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October 17, 2016

VIA ELECTRONIC FILINGDonna M. Giliberto, Esq.
Records Access Officer
New York State Department of Public Service
Three Empire State Plaza
Albany, NY 12223-1350**RE: Case 16-M-0407: Proceeding on Motion of the Commission to Seek Consequences Against Smart One Energy, LLC for Violations of the Uniform Business Practices******ATTACHMENT CONTAINS CONFIDENTIAL/TRADE SECRET INFORMATION****

Dear Ms. Giliberto:

Donna

We represent Smart One Energy, LLC (“Smart One”) in the above-referenced proceeding. On September 16, 2016, the New York State Public Service Commission (the “Commission”) issued an *Order Instituting Proceeding and to Show Cause* in this proceeding (the “Order”)¹ directing Smart One to “show cause, within 30 days of the date of this order, why the Commission should not revoke its eligibility to operate as an Energy Service Company in the State of New York, or impose other consequences, as described in UBP Section 2.D.6” (“Ordering Clause 2”).² Pursuant to Public Officers Law (“POL”) §§ 89 (5) and 87 (2) and 16 NYCRR § 6-1.3, Smart One submits this request for protection of certain trade secret and confidential commercial information (the “Confidential Information”) contained in Smart One’s attached response to Ordering Clause 2 (“Smart One’s Second Response”). As discussed in detail below, the Confidential Information for which Smart One requests protection from public disclosure consists of proprietary, sensitive data regarding the number of customer’s Smart One services and the number of brokers it utilizes to solicit and maintain customer accounts, disclosure of which would cause substantial injury to Smart One’s competitive position. Accordingly, Smart One respectfully requests that the Confidential Information in the attached filing be afforded the protections from disclosure provided by the POL and the Commission’s regulations. A redacted version of Smart One’s Second Response has been filed concurrently with the Commission Secretary.

¹ Case 16-M-0407: *Proceeding on Motion of the Commission to Seek Consequences Against Smart One Energy, LLC for Violations of the Uniform Business Practices*, Order Instituting Proceeding and to Show Cause (Issued Sept. 16, 2016).

² *Id.* at 10-11.

ANALYSIS

The Confidential Information Is A Trade Secret And/Or Confidential Information And Should Be Permanently Excepted From Disclosure Under FOIL

Section 87 (2) (d) of the POL states, in relevant part, that an agency 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.”³ As an appellate court interpreting this provision recently observed, POL § 87 (2) (d) clearly delineates two types of information to be protected: (1) “trade secrets;” and (2) “all other types of confidential commercial information imparted to an agency.”⁴ Smart One requests that the Confidential Information be excepted from disclosure under both of these categories.

A. The Confidential Information Is A Trade Secret

With respect to the first category, the Commission’s regulations define the term “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.”⁵ A court recently listed the factors that may be considered in determining whether information constitutes a trade secret:

“(1) the extent to which the information is known outside of his business; (2) the extent to which it is known by employees and others involved in his business; (3) the extent of measures taken by him to guard the secrecy of the information; (4) the value of the information to him and to his competitors; (5) the amount of effort or money expended by him in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.”⁶

This court further held that once a document has been found to be a trade secret under Public Officer’s Law § 87 (2) (d), no further showing is necessary and the record may not be disclosed.⁷

The Confidential Information satisfies each of these factors. The Confidential Information is a trade secret as it is a compilation of information that is used by Smart One in owning and operating its retail energy business, and it provides an opportunity for Smart One to obtain an advantage over competitors in the retail energy industry who do not know or use the Confidential Information. Further, the customer count and third-party broker information in the

³ POL § 87 (2) (d) (emphasis added).

⁴ *Verizon New York, Inc. v Pub. Serv. Commn.*, 137 AD3d 66 (3d Dept 2016).

⁵ 16 NYCRR § 6-1.3 (a).

⁶ *Verizon*, 137 AD3d at 66 (citations omitted).

⁷ *Id.*

attached filing sought to be protected here is not known outside Smart One's business, is closely guarded within the competitive retail markets, is valuable to Smart One as well as its competitors, and could not otherwise be easily acquired or duplicated. Accordingly, the Confidential Information in the attached filings should be excepted from disclosure.

B. The Confidential Information Is Being Submitted To The Commission By Commercial Enterprises Or Derived From Information Obtained From Commercial Enterprises And Which, If Disclosed, Would Cause Substantial Injury To The Commercial Enterprises' Competitive Positions

With respect to the second and third categories, Section 6-1.3 (b) (2) of the Commission's regulations states:

"A person submitting . . . confidential commercial information to the department . . . 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. Factors to be considered 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."⁸

The Confidential Information in the attached filings satisfies several, if not all, of the Commission's factors that must be considered in determining Smart One's instant request. For example, the Confidential Information is not known to others, including Smart One's existing or potential competitors. According to the New York State Court of Appeals, "[w]here FOIA disclosure is the sole means by which competitors can obtain the requested information, *the inquiry ends here.*"⁹ In addition, the Confidential Information would be highly valuable to Smart One's existing or potential competitors, preparation of the Confidential Information required considerable work and expense, and others cannot readily duplicate the Confidential Information. For these reasons as well, the RAO should protect the requested Confidential Information from public disclosure.

⁸ 16 NYCRR § 6-1.3 (b) (2).

⁹ *Encore College Bookstores v Auxiliary Serv Corp*, 87 NY2d 410, 420 (1995) (citing *Worthington Compressors v Costle*, 662 F2d 45, 51 [DC Cir 1981]) (emphasis added).

In assessing whether records are properly withheld from disclosure, the Court of Appeals has held that “[a]ctual competition and the *likelihood* of substantial competitive injury is all that need be shown.”¹⁰ The RAO and the Secretary have determined that “actual competition” in the retail energy industry in New York State has been established.¹¹ Accordingly, all that Smart One is required to show is the “likelihood” of competitive injury. Granting Smart One’s competitors in the retail energy industry access to its sensitive customer count and third-party broker information would certainly—not just likely—provide competitors with insight into the actual numbers of Smart One’s customers and brokers and would therefore cause it substantial competitive injury.¹² For these reasons as well, the RAO should protect the requested Confidential Information from public disclosure.

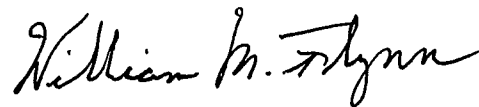
CONCLUSION

In sum, Smart One respectfully requests that the Confidential Information in the attached filing be deemed permanently protected from public disclosure. Following your review, please provide the filing to appropriate Staff with the direction that it be treated as confidential in accordance with the Commission’s rules.

In the event that any person requests a record excepted from disclosure, Smart One respectfully requests that the Department of Public Service inform Smart One of the Department’s intention to determine whether such exception should be granted or continued and permit Smart One to submit a written statement of the necessity, including any supporting affidavit(s), for the granting or continuation of such exception.

Thank you for your continuing attention in this matter.

Very truly yours,



William M. Flynn

Enclosure

¹⁰ *Id.* at 421 (citing *Gulf & W Indus v United States*, 615 F2d 527, 530 [DC Cir 1979]) (emphasis added).

¹¹ Case 12-M-0476, *et al.*: *Proceeding on Motion of the Commission to Assess Certain Aspects of the Residential and Small Non-residential Retail Energy Markets in New York State*, Trade Secret Determination 16-01 (Issued Feb. 1, 2016), at 10.

¹² *See id.* at 4; Case 12-M-0476, *et al.*: *Proceeding on Motion of the Commission to Assess Certain Aspects of the Residential and Small Non-residential Retail Energy Markets in New York State*, Determination of Appeal of Trade Secret Determination (Issued June 24, 2016), at 17-18 (noting that customer counts were excepted from disclosure in the context of ESCO historical pricing reports).