

**STATE OF NEW YORK
PUBLIC SERVICE COMMISSION**

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

**BRIEF OF UNITED WATER NEW YORK INC. IN SUPPORT OF PROTECTING
CONFIDENTIAL HEARING EXHIBIT 6 FROM PUBLIC DISLCOSURE**

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Dated: June 18, 2014

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Pursuant to the New York State Freedom of Information Law (“FOIL”) (Public Officers Law, §§84, *et seq.*), Part 6 of the New York State Public Service Commission’s (“Commission”) regulations, and Paragraph 18 of the Protective Order adopted in this proceeding,¹ United Water New York Inc. (“UWNY” or the “Company”), by and through its undersigned attorneys, submits this brief in support of the Company’s request to protect from public disclosure certain information contained in Confidential Hearing Exhibit 6 (Rebuttal Exhibit MJP-3), which consists of the Company’s response to Interrogatory/Document Request (“IR”) STAFF-27 BLB-3. Specifically, the Company seeks Protected Information² status for the attachment to its response to IR STAFF-27 BLB-3, which provides the Research and Innovation Alliance (“R+I Alliance”)³ “Projects Catalogue” summarizing R+I Alliance’s completed projects and the value of each project (the “Confidential Information”).

¹ 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, Ruling on Confidential Materials and Party Status (Aug. 19, 2013) (the “Protective Order”).

² Protected Information is “information alleged to be confidential and required to be protected from public disclosure under the Freedom of Information Law (Public Officers Law, §§84, *et seq.*), as implemented by Part 6 of the Rules of the [Commission] in (16 NYCRR §6-1.1 *et seq.*.” Protective Order at Attachment 1, ¶ 1.

³ The R+I Alliance is a legal entity structured as a partnership between the following companies: Lyonnaise des Eaux, United Water Management and Services, Aguas de Barcelona in Spain and Suez Environment. The R+I Alliance is a group of companies with global dimension. It coordinates a dynamic network around research and

I. ARGUMENT

The Confidential Information warrants Protected Information status because such information qualifies as a trade secret pursuant to the Commission's regulations and is exempt from disclosure under the Freedom of Information Law, POL §§84, *et seq.* Section 87(2) of the New York State Public Officers Law ("POL") states in relevant part that agencies may deny access to records that "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." N.Y. Pub. Off. Law § 87(2)(d)(McKinney 2012).

The Commission not only has the power, but also the affirmative responsibility to provide for the protection of trade secrets. N.Y. Tel. Co. v. Pub. Serv. Comm'n, 56 N.Y.2d 213, 219-20 (1982). The New York State Court of Appeals has held that the trade secret exemption in POL Section 87(2)(d) is triggered when public disclosure of the trade secret material would "cause substantial harm to the competitive position of the person from whom the information was obtained." Encore Coll. Bookstores, Inc. v. Auxiliary Servs. Corp. of the State Univ. of N.Y. at Farmingdale, 87 N.Y.2d 410, 419 (1995) (citations omitted). In Encore, the Court held that, where government disclosure is the sole means by which competitors can obtain the requested information, the courts must consider how valuable the information at issue would be to a competing business and how much damage would result to the enterprise that submitted the information. Id. at 420. Where the material is available from another source at some cost, consideration should also be given to whether allowing a competitor to obtain the materials for minimal FOIL retrieval costs would result in an unfair windfall to the competitor. Id. The Court

innovation in a continuous knowledge sharing initiative. This partnership provides the Company with access to a worldwide technical network including experts in virtually every field of water and wastewater operations, from water supply to treatment, distribution, and sludge drying.

also determined that the party seeking trade secret protection need not establish actual competitive harm; “rather, actual competition and the likelihood of substantial competitive injury is all that need be shown.” Id. at 421 (citations omitted).

The Commission has promulgated rules and regulations to implement FOIL. See 16 NYCRR 6-1.1 *et seq.* Section 6-1.3 allows a party to seek trade secret or confidential commercial information protection for any records submitted to the Commission. Id. § 6-1.3. Section 6-1.3(b)(2) requires the Company to “show the reasons why the information, if disclosed, would be likely to cause substantial injury to the competitive position of the subject commercial enterprise.” Id. § 6-1.3(b)(2).

The Commission defines a “trade secret” as “any formula, pattern, device or compilation of information which is used in one’s business, and which provides an opportunity to obtain an advantage over competitors who do not know or use it.” Id. § 6-1.3(a).⁴ Factors to be considered by the Commission in determining whether to grant trade secret or confidential commercial information status include, but are not necessarily limited to:

- 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.

Id. § 6-1.3(b)(2).

⁴ Confidential commercial information is not expressly defined in the regulations.

The Confidential Information meets the trade secret or confidential commercial information requirements listed above because the Confidential Information: 1) if disclosed, could cause the Company to suffer substantial economic and competitive harm; 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; and 3) would be of great value to others.⁵

The Confidential Information provides a catalogue containing detailed summaries of R+I Alliance's completed projects and the value of each project. The research projects R+I Alliance conducts are designed to evaluate new tools, technologies, and processes that R+I Alliance might market or that R+I Alliance might use to gain a competitive advantage in pursuing contracts. R+I Alliance's research projects, by default, provide a competitive advantage to the Company. This is particularly the case when the technical solution applied by R+I Alliance to a specific problem results in lower costs for the Company's customers (in reductions to both operating and capital expense). Indeed, that the Confidential Information has value to UWNYS and R+I Alliance's competitors is "self-evident." See, e.g., Matter of Schenectady v. O'Keeffe, 50 A.D.3d 1384 (2008).

In addition, the technical solution may develop a strong competitive advantage that sends price signals to the financial markets to increase a company's share price, which in turn could improve a company's credit rating thereby providing further benefits to customers. If the Confidential Information were disclosed, the Company would lose this competitive advantage and the potential customer benefits associated therewith.

⁵ The fact that there are no statutes or regulations specifically excepting the Confidential Information from disclosure is not dispositive. See e.g., Case 06-M-0878, Joint Petition of National Grid PLC and KeySpan Corporation for Approval of Stock Acquisition and other Regulatory Authorizations, First Permanent Protective Order (Nov. 9, 2006).

Moreover, the Confidential Information should be protected because UWNY's and R+I Alliances' competitors can use the Confidential Information to determine what research projects have been successful and unsuccessful without having to undergo the substantial cost and effort themselves. Specifically, the Confidential Information provides dates for deliverables from each project, as well as progress bars, each of which shows some measure of the success in completing the project. Disclosure of such information would provide an unfair competitive advantage to UWNY's and R+I Alliance's competitors because it would provide their competitors valuable information without incurring the significant research development and testing costs incurred by R+I Alliance in performing the research and development projects described in the catalogue. See, e.g., Sagiv v. Continental Tire North Am., Inc., 2005 N.Y. Misc. LEXIS 3215 (2005).

Finally, the Confidential Information has not been shared with persons outside of the Company or R+I Alliance and/or their affiliates except for such agents, counsel, and other individuals who are under an obligation to hold such information in confidence or who have agreed to keep it confidential. As the Confidential Information contained in the catalogue could be used by others to reveal United Water's, R+I Alliances' and Suez Environment's competitive advantage, it is appropriate to protect the Confidential Information from public disclosure.

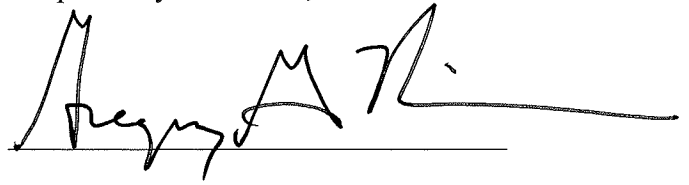
II. CONCLUSION

Public dissemination of the Confidential Information would subject the Company to significant economic and competitive harm, and it, therefore, falls within the ambit of the Commission's confidentiality rules and the POL and must be protected from disclosure. Accordingly, the Company respectfully requests that the Confidential Information be afforded Protected Information status under the Protective Order.

Dated: June 18, 2014

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Respectfully submitted,



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