operating Company, LLC, NRG Energy, Inc., and National Grid (together, the “Transmission and Generating Entities”) and which appear in redacted form on the Public Service Commission (“PSC” or the “Commission”) public docket for this proceeding (hereinafter, the “Requested Filed Documents”);

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<sup>1</sup> This motion is appropriately made pursuant to 16 N.Y.C.R.R. § 3.6. Part 3 of Title 16 is entitled “Procedures Applicable to All Proceedings” and the procedures specified in that Part are thus applicable here.

2. All documents submitted to the Commission by or on behalf of the Transmission and Generating Entities in this proceeding which do not appear on the PSC public docket for this proceeding (hereinafter, the “Non-Public Submissions”);

3. All communications from the Commission or Department of Public Service (“DPS”) staff to any one or more of the Transmission and Generating Entities which do not appear on the PSC public docket for this proceeding (hereinafter, the “Non-Public Communications”);

4. All records of meetings between the Commission, any quorum of the Commission, or any Commission member and any one or more of the Transmission and Generating Entities (hereinafter, the “Meeting Records”); and

5. All documents which are filed in this proceeding by the Transmission and Generating Entities and all communications from the Commission or DPS staff to the Transmission and Generating Entities after the date of this motion (hereinafter, the “Future Submissions”).

It is respectfully submitted that the Moving Parties require access to complete and unredacted versions of the Requested Filed Documents, the Non-Public Submissions, the Non-Public Communications, the Meeting Records, and the Future Submissions in order to meaningfully participate in this proceeding.

The Requested Filed Documents address the core economic and environmental issues at the heart of this proceeding, yet the versions of those documents that appear on the public docket are incomplete and heavily redacted. Indeed, entire sections, tables, attachments and appendices in these crucial documents consist entirely of black redacted rectangles. Upon information and belief, the redacted portions of the Requested Filed Documents contain critical cost and

environmental information that is indispensable to evaluating and commenting on the various transmission and repowering options under consideration in this proceeding.

Upon information and belief, the Non-Public Submissions, the Non-Public Communications, and the Meeting Records also include information that is indispensable to evaluating and commenting on the various transmission and repowering options under consideration in this proceeding.

The Moving Parties anticipate that, after the date of this motion, additional critical documents will be submitted in this proceeding by the Transmission and Generating Entities, and that the Commission and DPS staff will send additional communications to the Transmission and Generating Entities.<sup>2</sup> Based on the experience to date, the Moving Parties anticipate that only redacted versions of those Future Submissions will be provided to the Moving Parties or, alternatively, they will not be placed on the public docket at all. Upon information and belief, the Future Submissions will include information that is indispensable to evaluating and commenting on the various transmission and repowering options under consideration in this proceeding.

The Commission's Order initiating this proceeding<sup>3</sup> and the public interest standard that governs it<sup>4</sup> require a transparent, accessible process in which the merits of the various transmission and repowering options are open to review, evaluation and comment by the public. Instead, the massive redactions of critical information and lack of public access to key documents have transformed this proceeding into one characterized by secrecy, concealment and

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<sup>2</sup> This presumption is supported by the Notice Requiring Additional Information and Technical Conference, Filing No. 94 filed on August 23, 2013 by the Commission, available at <http://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterCaseNo=12-E-0577&submit=Search+by+Case+Number>.

<sup>3</sup> *Order Instituting Proceeding and Requiring Evaluation of Generation Repowering*, Case 12-E-0577 (Jan. 18, 2013) ("January 18 Order").

<sup>4</sup> See Point I, *infra*.

exclusion of public participation. The Moving Parties seek access to unredacted versions of the Requested Filed Documents, the Non-Public Submissions, the Non-Public Communications, the Meeting Records and the Future Submissions in order to provide input from elected officials, ratepayers, individual landowners, environmental organizations, and other concerned members of the public on the repowering and transmission options at issue and to assist the Commission in safeguarding the public interest. It is respectfully submitted that applicable statutes and case law, the January 18 Order, and the public interest require nothing less.

### **PROCEDURAL BACKGROUND**

This proceeding involves the proposed retirement of two coal-fired power plants: (1) the Dunkirk generating station located in Chautauqua County, New York, which consists of four units with a combined rating of approximately 635 megawatts (“MW”); and (2) the Cayuga facility located in Lansing, New York, which consists of two units with a combined capacity of approximately 312 MW.

On March 14, 2012, NRG Energy, Inc. (“NRG”), the owner of Dunkirk Power LLC, filed notice with the Commission of NRG’s intent to retire the Dunkirk facility by no later than September 10, 2012, on the ground that Dunkirk was not economic and was not expected to be economic.

On July 20, 2012, Cayuga Operating Company, LLC (“Cayuga”), the owner of the Cayuga facility, filed notice with the Commission of its intent to indefinitely retire the facility by no later than January 16, 2013. In support of its decision, Cayuga stated that current and forecasted wholesale electric prices in New York are inadequate for the Cayuga facility to operate economically.

The Commission initiated this proceeding by the January 18 Order. The Order directed the transmission and distribution utilities National Grid and New York State Electric and Gas Corporation (“NYSEG”) to (1) file with DPS staff the projected costs of the transmission alternatives that they propose to evaluate; and (2) request bids from the owners of the Cayuga and Dunkirk plants for the level of out-of-market support each would require in order to finance the repowering of their respective facilities. *See* January 18 Order.

On August 13, 2013, the Ratepayer and Community Intervenors filed and served a Request for Party Status in this proceeding. The Ratepayer and Community Intervenors include four county legislators, three town supervisors, three town board members, eleven individual landowners and ratepayers, and one community advocacy group, all of whom are concerned about the potential rate and environmental impacts associated with repowering the Cayuga and Dunkirk facilities.

On August 26, 2013, Earthjustice filed and served a Party Representative Form providing notice that it would be representing the Ratepayer and Community Intervenors in this proceeding.

On September 12, 2013, Citizens Campaign for the Environment (CCE”) filed and served a Request for Party Status in this proceeding. CCE is a non-profit, non-partisan organization that empowers communities and advocates solutions to protect public health and the natural environment in New York State. CCE has 80,000 members in New York State and its staff work out of regional offices located in Buffalo, Syracuse, Albany, White Plains, and Farmingdale, New York.

On September 13, 2013, Environmental Advocates of New York (“EANY”) filed and served a Request for Party Status in this proceeding. EANY is a non-profit government

watchdog group that holds lawmakers and agencies accountable for enacting and enforcing laws that protect natural resources and public health. EANY has more than 13,000 individual members.

CCE and EANY have consented to Earthjustice's representation for purposes of this motion.

### **THE REQUESTED FILED DOCUMENTS**

As directed by the January 18 Order, the Transmission and Generating Entities have submitted reports and analyses addressing the core economic and environmental issues that are the subject of this proceeding. These documents include the following Requested Filed Documents:

1. Dunkirk Part 2 Reliability Study, Filing No. 11 filed February 15, 2013 on behalf of Niagara Mohawk Power Corporation ("NiMo");
2. NYSEG Transmission Cost Submission, Filing No. 14 filed February 19, 2013 on behalf of NYSEG;
3. Information Related to Estimated Costs of Anticipated Transmission System Upgrades to Address Long-term Reliability Needs, Filing No. 15 filed February 19, 2013 on behalf of NiMo;
4. Redacted Version of Cayuga Operating Company LLC's Repowering Proposal, Filing No. 21 filed March 26, 2013 on behalf of Cayuga;
5. Dunkirk Repowering Options - Redacted, Filing No. 24 filed April 1, 2013 on behalf of NRG;
6. Report on Repowering Options – Redacted, Filing No. 51 filed May 17, 2013 on behalf of NiMo;
7. NYSEG Report on Cayuga Repowering Analysis, Filing No. 52 filed May 17, 2013 on behalf of NYSEG;
8. Repowering Reports, Filing No. 70 filed June 28, 2013 on behalf of NiMo;

9. Cayuga Comments on NYSEG Report, Filing No. 83 filed August 16, 2013 on behalf of Cayuga;
10. Comments of National Grid, Filing No. 86 filed August 19, 2013 on behalf of NiMo;
11. Redacted Response, Filing No. 97 filed September 5, 2013 on behalf of NiMo; and
12. Cayuga Revised March 26 Proposal, Filing No. 98 filed September 6, 2013 on behalf of Cayuga.<sup>5</sup>

The Requested Filed Documents appear on the PSC public docket in severely redacted versions that, upon information and belief, conceal critical economic and environmental information. The redactions in the Requested Filed Documents are so pervasive and numerous that the documents are rendered essentially useless for purposes of meaningful review and comment by the Moving Parties.

To cite just one example, more than half the pages in the Dunkirk Part 2 Reliability Study<sup>6</sup> have passages of text that are redacted. In addition, the following tables, figures, attachments and appendices are either completely or nearly completely redacted:

- Option Table (p. 5)
- Option 1 - Fuel Switch to Natural Gas (p. 12)
- Configuration Table (p. 13)
- Option 1 – Fuel Switch to Natural Gas, Existing Boilers (p. 14)
- Cost Summary Option 1 (p. 14)
- Typical Detailed Boiler Performance Calculated for Natural Gas (p. 15)
- Side Elevation of Steam Generators (p. 16)
- Option 2 – Simple Cycle Gas Turbines (p. 17)
- Cost Summary – Option 2 (p. 17)

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<sup>5</sup> Redacted versions of the Requested Filed Documents are available at <http://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterCaseNo=12-E-0577&submit=Search+by+Case+Number>.

<sup>6</sup> Filing No. 11 filed 2/15/13 on behalf of NiMO, available at <http://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterCaseNo=12-E-0577&submit=Search+by+Case+Number>.



- LMS100 Performance Summary (p. 19)
- LMS100 Estimated Cost Summary (p. 19)
- Option 3 – Combined Cycle Gas Turbine (p. 20)
- Cost Summary Option 3 (p. 20)
- Performance Heat Balance for Repowered Unit 2 (p. 21)
- Option 3 – Estimated Cost Summary (p. 22)
- Option 4 – Combined Cycle Gas Turbines (p. 22)
- Cost Summary – Option 4 (p. 22)
- Option 4 Estimated Cost Summary (p. 23)
- Table of Cayuga Repower Options (p. 35)
- Attachment 1 – Capital Cost Estimate Detail
- Attachment 3 – Cayuga Air Emission Impacts for Each Option
- Attachment 4 – Operational and Financial Model Detail
- Appendix 1 – (Title of this Appendix is Redacted)
- Appendix 3 – Project Organization Chart
- Appendix 4 – Personnel Resumes
- Appendix 5 - Schedules

Judging from the unredacted titles of these tables, figures, attachments and appendices, the redacted information concerns cost comparisons and summaries for various repowering options, as well as the projected environmental impacts of different repowering options. The other Requested Filed Documents have similar essential cost and environmental information redacted. These matters are at the core of this proceeding. Depriving the Moving Parties of access to this information severely impedes their efforts to provide input from affected ratepayers, elected officials, landowners and other members of the public on the proposals under consideration.

## ARGUMENT

### I. **In Violation of the January 18 Order and the Public Interest Standard That Governs This Proceeding, Meaningful Participation in This Proceeding by the Moving Parties is Being Thwarted by the Concealment of Critical Information**

The January 18 Order describes the purpose of this proceeding as:

*to examine the relative costs and benefits of repowering the plants at their existing sites, and to compare those costs and benefits to the costs and benefits of alternative transmission upgrades over the long term.* The benefits to be evaluated must include, but may not be limited to, the reliability, *environmental*, and *customer impacts* associated with the repowering and transmission solutions.

January 18 Order at 3; (emphasis added).

Because this is a public proceeding, the January 18 Order clearly contemplated that the public would participate in examining “the relative costs and benefits of repowering,” comparing “those costs and benefits to the costs and benefits of alternative transmission upgrades over the long term,” and evaluating the “environmental and customer impacts” of the repowering and transmission options. January 18 Order at 3. Unfortunately, the massive redactions in the Requested Filed Documents, and lack of access to the Non-Public Submissions, Non-Public Communications and Meeting Records are thwarting public participation on these core issues. Additionally, because the redactions and lack of access have the effect of excluding the public, including the Moving Parties, from meaningful participation in this proceeding, the Commission’s ability to meet the public interest standard that governs generation retirement proceedings is jeopardized.

This proceeding has been initiated by the Commission pursuant to its general authority under Article 4 of the New York Public Service Law (“PSL”) and, more specifically, pursuant to PSL § 70 and the Commission’s *Order Adopting Unit Notice Requirements for Generation Unit Retirements* (Case 05-E-0889, Dec. 20, 2005) (“Retirement Order”). Proceedings under PSL §

70 are intended to protect against “generator retirement that could *harm the public interest*.” Retirement Order at 15 (emphasis added). As the New York Court of Appeals has recognized, approval of a proposed retirement must “satisfy[] *the public interest requirement* of Public Service Law § 70 . . . .” *Luyster Creek, LLC v. New York State Pub. Serv. Comm'n*, 18 N.Y.3d 977, 978, (2012) (emphasis added).

The public interest standard cannot be met where, as here, the ability of the public to participate in a meaningful way is undermined by the concealment of information that is indispensable to evaluating and comparing the transmission and repowering proposals. Such wholesale concealment of critical information is directly at odds with the state policy, enshrined in the New York Freedom of Information Law, N.Y. Pub. Off. L. §§ 85-90 (“FOIL”), “to provide the public with a means of access to governmental records in order to encourage public awareness and understanding of and participation in government and to discourage official secrecy.” *Matter of Beechwood Restorative Care Ctr. v. Signor*, 5 N.Y.3d 435, 440 (2005) quoting *Matter of Alderson v. New York State Coll. of Agric. & Life Sciences at Cornell Univ.*, 4 N.Y.3d 225, 230 (2005); see also *New York State Rifle & Pistol Ass'n, Inc. v. Kelly*, 55 A.D.3d 222, 226-27 (1<sup>st</sup> Dep’t 2008) (state policy as articulated in FOIL is to disfavor “the withholding of official information helpful to the public in making intelligent, informed choices with respect to both the direction and scope of governmental activities”).<sup>7</sup>

It is respectfully submitted that, consistent with the January 18 Order, its statutory duty under PSL § 70 to protect the public interest, and its prior practice in at least one prior proceeding, the Commission must order that unredacted versions of the Requested Filed

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<sup>7</sup> The concealment from the public of critical information is also inconsistent with the Commission’s stated intention that, “[t]o the extent that devising a solution to a reliability detriment becomes necessary . . . other parties may be allowed to offer solutions.” Retirement Order at 16 (emphasis added). The Moving Parties are precluded from offering solutions to the reliability issues in this proceeding because critical information is being concealed.

Documents, Non-Public Submissions, Non-Public Communications, Meeting Records, and Future Submissions be provided to the Moving Parties. *See Petition and Complaint of Verizon New York Inc. and Affiliated Providers of Toll Services Against XChange Telecom Corp. Concerning Their Intrastate Switched Access Charges*, Ruling on Protective Order (Case 08-C-0726, Sept. 26, 2008)<sup>8</sup> at 5 (ordering unredacted version of submission to be provided to party because “obviously relevant to the issues in this proceeding”).

**II. The Transmission and Generating Entities Have Failed to Meet the Legal Standard for Redacting Information From the Requested Filed Documents Based on the Trade Secret or Confidential Commercial Information Exemption**

The purpose of FOIL is to promote the policy of “open government” and public accountability. *Newsday, Inc. v. Empire State Dev. Corp.*, 98 N.Y.2d 359, 362 (2002); *Capital Newspapers Div. of Hearst Corp. v. Burns*, 67 N.Y.2d 562, 565 (1986); *Gould v. New York City Police Dept.*, 89 N.Y.2d 267, 274 (1996). In order to achieve this goal, FOIL “mandates all agencies to make records available to the public,” *Empire Realty Corp. v. New York State Div. of Lottery*, 230 A.D.2d 270, 272 (3d Dep’t 1997), and an agency’s records “are presumptively open to public inspection.” (*Buffalo News v. Buffalo Enter. Dev. Corp.*, 84 N.Y.2d 488, 492 (1994)). These laudable open government policies are being undermined by the secrecy surrounding the submissions by the Transmission and Generating Entities.

Although the Commission has a duty to consider trade secret and confidential commercial information claims, *New York Tel. Co. v. Pub. Serv. Comm’n of State of N.Y.*, 56 N.Y.2d 213, 217 (1982), it also has a duty to apply the strict legal standard that governs such claims. Specifically, in order to overcome the strong presumption that information submitted to a governmental agency must be made available to the public, the entity claiming the exemption

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<sup>8</sup> Available at <http://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterCaseNo=08-c-0726&submit=Search+by+Case+Number>

must demonstrate “[a]ctual competition and the likelihood of substantial competitive injury . . .” if the information is released to the public. *Encore Coll. Bookstores, Inc. v. Auxiliary Serv. Corp. of State Univ. of New York at Farmingdale*, 87 N.Y.2d 410, 421 (1995) (citations omitted) (emphasis added). To establish actual competition, the party seeking to avoid disclosure must present “specific factual or evidentiary material” to sustain its burden of proof. *Pacific Architects & Eng’rs, Inc. v. Renegotiation Bd.*, 505 F.2d 383, 385 (D.C. Cir. 1974). A finding of actual competition requires more than “mere conclusory opinion testimony.” *Nat’l Parks & Conservation Ass’n v. Kleppe*, 547 F.2d 673, 679 (D.C. Cir. 1976).

The Transmitting and Generating Entities have failed to meet this burden. Not only have they failed to demonstrate that they face actual competition regarding the information being concealed; the record is also barren of any proof that disclosure of that information would cause them substantial competitive injury.

The Commission has established clear regulatory criteria that must be met in order to successfully invoke the trade secret or confidential commercial information exemption:

A person submitting trade secret or confidential commercial information to the Department shall clearly state the reason(s) why the information should be excepted from disclosure, as provided for in section 87(2)(d) of the Public Officers Law. In all cases, the person must show the reasons why the information, if disclosed, would be likely to cause substantial injury to the competitive position of the subject commercial enterprise. Factors to be considered 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.

16 N.Y.C.R.R. § 6-1.3(b)(2).

The submissions from the Transmitting and Generating Entities utterly fail to meet these regulatory criteria. *See* Request for Exception From Disclosure, Filing No. 11 filed February 15, 2013 on behalf of NiMo; Request for Exception From Disclosure, Filing No. 14 filed February 19, 2013 on behalf of NYSEG; Request for Exception From Disclosure, Filing No. 15 filed February 19, 2013 on behalf of NiMo; Request for Exception From Disclosure, Filing No. 21 filed March 26, 2013 on behalf of Cayuga; Request for Trade Secret and Confidential Information Protection, Filing No. 21 filed March 26, 2013 on behalf of Cayuga; Request for Exception From Disclosure, Filing No. 24 filed April 1, 2013 on behalf of NRG; Request for Exception From Disclosure, Filing No. 52 filed May 17, 2013 on behalf of NYSEG; Request for Exception From Disclosure, Filing No. 70 filed June 28, 2013 on behalf of NiMo; Request for Exception From Disclosure, Filing No. 83 filed August 16, 2013 on behalf of Cayuga; Request for Exception From Disclosure, Filing No. 86 filed August 19, 2013 on behalf of NiMo; Request for Exception From Disclosure, Filing No. 97 filed September 5, 2013 on behalf of NiMo; Cayuga Response to DPS Staff Request, Filing No. 98 filed September 6, 2013 on behalf of Cayuga.<sup>9</sup>

Each of the confidentiality requests by the Transmission and Generating Entities fails to adequately address – much less meet – the criteria set forth in the Commission’s regulations.<sup>10</sup>

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<sup>9</sup> Available at <http://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterCaseNo=12-E-0577&submit=Search+by+Case+Number>.

<sup>10</sup> In fact, it appears that NiMo has failed to even file a Request for Exception From Disclosure for its May 17, 2013 filing of a redacted version of its Report on Repowering Options. Thus, there is no legal basis for the Commission to withhold an unredacted version of this document and it must be provided to the Moving Parties in unredacted form.

To the contrary, the “justifications” filed by the Transmission and Generating Entities merely recite the regulatory criteria and allege generalized and wholly speculative threats of competitive injury. Some of the regulatory criteria are ignored; others are simply parroted without any details being provided. For example, the “justification” provided in National Grid’s Request for Exception From Disclosure for the Dunkirk Part 2 Reliability Study states, in its entirety:

National Grid submits that the Confidential Information qualifies for trade secret protection . . . and is therefore exempt from disclosure to the public. The Confidential Information includes information regarding electric system vulnerabilities under different operating conditions and contingencies. If made public, such information could be used by market participants to affect the performance of the electricity market in the region, leading to unfair economic advantage and competitive damage that would be harmful to customers . . . The Confidential Information was prepared by National Grid, has not been provided to any commercial third parties, and is not available to the public at large. The Confidential Information was difficult, time-consuming and costly to prepare and could not easily be developed or replicated by someone else.

National Grid’s Request for Exception From Disclosure, Filing No. 11 filed February 15, 2013 on behalf of NiMo.

It is remarkable, to say the least, that this brief and uninformative passage is all that is offered to justify the wholesale concealment of vast amounts of critical cost and environmental information. The Request’s *pro forma* recitation of the regulatory criteria falls far short of the strict standards established by the Commission for withholding information from the public. There is no discussion of the extent to which the disclosure would cause unfair economic or competitive damage, only the conclusory statement that disclosure would lead to “unfair economic advantage and competitive damage . . . ,” with no particulars given. No information is provided regarding the worth or value of the information being concealed. Nor is any specific information provided regarding the degree of difficulty and cost of developing the information, only the bare allegation that it was “difficult, time-consuming and costly to prepare.” And the Request simply claims, without any supporting facts or discussion, that the information “could

not easily be developed or replicated by anyone else.” Indeed, the submission of such nebulous and vague statements to support concealment from the public of numerous categories of critical information borders on abuse of the confidentiality process established by the Commission’s regulations.

The Requests for Exception From Disclosure filed by the other Transmission and Generating Entities adopt similarly vague boilerplate language to justify the indiscriminate concealment of crucial information. The Commission has previously rejected such generalized, unsubstantiated trade secret and confidentiality claims, and should do so here. *See National Fuel Gas Distribution’s Request for an Exception from Public Disclosure*, Determination of Appeal of Trade Secret Determination, Case 91-M-0927 (May 20, 2011)<sup>11</sup> at 10 (Despite “numerous arguments in support of its position . . . the Company does not show how disclosure of the . . . [information] would be likely to cause substantial injury to the competitive position of a commercial enterprise”); *Request for Records of Variable Energy Price Contracts for Consolidated Edison Solutions, Inc.*, Determination of Appeal of Trade Secret Determination, Case 98-M-1343 (Jan. 12, 2011)<sup>12</sup> at 4 (“general statements” do “not constitute the particularized and specific justification for an exception from disclosure”); *In re Kings Park Energy, LLC*, Interim Ruling on Applicant’s Motion for Trade Secret Protection, Case 00-F-1356 (Sept. 9, 2002)<sup>13</sup> at 7-8 (“a mere allegation that substantial competitive injury will result is not adequate

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<sup>11</sup> Available at <http://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterCaseNo=91-m-0927&submit=Search+by+Case+Number>

<sup>12</sup> Available at <http://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterCaseNo=98-m-1343&submit=Search+by+Case+Number>

<sup>13</sup> Available at <http://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterCaseNo=00-f-1356&submit=Search+by+Case+Number>



. . . The Applicant has not provided any information concerning the measures it . . . [has] taken to protect the information, quantifying the value of the information, or establishing that disclosure would likely cause substantial competitive injury”).

The Commission’s prior rejection of vague and unsubstantiated trade secret and confidentiality claims finds ample support in New York case law. The New York Court of Appeals has made clear that “[t]o meet its burden, the party seeking exemption *must present specific, persuasive evidence that disclosure will cause it to suffer a competitive injury*; it cannot merely rest on a speculative conclusion that disclosure might potentially cause harm.” *Markowitz v. Serio*, 11 N.Y.3d 43, 51 (2008) (emphasis added); *see also M. Farbman & Sons, Inc. v. New York City Health & Hospitals Corp.*, 62 N.Y.2d 75, 83 (1984) (“[w]here an exemption is claimed, the burden lies with the agency to articulate particularized and specific justification, and to establish that the material requested falls squarely within the ambit of [the] statutory exemptions”) (internal quotations and citations omitted); *City of Schenectady v. O’Keeffe*, 50 A.D.3d 1384, 1386 (3<sup>rd</sup> Dep’t 2008), *lv. to appeal denied*, 11 N.Y.3d 702 (“For this exception to apply, it must be established that the commercial enterprise that provided the data is in actual competition with other entities, and that release of the information would likely cause it substantial competitive injury”).

The confidentiality requests filed by the Transmission and Generating Entities are wholly lacking in any “specific, persuasive evidence” that disclosure would cause them competitive injury, and the Commission should therefore order that access to unredacted versions of the Requested Filed Documents be provided to the Moving Parties.

### **III. At Least Some of the Redacted Information in the Requested Filed Documents is Already in the Public Domain and Cannot Therefore Qualify for Exemption From Disclosure**

Upon information and belief, at least some of the redacted information in the Requested Filed Documents is already in the public domain, and is therefore not subject to a confidentiality exemption under FOIL. In an article published on September 7, 2013 in the Ithaca Journal, the newspaper claimed that a document filed by Cayuga<sup>14</sup> on August 16, 2013 “contained faulty redactions” and that “[t]he black redaction bars in the document were intended to hide the details of the plans, but they failed to obscure key details.” Andrew Casler, *Cayuga Operating Plant Retrofit Up To \$396M More Costly Than Power Line Upgrades*, Ithaca Journal, Sept. 7, 2013, at 1.<sup>15</sup> The article went on to state that the document shows that (1) the estimated construction cost for new NYSEG power transmission lines is \$55,923; (2) Cayuga calculated the total cost of closing the plant and upgrading the transmission lines to range from \$848,749 to \$984,311; and (3) Cayuga had earlier said the four retrofitting options for the power plant would cost between \$60 million and \$370 million.

The information in Cayuga’s August 16, 2013 submission must be released to the public because information held by an agency is not exempt from FOIL where “it is readily available to the public.” *Brownstone Publishers, Inc. v. New York City Dep’t of Fin.*, 150 A.D.2d 185, 187

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<sup>14</sup> The Cayuga filing is not specifically identified in the Ithaca Journal article. However, upon information and belief, the document is the Cayuga Comments on NYSEG Report, Filing No. 83 filed August 16, 2013 on behalf of Cayuga, identified herein as document number 9 in the list of Requested Filed Documents, *supra*.

<sup>15</sup> The September 7, 2013 article was removed from the Ithaca Journal website on or about September 9, 2013 and replaced with a contradictory article claiming that transmission line upgrades would cost nearly \$1 billion more than repowering the Cayuga plant. Andrew Casler, *Cayuga Operating Plant Retrofit Up To \$924.3 Less Costly Than Power Line Upgrades*, Ithaca Journal, Sept. 9, 2013 at 1, available at [http://www.ithacajournal.com/apps/pbcs.dll/article?AID=/201309062017/NEWS01/309060148&nclick\\_c heck=1](http://www.ithacajournal.com/apps/pbcs.dll/article?AID=/201309062017/NEWS01/309060148&nclick_c heck=1). If nothing else, the appearance of conflicting newspaper stories within a three day period underscores the widespread public confusion caused by concealment of crucial information in this proceeding.

(1<sup>st</sup> Dep't 1989), *lv. to appeal denied*, 75 N.Y.2d 791 (1990). *See also Physicians Comm. for Responsible Med. v. Hogan*, 29 Misc. 3d 1220(A), (Sup. Ct. Albany Co. 2010) (rejecting agency's FOIL exemption claim where there was an "abundance of information already available to the public in printed form and on the Internet" regarding the withheld records); *Gannett Co., Inc. v. Cnty. of Ontario*, 173 Misc. 2d 304, 306 (Sup. Ct. Ontario Co. 1997) (rejecting agency's FOIL exemption claim where "much of the information has already been released").

Federal courts interpreting the federal Freedom of Information Act, 5 U.S.C. §552 ("FOIA"), have repeatedly rejected confidentiality claims for information that is already in the public domain. *See Niagara Mohawk Power Corp. v. U.S. Dep't of Energy*, 169 F.3d 16, 19 (D.C.Cir.1999) (holding that where "identical information is truly public, then enforcement of an [FOIA] exemption cannot fulfill its purposes"); *Cottone v. Reno*, 193 F.3d 550, 554 (D.C.Cir.1999) ("Under our public domain doctrine, materials normally immunized from disclosure under FOIA lose their protective cloak once disclosed and preserved in a permanent public record"); *CNA Fin. Corp. v. Donovan*, 830 F.2d 1132, 1154 (D.C.Cir.1987), *cert. denied*, 485 U.S. 977, 108 S.Ct. 1270, 99 L.Ed.2d 481 (1988) ("To the extent that any data requested under FOIA are in the public domain, the submitter is unable to make any claim to confidentiality"); *Nat'l Cmty. Reinvestment Coal. v. Nat'l Credit Union Admin.*, 290 F.Supp.2d 124, 134 (D.D.C. 2003) ("[p]ublic availability of information defeats an argument that the disclosure of the information would likely cause competitive harm"). Case law under FOIA is "instructive," because "[t]he legislative history of the Freedom of Information Law indicates that many of its provisions . . . were patterned after [FOIA] . . ." *Matter of Fink v. Lefkowitz*, 47 N.Y.2d 567, 572, n. (1979).

Consequently, there is no legal basis for continuing to withhold the redacted information in Cayuga's August 16, 2013 submission, and that information must be released to the public.

**IV. Neither the Commission, DPS Staff, Nor the Transmission and Generating Entities Have Articulated Any Legal Basis for Denying Access to the Non-Public Submissions, Non-Public Communications and Meeting Records**

Upon information and belief, an unspecified number of Non-Public Submissions, Non-Public Communications and Meeting Records have not been placed on the PSC public docket for this proceeding, and the public and Moving Parties have not been provided access to those documents. Neither the Commission, DPS staff, nor the Transmission and Generating Entities have articulated any legal basis for withholding the Non-Public Submissions, Non-Public Communications and Meeting Records. Consequently, public access to those documents must be provided. *Markowitz v. Serio*, 11 N.Y.3d at 51.

Moreover, the failure by the Transmission and Generating Entities to serve the Non-Public Documents on all other parties to the proceeding, including the Moving Parties, violates 16 N.Y.C.R.R. § 3.5(1), which requires that “[a] party who presents a document for filing in a proceeding in which there are other parties shall at the same time serve the document on each such party.” Thus, the Moving Parties are entitled to the Non-Public Documents as a matter of Commission practice and procedure.

**V. Any Meetings Between the Commission, or a Quorum of the Commission, and Transmitting or Generating Entities Were Subject to the Open Meetings Law**

To the extent that the Commission, or any quorum of the Commission, has held meetings with any one or more of the Transmission and Generating Entities at which the matters or issues concerning this proceeding were discussed, those meetings should have been the subject of public notice and open to the public as required by the New York Open Meetings Law. *See* N.Y. Pub. Off. L. §§ 101-111. The fact that those meetings may have been informal does not exempt

them from Open Meeting requirements. *Goodson Todman Enterprises, Ltd. v. City of Kingston Common Council*, 153 A.D.2d 103, 105-06 (3<sup>rd</sup> Dep't 1990) (“informal conferences, agenda sessions and work sessions do invoke the provisions of the statute when a quorum is present and when the topics for discussion and decision are such as would otherwise arise at a regular meeting”); *Matter of Oneonta Star Div. of Ottaway Newspapers v. Board of Trustees of Oneonta School Dist.*, 66 A.D.2d 51, 54 (3<sup>rd</sup> Dep't 1979) (“Public bodies may not escape public view by claiming that they did not formally convene when, in fact, a meeting took place at which business of public interest was discussed”); *Matter of Orange County Pubs., Div. of Ottaway Newspapers v. Council of City of Newburgh*, 60 A.D.2d 409, 414 (2<sup>nd</sup> Dep't 1978) *aff'd*. 45 N.Y.2d 947 (“[T]he Legislature, by enacting the Open Meetings Law, intended to affect the entire decision-making process and not merely formal vote taking as it is the deliberative process which is at the core of the Open Meetings Law”) (internal citations and quotes omitted). Because records of such meetings must by statute be made available to the public, N.Y. Pub. Off. L. § 106(3), there is no legal ground for withholding them.

## CONCLUSION

For the reasons set forth herein, the Moving Parties request that the Commission forthwith enter an order granting the Moving Parties access to complete, unredacted copies of (1) the Requested Filed Documents, (2) the Non-Public Submissions, (3) the Non-Public Communications, (4) the Meeting Records, and (5) all Future Submissions, and granting such other and further relief as the Commission deems just and proper.

Dated: New York, New York  
September 16, 2013

Respectfully submitted,

/s/\_\_\_\_\_

Christopher Amato, Esq.

EARTHJUSTICE

156 William Street, Suite 800

New York, NY 10038-5326

Tel: 212-845-7390

Fax: 212-918-1556

[camato@earthjustice.org](mailto:camato@earthjustice.org)

*Counsel for Ratepayer and Community Intervenors,  
Citizens Campaign for the Environment, and  
Environmental Advocates of New York*