



September 16, 2016

VIA E-MAIL

Honorable Dakin D. Lecakes
Administrative Law Judge
New York State Department of Public Service
Three Empire State Plaza
Albany, NY 12223-1350

Re: Case 16-G-0257- Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of National Fuel Gas Distribution Corp. for Gas Service

Dear Judge Lecakes:

Pursuant to the New York State Freedom of Information Law (“FOIL”) (N.Y. Pub. Off. Law §§ 84, et seq. (McKinney 2016)), Part 6 of the New York State Public Service Commission’s (“Commission”) regulations and Paragraphs 2 and 13 of the Protective Order issued in this proceeding,¹ National Fuel Gas Distribution Corporation (“National Fuel” or the “Company”), by and through its undersigned attorneys, hereby submits this letter in support of the Company’s request to protect from public disclosure certain information contained in:

- 1) Exhibit __ (GCB-2) to the Rebuttal Testimony of the General Compensation & Benefits Panel which contains an excerpt from the October 2015 National Fuel Gas Distribution Corporation Annual Review of Officer Compensation prepared by the Company’s non-party consultant, the Hay Group;
- 2) The Rebuttal Testimony of Evan M. Crahen along with Exhibits __ (EMC-3) and (EMC-4) thereto which relate to a confidential draft audit report prepared by the Company’s non-party consultant, The Liberty Consulting Group (the “Liberty Information”); and
- 3) Exhibit __ (CFP-5) to the Rebuttal Testimony of the Company Finance Panel which contains highly-sensitive financial information (collectively, the “Confidential Information”).²

¹ Case 16-G-0257 - Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of National Fuel Gas Distribution Corp. for Gas Service, Ruling Adopting Protective Order (July 1, 2016) (“Protective Order”).

² In addition, the Confidential Information includes the confidential: 1) response to information request DPS-48, Attachment # 1 (set forth in Exhibit __ (GCB-1)) for which the Company requested an exemption from

Pursuant to Paragraph 13 of the Protective Order, a public/redacted version of the Confidential Information is being provided herewith.

I. LEGAL STANDARD

The Confidential Information should be protected from public disclosure because it qualifies as trade secret and/or 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. 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 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

disclosure on August 18, 2016; 2) supplemental response to information request DPS-48, Attachment #2 (set forth in Exhibit __ (GCB-3)) for which the Company requested an exemption from disclosure on August 18, 2016; and 3) response to information request DPS-180, Attachments #1 and 2 (set forth in Exhibit __ (GCB-4), Sheets 22-70) for which the Company requested exemption from disclosure on August 17, 2016.

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 Dep't 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 at 868.

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 at *5.

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 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).

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

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

“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:

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)).

II. ARGUMENT

A. Exhibit __ (GCB-2)

Exhibit __ (GCB-2), which contains an excerpt from the Company’s Annual Review of Officer Compensation prepared by the Hay Group, should be exempt from disclosure because it constitutes trade secret and/or confidential commercial information. This information contains

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.

commercially sensitive information related to: 1) officer salaries and payroll; and 2) the Company's incentive compensation structure.

This information must not be disclosed because it is highly sensitive, is not otherwise available to the Company's competitors, and is of great value to National Fuel as well as its competitors. Specifically, the Company competes with other employers to attract and retain high-performing and well-qualified employees and officers. If other employers knew the specific salary and compensation benefits that the Company offers to its employees and officers, they might be able to frustrate the Company's efforts to draw new candidates as well as maintain its current workforce. This information also constitutes non-public business information that must be protected because it reveals the Company's business strategy and focus and also reflects confidential data regarding: 1) the relationship between the Company and its employees and officers; 2) how the Company determines individual employee/officer goals and incentives; and 3) how the Company incentivizes its employees/officers in general.

This information also contains analyses conducted by the Hay Group that compare the competitiveness of the Company's officer compensation practices to other employers in the Hay Group's database. These analyses, the organization of the analyses, as well as the underlying empirical data supporting the analyses, constitute the intellectual property of the Hay Group and meet the trade secret and confidential commercial information standard, set forth above, because: 1) they are not publicly available and could not be practicably duplicated without the Hay Group's consent; 2) the Hay Group expended significant money and effort to develop this information; and 3) this information has not been shared with persons outside the Company, the Hay Group 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.

B. The Liberty Information

The Liberty Information contains: 1) Exhibit __ (EMC-3) which contains a draft audit report chapter prepared by The Liberty Consulting Group ("Liberty") regarding the Company; 2) Exhibit __ (EMC-4) which contains the Company's comments on Exhibit __ (EMC-3); and 3) a portion of the Rebuttal Testimony of Evan M. Crahen which discusses the same. This information is protected under Article XIV ("Use of Information and Confidentiality") of the Agreement executed between the Company, along with other electric and gas utilities, Liberty and the Commission in Case 13-M-0449 - Independent Third-Party Consultant to Conduct a Focused Review of the Internal Staffing Levels and Use of Contractors for Core Utility Functions at Major New York Energy Utilities.⁷ As such, the Liberty Information should not be disclosed.

⁷ Case 13-M-0449 - Independent Third-Party Consultant to Conduct a Focused Review of the Internal Staffing Levels and Use of Contractors for Core Utility Functions at Major New York Energy Utilities, Letter to Jay Lesch, National Fuel Gas Distribution, from Secretary Burgess, Regarding Operations Audit (June 27, 2014).

C. Exhibit __ (CFP-5)

Exhibit __ (CFP-5) contains highly sensitive financial information related to Seneca Resources Corporation (“Seneca”), an unregulated affiliate of National Fuel. This information should be protected because its disclosure would allow financial market participants to gain confidential information about the financial status of Seneca that would otherwise not be available to them. Disclosure would also confer a significant advantage on Seneca’s competitors because such competitors would have information about Seneca that Seneca would not have about them.

In addition, Exhibit __ (CFP-5) contains financial information related to subsidiary ceiling test calculations, disclosure of which would place the Seneca at a disadvantage relative to its peers because this type of information is only disclosed on an annual basis pursuant to the guidelines of the U.S. Securities and Exchange Commission. As such, this information must not be disclosed.

III. CONCLUSION

In summary, the Confidential Information must be protected from public disclosure. Should you have any questions regarding this filing, please contact us.

Respectfully submitted,



Bruce V. Miller
Gregory G. Nickson

Enclosures

cc: Honorable Kathleen H. Burgess, Secretary (via electronic filing w/ public enclosures)
Joseph Del Vecchio, Esq. (via e-mail w/ public and confidential enclosures)
Parties in Case 16-G-0257 who are entitled to receive confidential protected information
(via e-mail w/ public and confidential enclosures)
DMM Party List in Case 16-G-0257 (via e-mail w/ public enclosures)