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Regulatory Affairs



January 31, 2018

Jessica Vigars, Esq.
Records Access Officer
New York State Public Service Commission
Three Empire State Plaza
Albany, NY 12223

Re: Case 17-M-0815 - *Proceeding on Motion of the Commission on Changes in Law that May Affect Rates*; Central Hudson Gas & Electric Corporation's Request for Confidential Treatment

Dear Ms. Vigars:

Central Hudson Gas & Electric Corporation ("Central Hudson") is submitting the attached material which contains trade secret and confidential commercial information, and is therefore protected material. Specifically, the protected material consists of detailed information concerning Central Hudson's financial operations and tax strategies.

Central Hudson seeks confidential treatment of the protected material pursuant to 16 NYCRR Part 6-1 as detailed below.

Trade Secrets, Records Submitted by a Commercial Enterprise and Records Derived from Information Obtained from a Commercial Enterprise

The protected material constitutes a trade secret pursuant to Section 87 of the Public Officers Law and Part 6-1 of the Regulations. That request is supported by Section 87, as well as the decisions in *Verizon New York Inc. v. New York State Public Service Com'n*, 23 N.Y.S.3d 446 (2016), *New York Telephone Company v. Public Service Commission*, 58 N.Y.2d 213 (1982) and *Matter of Encore College Bookstores, Inc. v. Auxiliary Services Corporation of the State University of New York at Farmingdale*, 87 N.Y.2d 410 (1995).

Section 87 provides an exception from public disclosure for records that "are trade secrets or are submitted to an agency by a commercial enterprise or derived from

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information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise.” N.Y. Public Officers Law § 87.2(d) (McKinney 2014). The protected material is information submitted to the New York State Public Service Commission (“Commission”), a state agency, by Central Hudson, a commercial enterprise, which if disclosed would cause substantial injury to Central Hudson and customers.

Disclosure would harm Central Hudson by impairing its ability to protect its confidential information, including trade secret and commercial enterprise information that could damage its competitive position. The Commission promulgated Part 6-1 of the Regulations to further define what constitutes a trade secret or confidential commercial information. Section 6-1.3(b)(2) of the Regulations contains the factors the Commission will consider in determining trade secret and/or confidential commercial information status.¹

The Court of Appeals has considered what constitutes trade secret material and has determined that information is trade secret if it is “any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it.”² The Court held that once information is determined to be trade secret the inquiry ends and no additional inquiry is required.³

Similarly, exemption in the Public Officers Law Section 87(2)(d) is triggered when public disclosure of the trade material would “cause substantial harm to the competitive position of the person from whom the information was obtained.”⁴ The Court determined that the party seeking confidential commercial information protection need not establish actual competitive harm; “rather, actual competition and the likelihood of substantial competitive injury is all that need be shown.” In determining whether substantial harm exists, the Court determined that the

¹ The factors are: 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 or duplicating the information by others without the person's consent; and v) other statute(s) or regulations specifically excepting the information from disclosure. 16 N.Y.C.R.R. § 6-1.3(b)(2).

² *Verizon New York Inc. v. New York State Public Service Com'n*, 23 N.Y.S.3d 446 (2016) (referring to *Verizon New York Inc. v. New York State Public Service Com'n*, 46 Misc.3d 858 (2014)).

³ *Id.*

⁴ *Encore College Bookstores, Inc. v. Auxiliary Services Corporation of the State University of New York at Farmingdale*, 87 N.Y.2d 410 (1995).

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existence of substantial competitive harm depends on the “commercial value of the requested information to competitors and the cost of acquiring it through other means.” The Court concluded, “where FOIA disclosure is the sole means by which competitors can obtain the requested information, the inquiry ends here.”

The protected material falls within the definitions of trade secret and confidential commercial material. The information concerns protected material that would damage Central Hudson if it were made public. If the information is disclosed it would be to the detriment of Central Hudson, and ultimately its customers due to the involuntary disclosure of sensitive financial information and tax strategies unique to and collected by Central Hudson, that is unavailable elsewhere. Disclosure would harm Central Hudson and its customers because the information constitutes material non-public financial data.

The Commission is empowered to exempt from public disclosure material that constitutes trade secret and confidential commercial information.⁵ The Company, for the reasons stated above, respectfully requests that the protected material be deemed confidential material exempt from public disclosure under Public Officers Law Section 87 and, where applicable, Part 6-1 of the Commission’s Regulations.

Please contact the undersigned at (845)486-5831 or pcolbert@cenhud.com with any questions regarding this matter.

Respectfully submitted,

/s/ Paul A. Colbert

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Regulatory Affairs

⁵ *New York Telephone Company v. Public Service Commission*, 56 N.Y.2d 213 (1982).