

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ALBANY

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In the Matter of the Application of

NIAGARA MOHAWK POWER CORPORATION,

Petitioner,

-against-

NEW YORK STATE DEPARTMENT OF  
ENVIRONMENTAL CONSERVATION and  
LONG LAKE ENERGY CORPORATION,

Respondents.

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SUPREME COURT, ALBANY CO. SPECIAL TERM, 12/9/88, CAL.#12

JUSTICE VINCENT G. BRADLEY, PRESIDING

APPEARANCES:

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BRADLEY, J:

In this Article 78 proceeding, petitioner seeks to annul the determination issued by the Deputy Commissioner/General Counsel of respondent Department of Environmental Conservation (DEC) dated October 23, 1987. In this determination, DEC decided to grant respondent Long Lake Energy Corp. access to a document entitled "Summary Report of Sediment Sampling on the Hudson River at Hudson Falls, New York". The report was prepared on behalf of petitioner. The decision to disclose was made despite petitioner's previous request that the information be exempted from disclosure as a trade secret pursuant to Section 87(2)(d) of the state Freedom of Information Law, hereinafter referred to as FOIL (Public Officers Law Section 84 et seq.). Long Lake is competing with petitioner before the Federal Energy Regulatory Commission (FERC) for a license to operate a hydroelectric plant at Hudson Falls, New York. Petitioner already operates a plant in Hudson Falls and its application is apparently, in effect, a request for a renewal of its license.

The report at issue was submitted to DEC at DEC's request as part of petitioner's application for water quality certification ("401 certificates") made pursuant to 33 USC Section 1431. Under the federal Clean Water Act, the "401

certificates" must be included in petitioner's application to the FERC for a hydroelectric license. DEC requested the information because of its concern that toxic contaminants would be found in the bed of the Hudson at the Hudson Falls project site. Petitioner was able to conduct this analysis because, by virtue of its operation of its hydroelectric project in Hudson Falls, it can control part of the flow of the Hudson at this location. Long Lake, it appears, is unable to produce the same analysis because it cannot control the flow. Petitioner argues that if the report of the analysis is released to Long Lake, it will lose its competitive advantage in the application process before the FERC.

The Court finds that the petition must be dismissed as the report does not constitute a "trade secret" with the definition contained in Public Officers Law Section 87(2)(d) and 6 NYCRR 616.7(2)(v). First, as Long Lake argues, the analysis has no independent commercial value. It is not a "formula, pattern, process, procedure, plan, compound, devise, customer list or cost record" (6NYCRR 616.7(c)(2)(v)). It does not contain a description of

petitioner's methods of generating hydroelectric power or any other information which would give another enterprise a competitive edge in the production of electrical power.

Second, the analysis was prepared by petitioner for the sole purpose of using it in the licensing process. It is not the type of information which, if released to a competitor, will help the competitor to produce hydroelectric power more efficiently or more cheaply than petitioner. It was prepared for use in a context in which it would, in all probability, eventually become available to the public.

Finally, as respondent DEC argues, to permit one individual or entity to maintain secrecy over facts relating to the environmental soundness of property which belongs to the people of this state would be contrary to public policy and good government.

As to petitioner's claim that its competitive advantage will be harmed by release of the report, this argument must fail for two reasons. First, the Court agrees with DEC's General Counsel that the "monopoly" by which petitioner alone is able to control the flow of the river is not the type of interest protected by the trade secret exemption in Section 87(2)(d). Second, the Court agrees with respondent Long Lake

that FOIL's trade secret exemption protects legitimate competition in the marketplace, but it does not protect business enterprises which, as here, seek to keep information from the public which ultimately has a direct bearing on public health and safety.

Accordingly, the petition must be dismissed. Respondent DEC's attorney shall submit a single order consistent herewith.

Dated: Kingston, New York  
July 18, 1989

All papers to attorney for respondent DEC upon execution of the order entered hereon.