



February 19, 2016

VIA E-MAIL

Honorable Julia Smead Bielawski
Honorable Ashley Moreno
Administrative Law Judges
New York State Department of Public Service
Three Empire State Plaza
Albany, NY 12223-1350

Re: Case 15-E-0283 - Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of New York State Electric & Gas Corporation for Electric Service

Case 15-G-0284 - Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of New York State Electric & Gas Corporation for Gas Service

Case 15-E-0285 - Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of Rochester Gas and Electric Corporation for Electric Service

Case 15-G-0286 - Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of Rochester Gas and Electric Corporation for Gas Service

Dear Judges Bielawski and Moreno:

Pursuant to the New York State Freedom of Information Law (“FOIL”) (N.Y. Pub. Off. Law §§ 84, et seq. (McKinney 2014)), Part 6 of the New York State Public Service Commission’s (“Commission”) regulations and Paragraphs 8 and 14 of the Protective Order issued in these proceedings,¹ New York State Electric & Gas Corporation (“NYSEG”) and Rochester Gas and Electric Corporation (“RG&E” and together with NYSEG, the “Companies”), by and through their undersigned attorneys, hereby submit this letter in support of the Companies’ request to protect from public disclosure certain portions of Appendix J to the Joint Proposal being filed in the above-captioned proceedings (the “Confidential Information”).²

¹ Cases 15-E-0283 et al. - Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of New York State Electric & Gas Corporation for Electric Service, Ruling Adopting Protective Order and Revising Schedule (July 17, 2015).

² A public version of Appendix J that redacts the Confidential Information is also being submitted herewith.

The Confidential Information sets forth the electric distribution vegetation management mileage targets for NYSEG Electric and RG&E Electric under the Joint Proposal.

I. ARGUMENT

The Confidential Information should be protected from public disclosure because it qualifies as trade secret or in the alternative as confidential commercial information pursuant to the Commission's regulations and is thus exempt from disclosure under FOIL. Section 87(2) of the New York State Public Officers Law ("POL") states in relevant part that agencies may deny access to documents that are: 1) trade secrets; or 2) records submitted to an agency by a commercial enterprise (or records 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 2014); Verizon New York, Inc. v. New York State Pub. Serv. Comm'n, 46 Misc.3d 858 (3d Dep't 2016) ("Verizon I"). The Commission has also 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.

A. The Confidential Information Should Be Protected Because It Constitutes Trade Secret Information

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). Once an entity establishes that information is trade secret, no further inquiry is required and the record may not be disclosed. See Verizon I, 46 Misc. 3d at *5.³

Although the term "trade secret is not defined under FOIL, courts applying New York law generally follow Section 757 of the Restatement of Torts in determining whether information is entitled to protection as a trade secret." In re Physicians Comm. for Responsible Med. v. Hogan, 29 Misc.3d 1220(A), 10 (N.Y. Sup. Ct. Albany Cnty. Nov. 3, 2010); see also Ashland Mgmt., Inc. v. Janien, 82 N.Y.2d 395, 407 (1993). The Restatement defines a trade

³ In this case, the Albany County Supreme Court established that while records submitted to an agency under the confidential commercial information exemption require a showing of substantial injury to the competitive position of the subject enterprise to qualify for the exemption, no such showing was required for trade secret information because disclosure of a trade secret, "by its very nature," adversely impacts the subject entity and an additional evidentiary showing of harm would be "unnecessary and overly burdensome." Verizon New York, Inc. v. New York State Pub. Serv. Comm'n, 991 N.Y.S.2d 841, 851 (N.Y. Sup. Ct., Albany Cnty. 2014) ("Verizon II"), aff'd 46 Misc. 3d 858 (3d Dept' 2016). As such, the Albany County Supreme Court held that of the categories of information exempt under FOIL, trade secrets "delineate[] a discrete, stand-alone category deserving of protection from disclosure." Verizon II.

The Third Department upheld the Albany County Supreme Court's decision, holding that once information has been established to be trade secret, "it is wholly unnecessary and overly burdensome to require the entity [requesting protection] to then make a separate showing that FOIL disclosure...would cause substantial injury to its competitive position. Verizon I, 46 Misc. 3d at *5.

secret as “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.” Restatement (First) of Torts §757 (1939) cmt. b. “Whether information is a trade secret depends, in part, upon the ease or difficulty with which the information could be acquired or duplicated by others.” Savannah Bank v. Savings Bank of Fingerlakes, 69 N.Y.S.2d 227, 227 (4th Dep’t 1999).

Similarly, 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.” 16 NYCRR § 6-1.3(a).⁴ Factors to be considered by the Commission in determining whether to grant trade secret protection include:

- i) the extent to which the information is known outside of the party’s business;
- ii) the extent to which it is known by employees and others involved in the party’s business;
- iii) the extent of measures taken by the party to guard the secrecy of the information;
- iv) the value of the information to the party and its competitors;
- v) the amount of effort or money expended by the party in developing the information; and
- vi) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Case 14-M-0183 – Joint Petition of Time Warner Cable Inc. and Comcast Corporation for Approval of a Holding Company Level Transfer of Control, Determination of Appeal (Jan. 9, 2015) (citing Ashland, 604 N.Y.S.2d at 918). As indicated, once a party has established that the information at issue is trade secret, no further evidentiary showing is required. Case 14-M-0183, Determination of Appeal (Jan. 9, 2015).

The Confidential Information sets forth the electric distribution vegetation management minimum mileage targets NYSEG Electric and RG&E Electric must trim on an annual calendar year basis. The Joint Proposal provides that should the Companies fail to meet these targets, they will be subject to negative revenue adjustments.

The Confidential Information satisfies the standard for trade secret information because its disclosure could place the Companies at a competitive disadvantage in relation to vendors responding to requests for proposals for vegetation trimming work at the Companies. Specifically, if the individual mileage targets were known, bidding vendors could use the Confidential Information to unfairly ascertain the Companies’ patterns and parameters in negotiating prices and terms for service because such vendors would be aware that failure to

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

meet the mileage targets would expose the Companies to a financial penalty. As such, release of the Confidential Information could compromise future contract negotiations as well as undermine the Companies' ability to secure the lowest costs for vendor services.

B. The Confidential Information Should Be Protected Because It Constitutes Confidential Commercial Information

POL § 87(2) protects records submitted to an agency by a commercial enterprise and records derived from information obtained from a commercial enterprise and if disclosed, would cause substantial injury to the competitive position of the subject enterprise. Verizon I at *2. The New York Court of Appeals has established a two-prong test for determining whether confidential commercial information may be exempt from disclosure. Id. at *5; see also Encore Coll. Bookstores, Inc. v. Auxiliary Servs. Corp. of the State Univ. of N.Y. at Farmingdale, 87 N.Y.2d 410, 419-421 (1995). First, the party seeking exemption must show the existence of "actual" competition and must establish the extent to which competitors can use FOIL to obtain information without cost.⁵ Encore, 87 N.Y.2d at 420-21. Second, the party must show that disclosure would likely cause substantial harm to its competitive position.⁶ Id. at 421; see also 16 NYCRR 6-1.3(b)(2); Verizon I at *5. Factors to be considered by the Commission in determining whether disclosure would likely cause substantial competitive harm include:

- 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.

16 NYCRR § 6-1.3(b)(2).

Importantly, the competitive harm in question does not have to be limited to the submitting entity. As the Secretary to the Commission has stated:

⁵ The Court of Appeals has determined that the party seeking exemption need not establish actual competitive harm; "[r]ather, actual competition and the likelihood of substantial competitive injury is all that need be shown." Encore, 87 N.Y.2d at 421 (citations omitted).

⁶ As discussed above, this requirement does not apply to a party seeking protection under FOIL's trade secret exemption.

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In order to meet its burden, the party seeking the exemption must present specific, persuasive evidence that disclosure will likely cause it, or *another affected enterprise*, to suffer competitive injury.

Case 13-01288 - In the Matter of Financial Reports for Lightly Regulated Utility Companies, Determination of Appeal of Trade Secret Determination at 11 (Aug. 13, 2014) (emphasis added) (citing Markowitz v. Serio, 11 N.Y.3d 43, 51 (2008)).

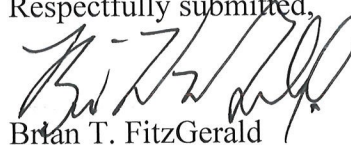
In addition to constituting trade secret, the Confidential Information also satisfies the confidential commercial information standard because: a) its disclosure would cause unfair economic and competitive harm to the Companies; b) the Confidential Information is not publicly known to others; and c) the Confidential Information is of considerable value to those vendors who competitively bid on electric vegetation trimming work at the Companies. As noted above, the Confidential Information could be used by the Companies' future bidders and vendors to unfairly influence their bid prices for vegetation management services at NYSEG and RG&E, thereby impairing the Companies' negotiating leverage and undercutting their efforts to obtain maximum value for their customers. Disclosure could also expose the Companies to an unreasonable risk of harm to their competitive position as the Confidential Information contains non-public commercially sensitive business information regarding the Companies' vegetation management program.

II. CONCLUSION

In summary, the Confidential Information must be protected from public disclosure because it constitutes trade secret and/or confidential commercial information.

Should you have any questions regarding this filing, please contact us.

Respectfully submitted,



Brian T. FitzGerald
Gregory G. Nickson

Enclosures

cc: Noelle M. Kinsch, Esq. (via e-mail w/ public and confidential enclosures)
Parties in Cases 15-E-0283 et al. who are entitled to receive confidential protected information and have requested to receive such information as it is made available (via e-mail w/ public and confidential enclosures)
Honorable Kathleen Burgess (via e-mail and electronic filing w/ public enclosure)
DMM Party List in Cases 15-E-0283 et al. (via e-mail w/ public enclosure)