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VIA ELECTRONIC FILING

Jessica Vigars, Esq.
Records Access Officer
New York State Department of Public Service
Three Empire State Plaza
Albany, NY 12223-1350

RE: Matter 14-02554 – Update to Marathon Power LLC d/b/a Marathon Energy Corporation’s 2018 Annual Compliance Filing

****ATTACHMENTS CONTAIN CONFIDENTIAL/TRADE SECRET****

Dear Ms. Vigars:

We represent Marathon Power LLC d/b/a Marathon Energy Corporation (“Marathon”) in the above-referenced matter. According to the Uniform Business Practices, energy service companies are required to file updates for any major changes to their application packages.¹ Pursuant to Public Officers Law (“POL”) §§ 89 (5) and 87 (2) and 16 NYCRR § 6-1.3, Marathon submits this request for protection of certain trade secret and confidential commercial information (the “Confidential Information”) contained in Marathon’s attached updated sales agreement. As discussed in detail below, the Confidential Information for which Marathon requests protection from public disclosure consists of proprietary, sensitive data regarding Marathon’s customer sales agreements, disclosure of which would cause substantial injury to Marathon’s competitive position. Accordingly, Marathon respectfully requests that the Confidential Information in the attached filing be afforded the protections from disclosure provided by the POL and the Public Service Commission’s (the “Commission”) regulations.

ANALYSIS

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

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.”² As an appellate court interpreting this provision recently observed, POL § 87 (2) (d) clearly delineates two types

¹ Case 98-M-1343: *In the Matter of Retail Access Business Rules*, Uniform Business Practices (Issued Feb. 2016), Section 2 (D) (1).

² POL § 87 (2) (d) (emphasis added).

of information to be protected: (1) “trade secrets;” and (2) “all other types of confidential commercial information imparted to an agency.”³ Marathon 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 of information to be protected, 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.”⁴ 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.”⁵

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.⁶

The Confidential Information constitutes a trade secret and satisfies each of the above factors. As an initial matter, the Confidential Information is a trade secret as it is a compilation of information that Marathon uses in owning and operating its retail energy business, and it provides Marathon with an opportunity to obtain an advantage over competitors in the retail energy industry who do not know or use the Confidential Information. Further, the specific terms of Marathon’s agreements with customers in the attached filing sought to be protected here are not known outside Marathon’s business, are closely guarded within the competitive retail markets, are valuable to Marathon as well as its competitors, and could not otherwise be easily acquired or duplicated. Accordingly, the attached Confidential Information should be permanently excepted from disclosure under the POL.

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

⁴ 16 NYCRR § 6-1.3 (a).

⁵ *Verizon*, 137 AD3d at 66 (citations omitted).

⁶ *Id.*

B. The Confidential Information Is Being Submitted To The Department By Commercial Enterprises Or Derived From Information Obtained From Commercial Enterprises, Disclosure Of Which Would Cause Substantial Injury To The Commercial Enterprises' Competitive Positions

With respect to the second category of information to be protected, 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."⁷

The Confidential Information in the attached filings satisfies several, if not all, of the Commission's factors that must be considered in determining Marathon's instant request. For example, the Confidential Information is not known to others, including Marathon'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*."⁸ Even if the information were available from other sources, the Confidential Information would satisfy the Commission's additional factors since it would be highly valuable to Marathon's existing or potential competitors, preparation of the Confidential Information required considerable work and expense, and others cannot readily duplicate the Confidential Information.

In assessing whether records are properly withheld from disclosure under this category, the Court of Appeals has held that "[a]ctual competition and the *likelihood* of substantial competitive injury is all that need be shown."⁹ The RAO and the Secretary have previously

⁷ 16 NYCRR § 6-1.3 (b) (2).

⁸ *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).

⁹ *Id.* at 421 (citing *Gulf & W Indus v United States*, 615 F2d 527, 530 [DC Cir 1979]) (emphasis added).

determined that “actual competition” in the retail energy industry in New York State has been established.¹⁰ Accordingly, all that Marathon is required to show is the “likelihood” of competitive injury. Granting Marathon’s competitors in the retail energy industry access to the Confidential Information would certainly—not just likely—provide competitors with knowledge of the specific service territories in which Marathon operates and would therefore cause it substantial competitive injury. For these reasons as well, the attached Confidential Information should be permanently excepted from disclosure under the POL.

CONCLUSION

In sum, Marathon respectfully requests that the attached Confidential Information 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, Marathon respectfully requests that the Department inform Marathon of the Department’s intention to determine whether such exception should be granted or continued and permit Marathon 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 attention in this matter.

Very truly yours,

/s/ Michelle K. Piasecki

Michelle K. Piasecki

Enclosures

cc: Jeff Grygier (*via electronic mail*)

¹⁰ 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; 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 28.