



May 20, 2015

Ms. Donna Giliberto
Records Access Officer
State of New York Department of Public Service
Three Empire State Plaza
Albany, NY 12223-1350

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

Dear Ms. Giliberto:

Pursuant to the New York State Freedom of Information Law ("FOIL") (Public Officers Law, §§ 84, et seq.) and Part 6 of the New York State Public Service Commission's ("Commission") regulations, 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 information contained in the Exhibits identified below that are attached to the Companies' respective rate case filings in the above-referenced matters.

Specifically, the Companies request trade secret and/or confidential commercial information protection for information contained in the following Exhibits:

- 1) Exhibit __ (ESNGSEP-4) which provides the city gate annual expense forecast for 2015 and 2016 for NYSEG and RG&E, respectively;

- 2) Exhibit __ (WCB-4) which provides a presentation prepared by Towers Watson & Co. (“Towers”) summarizing the Companies’ compensation study conducted by Towers;
- 3) Exhibit __ (WCB-9) which shows how the Companies calculated the customers’ share of the Non-Union Non-Executive Variable Compensation Plan expense;
- 4) Exhibit __ (WCB-10) which shows how the Companies calculated the customers’ share of the Non-Union Senior Leadership Variable Compensation Plan expense;
- 5) Exhibit __ (WCB-11) which shows how the Companies calculated the customers’ share of the Iberdrola USA Management Corporation (“IUMC”) Employee Variable Compensation Plan – Non-Union Non-Executive Plan expense; and
- 6) Exhibit __ (WCB-12) which shows how the Companies calculated the customers’ share of the IUMC Employee Variable Compensation Plan – Non-Union Senior Leadership Plan expense.

The information listed above is hereinafter collectively referred to as the “Confidential Information.” The Companies have prepared redacted versions of a majority of the documents above that removes the Confidential Information.¹ Enclosed, please find both the confidential trade secret versions and, where applicable, the redacted public versions of the documents. The Confidential Information is being provided to you in electronic format on the enclosed CD.

I. LEGAL STANDARD

The Confidential Information should be protected from public disclosure because such information 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 Pub. Serv. Comm’n, 991 N.Y.S.2d 841, 851 (N.Y. Sup. Ct., Albany Cnty. 2014). 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.

¹ Please note that a redacted version of Exhibit __ (WCB-4) was not prepared because Towers, the author of the Exhibit and the consultant who conducted the Companies’ compensation study which is summarized in the Exhibit, views the entire document as its proprietary and intellectual capital. Therefore, redactions would render the entire document meaningless.

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, 991 N.Y.S.2d 841 at 856.²

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 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).³ 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

² In Verizon, 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, 991 N.Y.S.2d at 851. 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.” Id.

³ Confidential commercial information is not expressly defined in the regulations.

- 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. 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, 991 N.Y.S.2d at 851. The New York Court of Appeals has established a two-prong test for determining whether confidential commercial information may be exempt from disclosure. See 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.⁴ Second, the party must show that disclosure would likely cause substantial harm to its competitive position.⁵ Id. at 421; see also 16 NYCRR 6-1.3(b)(2); Verizon, 991 N.Y.S.2d at 851. 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

⁴ 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).

⁵ As discussed above, this requirement does not apply to a party seeking protection under FOIL’s trade secret exemption.

- 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 __ (ESNGSEP-4)

Exhibit __ (ESNGSEP-4) constitutes trade secret information because it provides information related to the Companies' city annual expense forecast for 2015 and 2016, as well as a summary of the Companies' gas and capacity cost forecast for 2015 and 2016. This information satisfies the trade secret standard set forth above because it: 1) is highly sensitive and proprietary in nature in that it provides specific details of gas price and cost data; and 2) is otherwise unavailable to the Companies' competitors and could not be duplicated or independently developed.

Specifically, the Companies enter into hedging instruments in an effort to manage and reduce price volatility for the benefit of customers. Based upon the price of commodity associated with NYSEG's and RG&E's respective hedging plans and the prices that the Companies have agreed to pay to their suppliers for physical commodity, the Companies' competitors could estimate the Companies' commodity cost of gas. If marketers knew the price that NYSEG and/or RG&E intended to pay for gas and the pricing terms, they might be able to frustrate the Companies' effort to reduce price volatility to the appropriate level. This could cause sales customers to absorb higher costs. Furthermore, disclosure of the Confidential Information would confer a significant economic advantage on the Companies' competitors because such competitors would have information about the Companies that the Companies would not have about them.

Exhibit __ (ESNGSEP-4) also constitutes confidential commercial information because release of the gas and capacity cost forecast would expose the Companies to an unreasonable risk of harm to their economic competitive position. As noted above, this information is not generally available to the public, nor does it constitute the type of information that competitors make available to each other in the normal course of business. This information would allow

competitors to ascertain unfairly the Companies' cost of doing business and their patterns and parameters in negotiating the price of gas, which, in turn, could be used by others to gain an unfair bargaining advantage over the Companies.

B. Exhibit __ (WCB-4)

Exhibit __ (WCB-4) constitutes trade secret information because it consists of confidential, highly sensitive proprietary data regarding the Companies' compensation structure. Exhibit __ (WCB-4) also contains analyses conducted by Towers that compare the Companies' compensation practices to other employers in the Towers' database. These analyses, the organization of the analyses, as well as the underlying empirical data supporting the analyses, constitute the intellectual property of Towers and meets the trade secret standard, set forth above, because: 1) the Confidential Information is not publicly available and could not be practicably duplicated without Towers' consent; 2) Towers expended significant money and effort to develop the Confidential Information; and 3) the Confidential Information has not been shared with persons outside of the Companies, Towers 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.

In addition, pursuant to POL Section 87(2), applicable case law, and Commission precedent, Exhibit __ (WCB-4) is appropriately exempt from disclosure under the two-prong standard articulated in Encore for confidential commercial information with respect to both Towers and the Companies. With respect to Towers: a) actual competition exists in providing compensation study analyses; and b) the disclosure of the information, which is not publicly available and was developed at significant cost and effort by Towers using Towers' proprietary methods, would likely cause Towers competitive injury because, as noted above, the information is commercially valuable. As for the Companies, NYSEG and RG&E compete with other employers in the region for qualified and well-trained employees. As such, disclosure of the sensitive data concerning the Companies' compensation practices and structure would allow competing employers to ascertain unfairly the Companies' patterns and parameters in negotiating salaries with their employees and could therefore undermine the Companies' ability to negotiate salary terms with their employees in the future, including the Companies' ability to secure the lowest costs for employee services, satisfying both prongs of the Encore standard.

As an additional matter, maintaining the confidentiality of the Confidential Information would honor Towers' reasonable expectation of privacy. The Confidential Information is protected by confidentiality provisions and, therefore, is otherwise unavailable to the Companies' and Towers' competitors and could not be duplicated or independently developed.

C. Exhibit __ (WCB-9), Exhibit __ (WCB-10), Exhibit __ (WCB-11), and Exhibit __ (WCB-12)

The Confidential Information contained in Exhibit __ (WCB-9), Exhibit __ (WCB-10), Exhibit __ (WCB-11) and Exhibit __ (WCB-12) should be exempt from disclosure as trade secret information because it contains commercially sensitive information regarding the Companies' objectives in determining variable compensation for various categories of their

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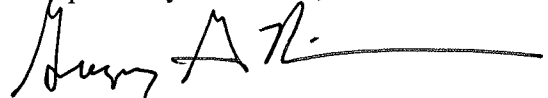
employees. This information reflects the Companies' business strategy and focus and reflects confidential data regarding the relationship between the Companies and their employees, how the Companies determine individual employee goals and incentives as well as how the Companies incentivize their employees in general.

III. CONCLUSION

In summary, public dissemination of 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 me.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Brian T. FitzGerald", followed by a long horizontal line extending to the right.

Brian T. FitzGerald
Gregory G. Nickson

Enclosure

cc: Honorable Kathleen Burgess (via hand delivery and e-mail w/o enclosures)
Active Party Service List for Cases 09-E-0715, 09-G-0716, 09-E-0717, and 09-G-0718
(via e-mail w/o enclosures)