



State of New Jersey

BOARD OF PUBLIC UTILITIES
TWO GATEWAY CENTER
NEWARK NJ 07102

JAMES E. MCGREEVEY
Governor

January 23, 2003

KRISTI IZZO
Secretary of the Board
Tel: (973) 648-3426
Fax: (973) 648-2409

James C. Meyer
Riker, Danzig, Scherer, Hyland, Perretti. LLP
One Speedwell Avenue
P.O. Box 1981
Morristown, NJ 07962

Re: Rockland Electric Company
Deferred Balances Audit Docket Nos. EX02060363 and EA02060367
Emergent Motion for Protective Order

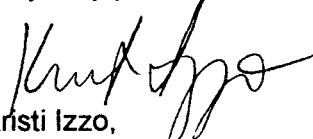
Dear Mr. Meyer:

At its agenda meeting of January 23, 2003, the Board of Public Utilities (Board) decided that the confidential Phase I Audit report of the Deferred Balances of Rockland Electric Company (RECO), along with RECO's Motion for Protective Order of this audit report, should be transmitted to the Office of Administrative Law immediately, for consideration in its rate proceeding, Docket No. ER02080614. The confidential report should remain confidential pending a ruling by the Administrative Law Judge, but may be distributed to parties who have entered into confidentiality agreements in the rate proceeding.

The Board also decided that requests filed with the Board for public disclosure of the confidential report shall be subject to the provisions of the Open Public Records Act, and that a copy of RECO's motion and certification will be kept with the confidential report in the Board's case files.

If you have any questions, please call Robert Catona, Bureau Chief, Division of Financial Audits at (973) 648-4953.

Very truly yours,


Kristi Izzo,
Secretary of the Board

WPS/RC/co

c Honorable Jeff S. Masin
Frank Marino

Service List

James C. Meyer, Esq.
Riker, Danzig, Scherer, Hyland, Perretti. LLP
One Speedwell Avenue
P.O. Box 1981
Morristown, NJ 07962

Mr. Frank Marino
Consolidated Edison Company of NY, Inc.
4 Irving Place - Room 549-S
New York, NY 10003

Honorable Jeff S. Masin, Acting Director and Chief Administrative Law Judge
Office of Administrative Law
9 Quakerbridge Plaza
Trenton, NJ 08625

-Walter P. Szymanski, Director, Division of Audits
-Nusha Wyner, Director, Division of Energy
Board of Public Utilities
Division of Audits
Two Gateway Center
Newark, NJ 07102

Helene Wallenstein, DAG
Division of Law
124 Halsey St.
Newark, NJ 07102

RIKER, DANZIG, SCHERER, HYLAND
& PERRETTI LLP
Headquarters Plaza
One Speedwell Avenue
P. O. Box 1981
Morristown, New Jersey 07962-1981
(9730) 538-0800

Attorneys for
Rockland Electric Company

IN RE AUDITS OF DEFERRED BALANCES
OF NEW JERSEY'S FOUR ELECTRIC
UTILITIES—ROCKLAND ELECTRIC
COMPANY

BPU Docket No. EX02060363
BPU Docket No. EA02060367 (RECO)

**EMERGENT MOTION FOR
PROTECTIVE ORDER**

Respondent Rockland Electric Company ("RECO") hereby moves on an emergent basis for a Protective Order to protect confidential information from public disclosure. The Confidential Information for which protection is sought is the hedging goals and strategy of RECO and its affiliates, Orange and Rockland Utilities, Inc. ("O&R") and Consolidated Edison Company of New York, Inc. ("Con Edison") ("Confidential Information"). RECO, O&R, and Con Edison shall be referred to collectively in this Motion as the "Utilities". The Confidential Information is set forth in a draft audit report prepared on behalf of the New Jersey Board of Public Utilities ("Board") by Larkin & Associates, PLLC, and its subcontractor, Synapse Energy Economics, Inc. (together "Larkin"). The Board hired Larkin to review and verify the deferred balances incurred by RECO in providing basic generation service to its

customers during the three-year period August 1, 1999 through July 31, 2002. The pages of the Larkin audit report attached hereto as Exhibit A redact the specific passages that should be treated as Confidential Information.¹ As set forth herein, the Confidential Information satisfies the criteria for issuance of a Protective Order. The Motion is supported by the Certification of Joseph Holtman dated January 6, 2003 ("Holtman Cert.").

RECO submits this emergent motion in anticipation that this draft audit report will be presented to and accepted by the Board at its open session on January 8, 2003. The Protective Order is necessary to protect the Confidential Information from public disclosure once the report is accepted and subject to release.

BACKGROUND

Con Edison and O&R are both wholly owned utility subsidiaries of Consolidated Edison, Inc. ("CEI"). RECO is a wholly owned utility subsidiary of O&R. Since O&R's merger with CEI in 1999, the Con Edison Electricity Supply Department ("Supply Department") has purchased energy, capacity, and ancillary services and entered into hedging arrangements on behalf of both O&R and RECO.

Pursuant to the order of the Board, on August 30, 2002, RECO filed with the Board a Petition to Recover its Deferred Balances in the above-referenced proceeding. As noted above, the Board hired Larkin to review and verify the deferred balances incurred by RECO in providing basic generation service to its customers. This

¹ Because of its confidential nature, the Confidential Information itself has not been attached. Since a copy of the draft Larkin audit report has been provided to Board Staff, they can readily determine what material has been redacted by comparing the pages set forth in Exhibit A to the corresponding pages in the draft audit report. If the Board directs, RECO can make an additional copy of the Confidential Information available under seal for *in camera* review by the Board.

audit is being conducted in two phases. Phase 1 covers the three-year period August 1, 1999 through July 31, 2002. Phase 2 covers the period August 1, 2002 through July 31, 2003. (Holtman Cert., ¶2)

On or about December 24, 2002, Larkin circulated to RECO, for factual verification, a draft of its audit report regarding RECO's deferred balances incurred during Phase 1 ("Draft Report"). The Draft Report contains a discussion of the prudence of the hedging program implemented by the Supply Department on behalf of the Utilities. The Draft Report discusses the hedging goals and strategy of the Utilities, including the target percentage of load to be covered by hedges. (Holtman Cert., ¶3) Such information is highly confidential proprietary commercial and financial information, and its disclosure could cause the Utilities competitive harm. Specifically, the disclosure of the Utilities' hedging goals and strategy to potential counterparties would undercut the Utilities' competitive position and bargaining leverage, and increase the cost of hedging. (Holtman Cert., ¶¶3, 5-6)

Accordingly, it is necessary to seek a Protective Order to safeguard the confidentiality of the Confidential Information.

ARGUMENT

THE BOARD SHOULD ISSUE A PROTECTIVE ORDER DIRECTING THAT THE INFORMATION BE TREATED AS CONFIDENTIAL, DEEMED NOT A GOVERNMENT RECORD, AND EXEMPT FROM PUBLIC DISCLOSURE

A. PROTECTION OF THE CONFIDENTIAL INFORMATION IS CONSISTENT WITH AND REQUIRED BY THE OPEN PUBLIC RECORDS ACT

P.L. 2001, chapter 404, commonly referred to as the Open Public Records Act ("OPRA"), substantially amended N.J.S.A. 47:1A-1 et seq. regarding access to government records. OPRA recognizes that orders in individual cases may provide for confidential treatment of information. N.J.S.A. 47:1A-1; N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-9.² Consistent with OPRA, the Board's rules to implement the provisions of OPRA provide:

Nothing in this section shall limit the Board's authority to make a confidentiality determination within the context of a hearing or other proceeding or with regard to any other matter as the Board may deem appropriate

See N.J.A.C. 14:1-12.6(d).³ Thus, the Board's rules contemplate case-specific Protective Orders exempting information from public disclosure in contested cases.

This is an appropriate case for entry of a Protective Order. First, OPRA requires that the information in question be deemed confidential and not subject to

² OPRA recognizes such determinations may be made pursuant to regulations promulgated under authority of a statute or Executive Order of the Governor. Governor McGreevey's Executive Order Nos. 21 and 26 continue Executive Order No. 9 of Governor Hughes, which allowed agencies to promulgate rules providing exemptions to N.J.S.A. 47:1A-1 et seq.

³ The Board's OPRA rules to be codified at N.J.A.C. 14:1-12.1 et seq. are proposed at 34 N.J.R. 2271 (July 1, 2002) and are currently effective under Executive Order.

public disclosure. OPRA expressly provides that "government records" are not subject to public access if they are exempt under 47:1A-1 et seq. or other statutes or regulations promulgated under authority of any statute or Executive Order of the Governor. In defining "government record," OPRA specifically provides that:

A government record shall not include the following information which is deemed to be confidential for the purposes of P.L. 1963, c.73 (C. 47:1A-1 et seq.) as amended and supplemented:

* * *

trade secrets and proprietary commercial or financial information obtained from any source

* * *

information, which if disclosed would give an advantage to competitors or bidders. . . .

N.J.S.A. 47:1A-1.1

The Utilities' hedging goals and strategy constituting the Confidential Information is not a "government record" and is "deemed to be confidential" under OPRA, since it is proprietary commercial or financial information (Holtman Cert., ¶5) and if disclosed would give an advantage to competitors or bidders (i.e., potential counterparties to hedging instruments). (Holtman Cert., ¶¶3, 6) This result is consistent with a recent Board decision to issue a Protective Order under OPRA in a similar situation. See I/M/O the Provision of Basic Generation Service Pursuant to the Electric Discount And Energy Competition Act, N.J.S.A. 48:3-49 et seq., Decision and Order, Docket Nos. EX01110754 and EO02070384 (Dec. 3, 2002) ("BGS Protective Order"). In a descending clock auction for BGS power supply, the Board issued a Protective Order to protect the purpose of the auction to achieve the lowest competitive market

price. Id. at 5. The Protective Order covered, inter alia, bidding round prices determined by the auction manager and individual bids by bidders in the auction. Id. at 8. The Board reasoned that the information would provided an advantage to competitors or bidders that would allow them to make adjustments and impede "the current and any future competitive process." Id. Accordingly, the Board concluded that such information should be deemed confidential and not considered a government record under OPRA, and directed that the Board's custodian should deny all requests for access. Id. On December 26, 2002, the Board issued an Order of Clarification, that confirmed the BGS Protective Order extended to, among other things, RECO's separate RFP process for procuring power supply for its non-PJM load, because of the same underlying concerns.

The Confidential Information here should be afforded the same treatment. The Utilities hedging goals and strategy is highly confidential information, the disclosure of which could cause the Utilities competitive harm. (Holtman Cert., ¶3.) Disclosure would reveal to potential counterparties confidential information such as the target percentage of load to be covered by hedges. Release of such information would undercut the Utilities bargaining position, leverage, and their ability to negotiate superior terms with hedging counterparties. (Holtman Cert., ¶3.) In other words, it would impede the "competitive process" of arms length negotiation in the market and impair the ability of the Utilities to receive competitive terms. This, in turn will increase hedging costs, which ultimately results in increased costs of power supply for

customers. (Holtman Cert., ¶6.) Under these circumstances, a Protective Order should issue consistent with OPRA and the Board's BGS Protective Order.

B. DISCLOSURE OF THE CONFIDENTIAL INFORMATION
WILL CAUSE SERIOUS HARM TO RECO AND
CUSTOMERS

When confidentiality requests are made to the Board's Custodian, a party claiming confidentiality substantiates that claim principally by showing the harmful effects of disclosure on the claimant's competitive position or proprietary commercial or financial information, and the causal relationship between the disclosure and the harm. See N.J.A.C. 14:1-12.8 (a) 5. This is consistent with the historic analysis applied to requests for Protective Orders under the "good cause" standard in N.J.A.C. 1:1-14.1 of the OAL rules. See Publicker Industries, Inc. v. Cohen, 733 F.2d 1059 (3d Cir. 1984) (good cause shown where disclosure works a specific injury to the party seeking closure); Application of Jersey Central Power & Light Company, BPU Docket No. EM92030359, Order Granting Motion for Protective Order (September 8, 1994). ("Data is considered confidential if it... 'is of the type that, if released to the public, would cause substantial harm to the competitive position of the person from whom the data was obtained.'") (citations omitted) ⁴

⁴ Application of Jersey Central Power & Light Company for Approval of the Power Purchase Agreement Between Jersey City Power & Light Company and Freehold Cogeneration Associates, L.P. and Verified Petition of Freehold Cogeneration Associates, L.P. for Approval of Joint Agreement Between Board of Regulatory Commissioners Staff & Freehold Cogeneration Associates, L.P., BPU Docket No. EM92030359, Order Granting Motion for Protective Order (September 8, 1994). (The Board granted JCP&L a Protective Order and approved a Nondisclosure Stipulation for confidential information received by JCP&L in response to its pending RFPs for short, medium, and long-term capacity and/or energy supplies while bid process was ongoing.)

As discussed above, the Utilities and their customers will suffer specific harm from disclosure of the Confidential Information. Disclosure of the of the Utilities' hedging goals and strategy to potential counterparties would undercut the Utilities' competitive position and bargaining leverage, and increase the cost of hedging.

Other requirements of the rules applicable to applications to the Custodian focus on whether the information is currently safeguarded (i.e., protection by the claimant from disclosure, whether the information is routinely available to the public, or the extent to which it is has already been disclosed. See N.J.A.C. 14:1-12.8 (a) 1, 2, 3. Accord Application of Jersey Central Power & Light Company, supra (information is confidential if it is not the type usually released to the public).

As set forth in the Holtman Certification (§4), the Utilities protect the confidentiality of the hedging goals and strategy, and have not disclosed such information to the public or potential hedging counterparties. RECO also notes that it only requests confidential treatment for a limited amount of information in the scheme of the overall audit report. According, it is appropriate for the Board to issue the requested Protective Order.

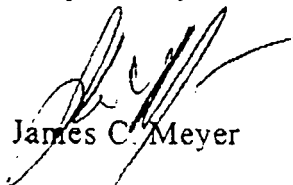
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CONCLUSION

For all the foregoing reasons, RECO requests a PROTECTIVE ORDER directing that:

- (1) those passages of the Larkin report discussing the hedging goals and strategy of the Utilities are deemed confidential, not a "government record" under OPRA, and exempt from public disclosure;
- (2) the Board Custodian is to treat such information as confidential and to deny all requests for access to it; and
- (3) any public testimony or other public filings (including by Larkin), in any proceeding, must be appropriately redacted to remove Confidential Information, and any Confidential Information filed or introduced into the record in this matter (physically or orally) must be appropriately sealed to protect it from public disclosure.

Respectfully submitted,



James C. Meyer

Dated January 6, 2003

3228964.01 ✓

STATE OF NEW JERSEY
BOARD OF PUBLIC UTILITIES

Riker, Danzig, Scherer, Hyland & Perretti LLP
Headquarters Plaza
One Speedwell Avenue
P.O. Box 1981
Morristown, NJ 07962-1981
(973) 538-0800
Attorneys for Respondent
Rockland Electric Company

RE IN AUDITS OF DEFERRED
BALANCES OF NEW JERSEY'S FOUR
ELECTRIC UTILITIES--ROCKLAND
ELECTRIC COMPANY

BPU Docket No. EX02060363
BPU Docket No. EA02060367

**CERTIFICATION OF
JOSEPH HOLTMAN**

Joseph Holtman, of full age, certifies as follows:

1. I am the Director-Electricity Supply for Consolidated Edison Company of New York, Inc. ("Con Edison"). Con Edison and Orange and Rockland Utilities, Inc. ("O&R") are both wholly owned utility subsidiaries of Consolidated Edison, Inc. ("CEI"). Rockland Electric Company ("RECO") is a wholly owned utility subsidiary of O&R. Since O&R's merger with CEI in 1999, the Con Edison Electricity Supply Department ("Supply Department") has purchased energy, capacity, and ancillary services and entered into hedging arrangements on behalf of both O&R and RECO. In my capacity as Director-Electricity Supply for Con Edison, I have knowledge of the facts set forth herein.

2. Pursuant to the order of the New Jersey Board of Public Utilities ("Board"), on August 30, 2002, RECO filed with the Board a Petition to Recover its Deferred Balances in the above-referenced proceeding. The Board hired Larkin & Associates, PLLC, and its subcontractor, Synapse Energy Economics, Inc. (together

5. The Utilities consider their hedging goals and strategy to constitute information that is strictly confidential, and that is proprietary commercial and financial information. It is competitively sensitive, and if disclosed, would give an advantage to competitors.

6. Disclosure here would cause a serious injury to the Utilities. As noted above, disclosure of the Utilities' hedging goals and strategy would undercut the Utilities' bargaining position and their ability to negotiate superior terms with hedging counterparties. Any increase in hedging costs disadvantages RECO's customers. Confidentiality must be maintained for the Utilities' hedging goals and strategy.

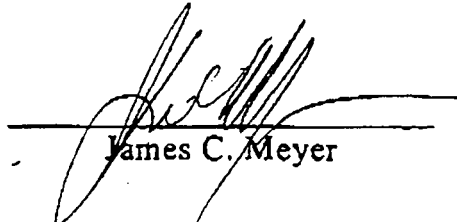
I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.



Joseph Holtman

Dated: January 6, 2003

Pursuant to R. 1:4-4(c), I certify that Joseph Holtman has acknowledged that the signature on the facsimile transmission is his signature. I further certify that the original document with the original signature affixed will be filed if requested by this Board or a party.



James C. Meyer

Dated: January 6, 2003

3228965.01