

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

CASE 13-W-0295 - Proceeding on Motion of the Commission as to
the Rates, Charges, Rules and Regulations of
United Water New York Inc. for Water Service.

SECOND RULING ON CONFIDENTIAL MATERIALS

(Issued July 25, 2014)

RAFAEL A. EPSTEIN and DAVID R. VAN ORT,
Administrative Law Judges:

This ruling concerns the status of a document that UWNY made available to all parties as an exhibit in its rebuttal case, pursuant to a previous ruling and protective order in which we sought to facilitate the exchange of allegedly confidential materials among any parties that executed a nondisclosure agreement.¹

At the time of that ruling, we were mindful that the statutory and regulatory provisions governing such matters can be construed as creating a presumption favoring public disclosure of evidence used in public proceedings, but we also understood that this case might be decided on the basis of a negotiated joint proposal or a litigated record devoid of allegedly confidential material. We therefore ruled that a decision on the merits of any confidentiality claims would be deferred until it became clear whether allegedly confidential information might eventually be offered in evidence and prove relevant.

Ultimately the only material provided for the record under a claim of confidentiality pursuant to the ruling and protective order has been a portion of a UWNY rebuttal exhibit originally designated prefiled Exh. MJP-3, subsequently

¹ Ruling on Confidential Materials and Party Status (issued August 19, 2013) ("the protective order").

renumbered as Hearing Exh. 6. The exhibit comprises an interrogatory response consisting of nine pages of questions from DPS Staff and answers from UWNY which are not claimed to be confidential; and a 209-page "July 2013 Projects Catalogue" issued by R&I Alliance, UWNY's research and development affiliate, provided as part of UWNY's response to Staff's question seeking details of all R&I projects for which UWNY was seeking rate recovery in this case. Exh. 6 reasonably should be considered potentially relevant evidence because it could have some bearing on R&I cost issues considered in our Recommended Decision, in the parties' subsequent briefs on exceptions, and in the Commission's June 26, 2014 order resolving the exceptions and setting rates.

In support of UWNY's confidentiality claim for the July 2013 Catalogue, the company has filed the "comprehensive brief" prescribed in 16 NYCRR 6-1.4(a)(3), asserting that the document is a trade secret exempted from disclosure by the Freedom of Information Law (Public Officers Law (POL) §§84 *et seq.*). DPS Staff, the DOS Utility Intervention Unit (UIU), and the Town of Ramapo (a member of the Municipal Consortium during the litigation phase) have waived opposing replies, although the latter two parties disavow any acquiescence in UWNY's position.²

We find that the July 2013 Catalogue constitutes a trade secret within the meaning of the Commission's regulations in 16 NYCRR Part 6 and should continue to be protected as such.

² E-mails to the Judges, June 20, 2014. ("The UIU will not file a response; not filing a response should not be interpreted as agreement with the Company's position"; "The [Town of Ramapo's] failure to respond should not be taken as implicit support for UWNY's position. It has been the Town's continuing position that ratepayers, if they are to pay for any element of cost, should be provided with the information to determine what they are paying for.")

We reach this conclusion on the basis of an *in camera* review of the materials at issue, considering them with reference to the six decisional factors listed in 16 NYCRR 6-1.3(b)(2) as the legally controlling interpretation of the applicable standard of proof under the POL. That rule, incorporating the standard judicial analysis summarized in a similar list in Restatement of Torts §757 (1939), states that factors to be considered in evaluating a trade secrecy claim include, without limitation,

- (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.

Regarding criterion (vi), UWNY concedes that there is no specific statute or regulation preventing disclosure; but the company correctly notes that this is only one of the enumerated factors, and therefore its absence does not mandate disclosure. Turning to the other five criteria, we find no reason to deny that all of them collectively, and indeed each of them individually, compels the conclusion that the July 2013 Catalogue is a trade secret.

We find UWNY's brief accurate in characterizing the Catalogue as a compilation of R&I projects, including a description of each project's operational value or benefits to R&I's affiliates and the project's degree of completion. Criteria (iv) and (v) call for an inquiry whether R&I's

competitors independently could develop research agendas based on their own judgments as to which projects would provide a greater or lesser benefit to a water company's operations. In response to that question, we find that the Catalogue and the expertise it incorporates are so extensive that development of the same knowledge base independently would certainly entail great "difficulty and cost" within the meaning of Rule 6-1.3(b)(2).

Furthermore, even if a competing firm succeeded in such a parallel endeavor, the R&I Catalogue still could provide the competitor a substantial, additional competitive advantage by disclosing the nature and relative value and status of each of the numerous projects offered by R&I. Consequently, the Catalogue is valuable as a trade secret from the perspective of criteria (i), (ii), and (iii). The competitive disadvantage resulting from disclosure of such information would detrimentally affect R&I affiliates such as UWNY by, for example, diminishing the value of UWNY customers' indirect investment in R&I and the financial benefits UWNY and its customers derive from UWNY's relationships with R&I and R&I's other affiliates.

Accordingly, the July 2013 Catalogue is a trade secret, it should remain confidential, and any party having received it should continue to maintain its confidentiality in the manner prescribed in the protective order.

(SIGNED)

RAFAEL A. EPSTEIN

(SIGNED)

DAVID R. VAN ORT