

**STATE OF NEW YORK
PUBLIC SERVICE COMMISSION**

Case 13-W-0246 - Verified Petition of United Water New York Inc.
for Implementation of a Long-Term Water Supply
Surcharge, And Related Tariff Amendment.

**DEPARTMENT OF PUBLIC SERVICE STAFF REPLY TO
UNITED WATER BRIEF IN SUPPORT OF PROTECTING
CONFIDENTIAL HEARING EXHIBITS 1 AND 8 FROM
PUBLIC DISCLOSURE**

I. INTRODUCTION

On July 30, 2014, United Water New York, Inc. (UWNY or the Company) filed a brief¹ supporting its position that certain material submitted in this case be kept confidential, pursuant to a Ruling on Schedule issued by Administrative Law Judge (ALJ) Kevin Casutto.² ALJ Casutto directed UWNY to file a brief in support of its assertion that Confidential Hearing Exhibits 1, containing vendor invoices for expenses incurred in developing the Haverstraw Desalination Facility, and Confidential Hearing Exhibit 8, containing partially redacted legal invoices, be exempt from disclosure pursuant to the New York State Freedom of Information Law (FOIL), Public Officers Law (POL) §§84 *et seq.*, Part 6 of the New York State Public Service Commission's regulations and Paragraph 18 of the Protective Order adopted in

¹ Case 13-W-0246, Verified Petition of United Water New York Inc. for Implementation of a Long-Term Water Supply Surcharge, And Related Tariff Amendment, Brief of United Water New York Inc. in Support of Protecting Confidential Hearing Exhibits 1 and 8 from Public Disclosure (filed July 30, 2014) (UWNY Brief).

² Case 13-W-0246, supra, Ruling on Schedule (issued July 3, 2014).

this proceeding.³ The following is Department of Public Service Staff's (Staff) reply to UWNY's Brief.

The Company argues that the invoices contained in Confidential Hearing Exhibit 1 contain trade secret/confidential commercial information, and disclosure of that information would 1) violate confidentiality provisions of agreements with vendors and 2) would cause substantial injury to UWNY if disclosed.⁴ Confidential Exhibit 8, UWNY claims, contains Attorney/Client Privileged Material and should therefore be withheld from disclosure. For the reasons stated in more detail below, all of the information claimed as confidential by the Company should be made public.

II. ARGUMENT

A. Confidential Exhibit 1

With respect to the invoices contained in Confidential Hearing Exhibit 1, UWNY has not met its burden of showing that such invoices, if disclosed, would result in harm to the company, and so, these invoices should be released.

UWNY correctly states that POL §87(2) allows agencies to 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."⁵ The Company also states, correctly, that the New York State Court of Appeals has held that the POL §87(2)(d) trade secret exemption is triggered where

³ Case 13-W-0246, supra, Ruling on Confidential Materials (issued March 5, 2014).

⁴ UWNY Brief, p. 1.

⁵ POL §87(2)

disclosure of claimed trade secret material would "cause substantial harm to the competitive position of the person from whom the information was obtained."⁶ However, while Encore does stand for the proposition that information may be withheld if it will harm the providing party and that the company need not prove actual harm, UWNY has still not met its burden.

The Commission requires that a party claiming confidentiality must "show the reasons why the information, if disclosed, would be likely to cause substantial injury to the competitive position of the subject commercial enterprise."⁷ UWNY has not made a showing that the invoices provided, if released would be likely to cause harm to its competitive position.

As an initial point, the Company fails to address the fact that, as a regulated utility, UWNY maintains a monopoly within its service territory. There are not, therefore, competing water companies within Rockland County vying for UWNY's business, who would seize on the material in question to the Company's disadvantage. Therefore, to the extent the Company claims that its competitive position will be harmed if this information is disclosed, such claims are without merit.⁸

⁶ Encore Coll. Bookstores, Inc. v. Auxiliary Servs. Corp. of the State Univ. of N.Y. at Farmingdale, 87 N.Y.2d 410, 419 (1995) (Encore).

⁷ 16 NYCRR §6-1.3(b)(2).

⁸ Compare ALJ Joel Linsider's January 31, 2002, Ruling on Proprietary Status of Module 3 Testimony and Exhibits in Case 98-C-1357, cited by UWNY in footnote 15. There, for at least some of the documents at issue, Verizon argued that the records included "unpublished historical or projected data on demand for retail products" and that such should be protected because they could be of value to Verizon's own competitors in planning market strategies.

The Company argues that the invoices contain "highly sensitive proprietary contractor-specific details of price, pricing structure, and the terms and conditions of the relationship between the Company and various contractors, and disclosure would expose the Company and its contractors to an unreasonable risk of harm to their respective economic competitive positions."⁹ Absent supporting facts, however, the mere assertion that the information is confidential does not satisfy the Company's burden.¹⁰

As noted on page 3 of UWNY's brief, Section 6-1.3 of the Commission's regulations requires a showing of the reasons why the information if disclosed would be "likely to cause substantial injury to the competitive position of the subject commercial enterprise." Rather than demonstrating concrete reasons, by, for example, identifying specific information and specific harms, UWNY relies on overly-generalized descriptions that provide no value in judging the merit of the Company's assertions. The entirety of UWNY's supporting facts and reasons is contained in a single paragraph on page four of its Brief that makes no effort to describe with any specificity the types of goods or services supplied by vendors, let alone why the release of "prices" and "pricing structure[s]" of such vendors create "an unreasonable risk of harm to [the vendor's] competitive position."¹¹ Unfortunately for UWNY and its vendors, such non-specific, conclusory assertions, are not enough to

⁹ UWNY Brief, p. 4.

¹⁰ See, Matter of Verizon N.Y., Inc. v. Bradbury, 40 A.D.3d 1113 (N.Y. App. Div. 2d Dep't 2007) (petitioner failed to establish specific harm it would suffer if documents were disclosed; thus, documents were not exempt from disclosure pursuant to Public Officers Law §87(2)(d)).

¹¹ UWNY Brief, p. 4.

establish the specific harm required by cases like Verizon v. Bradbury, supra.

B. Confidential Exhibit 8

With respect to the legal invoices contained in Confidential Hearing Exhibit 8, Staff notes that, prior to submission of this Exhibit to Staff and the other parties, UWNKY significantly redacted portions of the document so as not to disclose privileged material. These invoices, in their current form, should be made public.

New York courts have held that attorney bills are not, per se, protected under attorney/client privilege or attorney work product.¹² "Under New York law, 'attorney time records and billing statements are not privileged when they do not contain detailed accounts of the legal services rendered.'"¹³ Appellate courts in other jurisdictions have held that attorney invoices are not protected by attorney/client privilege unless those

¹² Matter of Orange County Publications, Inc. v. County of Orange, 168 Misc. 2d 346 (Orange County 1995) (stating, "a communication concerning the fee to be paid has no direct relevance to the legal advice to be given, but rather is a collateral matter which, unlike communications which relate to the subject matter of the attorney's professional employment, is not privileged").

¹³ 105 Street Associates, LLC v. Greenwich Ins. Co., Slip Opinion (Decided November 7, 2006), 2006 U.S. Dist. LEXIS 81717; see also IMO Industries v. Andersen Kill and Olick, 192 Misc.2d 605, 613 (New York County 2002) (holding that a legal bill is not work product because the preparation and submission of a bill is not dependent on legal expertise, education or training, and cannot be attributed to the unique skills of an attorney); cf., Licensing Corp. of America v. National Hockey League, 153 Misc. 2d 126, 128 (New York County 1992) (protecting, under attorney work/product, bills that were "detailed in showing services, conversations, and conferences between counsel and others").

invoices specifically include the substance of actual conversations between the attorney and client.¹⁴

As UWNY has already redacted privileged information from the invoices submitted to DPS Staff, those invoices should be made available to the public.

III. CONCLUSION

For the reasons stated above, UWNY has not, with respect to Confidential Exhibit 1, met its burden of showing disclosure would result in harm to the company. Absent such a showing, the invoices contained in that Exhibit should be made available to the public. Further, the legal invoices contained in Confidential Exhibit 8, having already been redacted so as to exclude attorney/client privileged material, should also be made available to the public.

Respectfully Submitted,

/s/

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Albany, New York

¹⁴ See, Weslaco Holding Co. v. Crain, Misc. No. H-07-0317, 2007 WL 1746822, at 1 (S.D. Tex. June 15, 2007) (citing Duval County Ranch Co. v. Alamo Lumber Co., 663 S.W.2d 627, 634; Jim Walter Homes, Inc. v. Foster, 593 S.W.2d 749, 752). Staff recognizes that, as Texas law, these cases are not dispositive in New York State. However, the Weslaco case more fully describes the level of detail required of Niagara Mohawk.