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Via Electronic Filing

Michelle Zaludek
Records Access Officer
State of New York Department of Public Service
Agency Building 3
Albany, New York 12223-1350

RE: Matter No. 14-02554 – In the Matter of Compliance with Annual, Triennial, and Third Party Marketer/Vendor Listing: M&R Energy Resources Corp. (Request for Confidential Treatment)

Dear Ms. Zaludek:

M&R Energy Resources Corp. (“M&R” or the “Company”) respectfully requests that the Commission and the Department of Public Service treat the redacted information in the following attached documents as trade secret information and confidential commercial information, pursuant to Public Officers Law §§ 87(2) and 89(2), and the Commission’s implementing regulation, 16 NYCRR § 6-1.3:

- Attachment A, Section B – Sales Agreement
- Attachment A, Section C – Marketing Representative ID
- Attachment A, Section D – Marketing Standards Quality Assurance Plan
- Attachment A, Section E – TPV
- Attachment A, Section G – Sample Bill
- Attachment A, Section I – Promotional Materials and Information
- Attachment A, Section L – Marketing Vendors
- Attachment A, Section P – Complaint Data
- Attachment A, Section Q – Security/Data Breach Information
- Attachment A, Section R – History of Bankruptcy, Dissolution, Merger or Acquisition

(collectively, “Confidential Information”).

The Confidential Information for which the Company requests protection from public disclosure consists of proprietary, sensitive information regarding the Company’s business practices and customer sales agreements, disclosure of which would cause substantial injury to the Company’s competitive position. Accordingly, the Company respectfully requests that the Confidential Information in the attached unredacted documents be treated as confidential trade secret information and afforded all of the protections against public disclosure available for such

information, as provided by law. A redacted version of the Confidential Information is also attached, and the redacted copy can be used for public disclosure.

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

Analysis

POL § 87(2)(d) states in relevant part that agencies must 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.” The New York State Appellate Division, Third Department, upheld the New York State Supreme Court’s ruling in *Verizon v. New York State Public Service Commission*, which found that trade secret records submitted to an agency are exempt from public disclosure under New York’s Freedom of Information Law (“FOIL”) and do not require an additional showing of substantial competitive injury.¹ The Third Department affirmed that “trade secret” and “substantial competitive injury” tests are two alternative standards; information satisfying either test must be exempted from public disclosure under FOIL.² The Company respectfully submits that the Confidential Information satisfies each of these alternative standards and must therefore be exempted from disclosure.

A. The Confidential Information Is A Trade Secret And, If Disclosed, Would Cause Substantial Competitive Injury; Therefore, the Confidential Information Should Be Permanently Excepted From Disclosure Under the POL

The Commission’s Regulations define 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.”³ The factors to be considered by the Commission in determining whether the information should be exempted from disclosure as either a trade secret or as confidential commercial information include:

¹ *Verizon New York, Inc. v. New York State Public Service Commission*, 46 Misc. 3d 858 (N.Y. Sup. Ct., Albany Co. July 31, 2014), *aff’d* by *Verizon New York, Inc. v. New York State Public Service Commission*, 137 A.D.3d 66 (3d Dep’t 2016).

² *Verizon*, 137 A.D.3d at 73. *See also* New York Public Officers Law §§ 87(2)(d), which provides two distinct categories of exemption: the first covers records, or portions of records, that are trade secrets, and the second protects records that would, if disclosed, cause substantial competitive injury to the party seeking exemption

³ 16 NYCRR § 6-1.3(a)

1. the extent to which the disclosure would cause unfair economic or competitive damage;
2. the extent to which the information is known by others and can involve similar activities;
3. the worth or value of the information to the person and the person's competitors;
4. the degree of difficulty and cost of developing the information;
5. the ease or difficulty associated with obtaining or duplicating the information by others without the person's consent; and
6. other statute(s) or regulations specifically excepting the information from disclosure.⁴

The 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.⁵ The information included in the Confidential Information satisfies each of these factors. The Confidential Information contains trade secrets and confidential commercial information pertaining to its customer accounts and business strategy, which if disclosed would cause substantial injury to the competitive position of the Company in the retail energy marketplace. Disclosure of this proprietary information would advantage the Company's competitors by giving them insight into the Company's customer accounts, product offerings, and business strategy. The Confidential 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. Disclosing the Confidential Information would cause the Company economic and competitive harm, giving the Company's competitors an unfair economic or competitive advantage.

Pursuant to POL § 87(2)(d) and 16 N.Y.C.R.R. § 6-1.3(b)(2), the Confidential Information also constitutes information obtained from a commercial enterprise, the disclosure of which would cause substantial injury to the competitive position of the subject enterprise by exposing their market position. The Company is a commercial enterprise.

In assessing whether records are properly withheld from disclosure under this category, the Court of Appeals has held that "actual competition and the *likelihood* of substantial competitive injury is all that need be shown."⁶ The RAO and the Secretary have previously determined that "actual competition" in the retail energy industry in New York State has been

⁴ See also *Verizon*, 137 A.D.3d at 72-73

⁵ *Verizon*, 137 AD3d at 72-73 (internal quotation marks and citation omitted); see also 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), at 8 (acknowledging that "once information is established . . . to be a trade secret, it can be exempted from disclosure without requiring an additional showing").

⁶ *Id.* at 421 (citing *Gulf & W Indus v United States*, 615 F2d 527, 530 [DC Cir 1979]) (emphasis added).

established.⁷ Accordingly, all that the Company is required to show is the “likelihood” of competitive injury. Granting the Company’s competitors in the retail energy industry access to the Confidential Information would certainly—not just likely—cause the Company unfair economic or competitive damage. Specifically, the public disclosure of the proprietary, sensitive information in the attached filing would competitively damage the Company by, for example, providing unfair advantage to its current and potential competitors in the retail energy industry. Such an outcome would cause substantial injury to the Company’s competitive position because it could prevent the Company from evenly competing with other existing or potential retail energy providers. For these reasons as well, the attached Confidential Information should be permanently excepted from disclosure under the POL.

Conclusion

Accordingly, M&R respectfully requests confidential treatment for the Confidential Information, which satisfies both the “substantial competitive injury” and “trade secret” tests under the POL. To protect confidentiality, the Confidential Information must be maintained in the DPS’s confidential files and must be provided only to interested members of the Public Service Commission and DPS Staff, and not otherwise be disclosed or made available, either through FOIL or otherwise.

Please contact me if you have any questions related to this filing. Thank you for your attention to this matter.

Respectfully submitted,

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⁷ See 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.