

Case No. VEE-0044

February 24, 1998

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

REQUEST FOR CONFIDENTIAL TREATMENT

Name of Petitioner: Public Service Electric and Gas Company (New Jersey)

Date of Filing: July 14, 1997

Case Number: VEE-0044

On July 14, 1997, the Office of Hearings and Appeals received from the Energy Information Administration (EIA) a "letter of appeal" that had been filed with the EIA by the Public Service Electric and Gas Company of New Jersey (PSE&G). In the letter, PSE&G requested confidential treatment of several items of information that it provides to the EIA on Form EIA-860, "Annual Electric Generator Report." For each electrical generator of each generating plant that PSE&G operates, the items of information are: (1) the unit heat rate; (2) the winter and summer net capabilities; and (3) the unit retirement date. During the lengthy discussion that followed, the request was limited by PSE&G to the unit heat rate data.

The Form EIA-860 is one of the documents through which EIA fulfills its mandate to collect, evaluate, and disseminate information concerning domestic energy production, demand, and technology. See Department of Energy Organization Act, 42 U.S.C. §7101, et seq. PSE&G and the approximately 900 other utilities that operate power plants in the United States file the Form EIA-860 annually. The EIA historically has regarded all data filed on the Form EIA-860 as non-confidential. Use of the Form EIA-860 has been approved by the Office of Management and Budget (OMB), which has oversight of EIA data collections, as a non-confidential survey .

The posture of the electric power industry appears to be changing from that of a highly regulated to a competitive industry. The EIA is aware that in this environment, some firms are becoming concerned at the availability of any company-specific information that might confer an advantage upon competitors. In this instance, PSE&G was concerned that information now reported on Form EIA-860, together with knowledge of the cost of fuel, would make it possible for competing firms to know PSE&G's marginal cost of generating electrical power. For competitive reasons similar to these, data for non-public firms and the Bonneville Power Administration has been withheld from release. The Edison Electric Institute, a trade group representing investor-owned electric utilities such as PSE&G, shares these concerns and has submitted comments in this proceeding in support of the PSE&G position. It also appeared likely that a favorable decision on the PSE&G request could precipitate numerous requests from other utilities that are surveyed, possibly disrupting EIA operations but not leading to a consistent resolution to the general issue of confidentiality. As a result

of these very special circumstances, we concluded that this issue should most appropriately be decided in the context of a public re-evaluation of the Form EIA-860.

During lengthy discussions which we conducted involving the EIA and PSE&G, in order to accommodate the PSE&G concerns, EIA volunteered that it would request only a one-year clearance from OMB, through December 31, 1998, of its electric power surveys. (1) EIA also stated that it would not release in publication or via the Internet the individual company heat rate data provided on Form EIA-860 by all utilities through December 31, 1998. In addition, during 1998, EIA stated that it would issue a Federal Register notice soliciting comments from the industry on confidentiality associated with its electric surveys, and would work with industry to evaluate EIA's data for a specific company disclosure policy in this area. In the interim, consistent with OMB policy, EIA will release heat rate data only upon written request. For its part, PSE&G stated under the circumstances that it would agree to the dismissal without prejudice of its request for confidential treatment of the Form EIA-860 data, pending the review of EIA's disclosure policy, but that it would not be bound by the temporary relief offered by the EIA. (2)

In December 1997, before this agreement could become final, but in order to meet its commitments in a timely fashion, EIA released the calendar year 1996 data provided by submitters of Form

EIA-860, except for the "Unit Heat Rate" data. As it had agreed, in January, 1998, EIA published a Federal Register notice requesting comments concerning the confidentiality of data provided through all EIA electric power surveys. 63 F.R. 1960-62 (January 13, 1998) As stated, these steps were necessary for EIA to fulfill its commitments in a timely fashion. Ultimately, in a letter dated January 23, 1998, PSE&G asked that its request for confidential treatment be withdrawn. See, Letter from Harold W. Borden, Jr., Vice President -- Law, PSE&G.

The foregoing steps taken by EIA are clearly intended to further the best interests of the public and the electric power industry. The public's interest is promoted by allowing the ultimate issue of confidentiality for all submitters to be resolved by a collaborative process with maximum participation from the public. See Best Practices for Government Agencies: Guidelines for Using Collaborative Agreement-Seeking Processes, Report and Recommendations for the SPIDR Environment/Public Disputes Sector Critical Issues Committee (1997). The interests of all submitters of Form EIA-860 are protected by insuring that proprietary and non-proprietary data on the form will be identified and treated accordingly by EIA within the 1998 calendar year. Finally, the interests of EIA and the public are furthered by permitting EIA to continue to distribute reports and information based on the Form EIA-860 during the evaluation process.

Under these circumstances, we believe that dismissing PSE&G's request is the best course to follow.

It Is Therefore Ordered That:

The request for confidential treatment made by the Public Service Electric and Gas Company of New Jersey is hereby dismissed.

George B. Breznay

Director

Office of Hearings and Appeals

Date: February 24, 1998

- (1) For its electric power surveys, including Form 860, the EIA generally requests a three-year clearance.
- (2) As these lengthy discussions--which took place from July 1997 through January 1998--were concluding, and after EIA had begun to take the agreed-upon measures, PSE&G asked that its request for confidential treatment be withdrawn.