

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

**Proceeding on Motion of the Commission as to the Rates,
Charges, Rules and Regulations of the Long Island Water
Corporation d/b/a Long Island American Water for
Water Service.**

Case 11-W-0200

**MOTION FOR RULING ON
CONFIDENTIAL INFORMATION**

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I. INTRODUCTION

On April 29, 2011, Long Island Water Corporation, d/b/a Long Island American Water (“LIAW” or “the Company”), filed an application for a major rate increase with the Public Service Commission (“Commission”). During the course of this proceeding, Department of Public Service Staff (“Staff”) and the Utility Intervention Unit of the Department of State (“UIU”) served a number of information requests (“IR”) on the Company, certain responses to which the Company believes to contain trade secrets or confidential commercial and critical infrastructure information (“Confidential Information”). To date, the Company has provided Confidential Information to Staff and UIU under the protections afforded by Public Service Law (“PSL”) § 15 and Public Officers Law (“POL”) § 74(3)(c) which prevent Staff Counsel and state officials, respectively, from disclosing confidential information. The Company, Staff and UIU preliminarily agreed that information falling under the categories of salaries with job titles, system infrastructure, dates of capital infusions, union salaries and competitively bid contracts would be protected until such time as a brief could be submitted (*see* 16 NYCRR § 6-1.4(a)(1))

and a ruling issued. No other parties participated in this proceeding or requested access to the Confidential Information.

LIAW seeks to protect the Confidential Information from disclosure during and after the close of this proceeding. Accordingly, pursuant to POL §87 and Section 6-1.3 of the Commission's rules (16 NYCRR § 6-1.3), LIAW hereby seeks a ruling that the information described herein satisfies the criteria for confidentiality set forth in the statutes and regulations and should be treated appropriately by the agencies and parties involved in this proceeding.

II. STANDARD FOR IDENTIFYING TRADE SECRETS AND CONFIDENTIAL COMMERCIAL AND CRITICAL INFRASTRUCTURE INFORMATION.

The POL, in relevant part, states that each agency shall deny access to records or portions thereof that:

... if disclosed would constitute an unwarranted invasion of personal privacy...;

... if disclosed would impair present or imminent contract awards or collective bargaining negotiations;

... 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; or

... if disclosed could endanger the life or safety of any person.

(POL § 87(2) (b), (c) (d) and (f))

Pursuant to the Commission's rules, an entity submitting trade secret or confidential commercial information must state the reasons why the information must be excepted from disclosure (16 NYCRR § 6.1-3(b)(2)). The reasons should include why the information, if

disclosed, would cause substantial injury to the competitive position of the entity. Factors include, but are not limited to:

- A. the extent to which the disclosure would cause unfair economic or competitive damage;
- B. the extent to which the information is known by others and can involve similar activities;
- C. the worth or value of the information to the person and the person's competitors;
- D. the degree of difficulty and cost of developing the information;
- E. the ease or difficulty associated with obtaining or duplicating the information by others without the person's consent; and
- F. other statute(s) or regulations specifically excepting the information from disclosure.

(16 NYCRR § 6-1.3(b)(2)).

Information receiving confidential status is given the protections set forth in Section 6.1-4 of the Commission's rules (16 NYCRR § 6.1-4).

III. DISCUSSION

The information at issue was provided in workpapers, testimony and in response to Staff and UIU IRs and, as discussed in this section, constitute trade secret and confidential commercial information pursuant to the criteria listed above because such confidential information: (1) would cause unfair economic or competitive advantage; (2) is neither generally available to the public nor easy for members of the general public to obtain or duplicate without the Company's permission; (3) would be of great value to others; (4) if disclosed, could cause the Company and its customers to suffer substantial economic harm, and (5) with respect to certain payroll information, would constitute and unwarranted invasion of personal privacy.

A. Response to Staff IR-10: Board Approvals for Equity Infusion

In IR-10, Staff requested copies of LIAW's parent's board approvals authorizing equity infusions into LIAW in 2011 and 2012 (See Attachment 1). This information is entitled to trade

secret protections because, if disclosed to outside parties, would cause unfair economic or competitive advantage. Equity infusions reflect the Company's business plans. Disclosing this information would grant the Company's competitors unfair insight into LIAW's business strategies. The Commission has previously recognized that business plans are entitled to trade secret protection.¹

In addition, public disclosure of this information would also give unfair insight to investors in the financial markets. With knowledge of planned equity infusions, financial investors would have unfair insight into LIAW's future capital structure and be able to determine, in advance, associated market impacts to the detriment of LIAW and other investors.

B. Response to Staff IR-13: All Workpapers in Excel Format

In IR-13, Staff requested Excel versions of all workpapers coinciding with Exhibits supporting the rate application with rights to modify.² The information contained in the workpapers in Excel format, with formulae contained therein, are trade secrets under the Commission's rules. A "trade secret" is "any formula, pattern, device or compilation of information which is in one's business, and which provides an opportunity to obtain an advantage over competitors who do not know or use it." (16 NYCRR Section 6-1.3(a)). In *Encore College Bookstores v. Auxiliary Serv. Corp.*, 87 N.Y.2d 410, 420 (1995), the Court of Appeals examined what constitutes competitively sensitive information stating:

Because the submitting business can suffer competitive harm only if the desired material has commercial value to its competitors, courts must consider how valuable the information will be to the competing business, as well as the resultant damage to the submitting enterprise. Where FOIA disclosure is the sole means by which competitors can obtain the requested information, the inquiry ends here.

¹ See e.g. Case 00-C-0134: Telergy Metro, LLC, *Ruling on Trade Secret Status of Certain Material and Admitting and Additional Affidavit* (Apr. 27, 2001); see also Case 99-E-0681: Niagara Mohawk Power Corporation, *Ruling on Protection and Procedural Matters* (Nov. 22, 1999).

² The data and information discussed in this subsection are computer programs and, therefore, could not be attached to this motion. The Excel files can be provided electronically upon request.

The Court in *Encore* further explained:

Where, however, the material is available from other sources at little or no cost, its disclosure is unlikely to cause competitive damage to the submitting commercial enterprise. On the other hand, as explained in *Worthington*: "Because competition in business turns on the relative costs and opportunities faced by members of the same industry, there is a potential windfall for competitors to whom valuable information is released under FOIA. If those competitors are charged only minimal FOIA retrieval costs for the information, rather than the considerable costs of private reproduction, they may be getting quite a bargain. Such bargains could easily have competitive consequences not contemplated as part of FOIA's principal aim of promoting openness in government"

Encore at 420 (citations omitted).

Here, the formulae used in the Excel workpapers were developed by LIAW and would be valuable to LIAW's competitors. The formulae used by LIAW in its workpapers were developed by the Company and/or its parent through years of company administration, accounting and rate case preparation. This information is not known by others and could not easily be developed or duplicated by another entity. No party outside LIAW has access to these workpapers. Pursuant to the Court of Appeals decision in *Encore*, competitors could avoid considerable costs in reproducing these formulae opening the door for a potential windfall.

In addition, the Excel workpapers contain information that standing alone is confidential (*i.e.* the Confidential Information discussed herein). This confidential information cannot be separated from the remainder of the Excel workpapers and still allow the Excel workpapers to function properly.

The information in the workpapers that is not discussed herein and otherwise determined confidential is available to the public in other locations in the record. Accordingly, ruling that the Excel workpapers are protected as trade secret and competitively sensitive materials will not deprive public access to LIAW financial information.

For these reasons, the Excel workpapers are trade secrets and competitively sensitive information and should be considered confidential.

C. Response to Staff IR-24: System Map

In IR-24, Staff requested a map of the Company's service territory showing the locations of all sources, tanks, pumps and interconnections along with a schematic of the system. (See Attachment 2) For security reasons, the Company does not disclose maps of its water plant. The system map identifies the routes of LIAW's mains and the locations of water supply plants. Any attempt to damage or otherwise tamper with LIAW's facilities would not only impact the Company's ability to provide safe and adequate service but could endanger the life or safety of any if LIAW's customers in violation of POL § 87(2)(f).

D. Response to Staff IRs-26, 28, 97, 98 100, 135, 148, 161 and 168; UIU IRs 19 and 23 (Competitively Bid Contracts and Procedures)

In the IRs listed above, Staff and UIU requested, *inter alia*, contracts LIAW has with outside parties to provide various services (See Attachment 3). The information requested is as follows:

- IRs 26 and 28: Competitively Bid Contracts for Purchased Power, Chemical and Fuel Costs;
- IRs 97, 98 and 100: Competitively Bid Contracts for Business Transformation initiative (information technology);
- IR 135: Business Transformation Plan and Competitively Bid Contracts;
- IR 148: Contract with Price Waterhouse;
- IR 161: Expert and legal fees and services agreements;
- IR 168: Price Waterhouse invoices and service agreements with vendors;
- UIU IR 19: Contracts and RFP solicitation for expert witnesses Ahern and Baryenbruch;
- UIU IR 23 (g) and (h): Cost, bidding and procurement process for investment in business transformation and IT.

The information submitted in response to these IRs is competitively sensitive and if released could cause financial harm to LIAW. Outside goods and services obtained through competitively bid contracts are confidential and should not be disclosed to the public. Such information is not known by others and cannot be readily developed, duplicated or obtained without the consent of the Company. LIAW does not release the results of competitive solicitations to anyone.

In addition, if released, this information could cause unfair economic or competitive damage (16 NYCRR § 6-1.3(b)(2)(i)) or potentially impair present or imminent contract awards (POL § 87(2)(c)). Public release of this information would negatively impact the Company's competitive negotiating position with existing and potential suppliers weakening the Company's procurement programs. In many cases, these agreements contain a confidentiality provision which prohibits disclosure by the parties. If LIAW's current contracts or agreements were disclosed to the public, competitors of LIAW's current suppliers could use this information in preparing responses to future bid solicitations. If price and other terms and provisions were made public, other entities, from which LIAW may purchase similar products or services in the future, would find out how much the Company is willing to pay and these entities may not offer it any lower prices. Moreover, the vendors who have done business with LIAW may be unwilling to submit competitive and aggressive bids in the future if the Company were to make public the confidential price terms. If LIAW were consequently unable to obtain favorable price terms as a result of a public disclosure, the ratepayers could suffer and pay higher prices for water service. Disclosure of the agreements may also subject LIAW to legal action stemming from breach of confidentiality provisions.

In the responses to IR 135 and UIU 23(g), in addition to competitively bid contract information, LIAW also provided information regarding expenditures for its Business Transformation initiative. The Business Transformation Plan provides detailed information on vendor selection and criteria, as well as software and equipment upgrades. This information is also confidential and constitutes competitively sensitive information in the form of LIAW and American Water business and capital plans. As such, this information is also confidential for the reasons set forth in this subsection as well as subsections III.A and B above.

E. Response to Staff IR-33 and Engle Rebuttal Testimony: Union Payroll

In IR-33, Staff requested workpapers related to estimated union salary increases (See Attachment 4). This information, if publicly disclosed, would impair imminent collective bargaining agreements in violation of POL Section 87 (*see* POL § 87(2)(c)). LIAW is currently in labor negotiations with its union. If this information became publicly known, it could cause an unfair negotiating advantage for the union in collective bargaining negotiations with the Company prohibited by POL § 87 2(c).

F. Response to Staff IRs-35, 36, 38, 166 and 177: Non-Union Payroll

In IR-35, Staff requested revisions to application Exhibit 12, tab 4, relating to non-union salaries, incentive compensation, payroll taxes and group life insurance by individual employee classification (See Attachment 5). Staff also requested workpapers related to this Exhibit. In IR-36, Staff requested a breakdown of non-union payroll by employee listing each employee separately and allocating costs by employee. In IR-38, Staff requested actual salary increase percentages for non-union employees. In IR-166, Staff requested the total number of service company employees by title and salaries for the year-ended 2010. In IR-177, Staff requested

salary information for the positions of Rates Manager and Supervisor Field Operations. The information submitted in response to these IRs should be granted confidential status.

This information is not available in any other place and cannot be developed, obtained or duplicated independently. Moreover, disclosure of this information would constitute an unwarranted invasion of personal privacy. Privacy is measured by what would be offensive and objectionable to a reasonable person of ordinary sensibilities, and a determination requires balancing of competing interests or public access and individual privacy. *See e.g., Empire Realty Corp v New York State Div. of Lottery*, 230 AD2d 270 (3rd Dept 1997). Certainly LIAW's employees would not want such information publicly available for review by their colleagues or other persons. Public disclosure of this information may also result in serious economic hardship for these individuals as it may diminish their ability to negotiate compensation terms of any future employment. Lastly, disclosure to the Company's competitors would impair LIAW's ability to attract and retain qualified and experienced individuals to operate its system. The Company's investment in its skilled employees has value to competing employers and must be protected.

According to a recent ruling, "it is well established that individual employee names and identification numbers are generally entitled to protection from disclosure, in order to protect personal privacy pursuant to [POL] sections 87(2)(b) and 89(2)."³ In a company such as LIAW with a relatively small number of employees, it should make no difference whether the information contains employee names, identification numbers. In the case of LIAW, disclosing title information with salary is tantamount to disclosing the employees' actual names.

³ Case 10-E-0050: *Proceeding on Motion of the Commission as to the Rates Charges Rules and Regulations of Niagara Mohawk Power Corporation for Electric Service*, Ruling Concerning Employee Identities (Aug. 25, 2010).

G. Response to Staff IR-52: Operating Revenues

In IR-52, Staff requested Statement of the Pro Forma Operating Revenues in Excel format with full rights to edit.⁴ As discussed in Section III.A above, the information contained in the Excel file with respect to pro forma operating revenues are also trade secrets under the Commission's rules. As noted above, a "trade secret" is "any formula, pattern, device or compilation of information which is in one's business, and which provides an opportunity to obtain an advantage over competitors who do not know or use it." (16 NYCRR Section 6-1.3(a)). Here, the confidential formulae used in the Excel file were developed by LIAW and would be valuable to LIAW's competitors. This information is not known by others and could not easily be developed or duplicated by another entity. The formulae and Excel file used by LIAW were developed by the Company and/or its parent through years of company administration, accounting and rate case preparation. No party outside LIAW has access to these workpapers. According to the Court of Appeals in *Encore*, allowing competitors access to these formulae at no cost would produce a windfall for competitors and an economic harm for the Company. Moreover, non-confidential financial information contained in the Excel workpaper is available in other documents within the rate case record. Accordingly, the public has access to this information elsewhere. Thus, there is no necessity to make the formulae or Excel workpaper available for public disclosure.

For these reasons, the workpapers are trade secrets and confidential treatment of the workpapers is warranted.

⁴ The information contained in this IR response is a computer program and, therefore, could not be attached to this motion. The Excel file can be provided electronically upon request.

H. Response to UIU IR 15: American Water Information Technology Infrastructure Comprehensive Planning Study Report

In its IR 15, UIU requested copies of all studies, analyses and other documents related to American Water's comprehensive review of its proposed company-wide Business Transformation initiative. In response to UIU's request, LIAW provided the American Water Information Technology Infrastructure Comprehensive Planning Study Report ("Report") (See Attachment 6). While this report was provided to UIU under the protections of POL § 74(3)(c), the Report is confidential and contains trade secret and competitively sensitive information and should not be disclosed to the public.

The Report examines the detailed and systematic processes used to identify the information technology-based needs of American Water that enables the company's public utility subsidiaries (one of which is LIAW) to deliver high quality service to its customers. The Report details means to enhance core business processes and systems to be more accurate, timely and effective including implementation schedules and associated costs.

The Report is confidential because it contains trade secrets. As noted above, a "trade secret" is "any formula, pattern, device or compilation of information which is in one's business, and which provides an opportunity to obtain an advantage over competitors who do not know or use it." (16 NYCRR Section 6-1.3(a)). Here, American Water spent significant time, money and other resources preparing the Report as a guide for implementing its Business Transformation initiative and installing information technology systems for use in its business of providing quality public utility services. The findings contained in the Report are known and used only by American Water. Competitors do not know or use this information.

The Report also contains competitively sensitive information. According to the Court of Appeals in *Encore*,

Because competition in business turns on the relative costs and opportunities faced by members of the same industry, there is a potential windfall for competitors to whom valuable information is released under FOIA. If those competitors are charged only minimal FOIA retrieval costs for the information, rather than the considerable costs of private reproduction, they may be getting quite a bargain. Such bargains could easily have competitive consequences not contemplated as part of FOIA's principal aim of promoting openness in government.

Encore, 87 N.Y.2d at 420 (citations omitted).

The information contained in the Report is not known by others and could not easily be developed or duplicated by another entity. No party outside LIAW has access to the Report. Pursuant to the Court of Appeals' decision in *Encore*, competitors could avoid considerable costs in reproducing the information contained in the Report opening the door for a potential windfall and cause unfair economic or competitive damage to LIAW.

For these reasons, the Report should be considered confidential information and not disclosed to the public.

IV. CONCLUSION

For the reasons set forth above, the Company respectfully requests that Your Honor issue a ruling declaring that the information filed in testimony and in response to IRs discussed herein be granted confidential status and given the protections provided for in the Commission's regulations.

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