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TO: Chairman Winslow
Commissioner Conaway
Commissioner Drexler
Commissioner Gray
Commissioner Karia

FROM: Brenda R. Mayrack, Esq., Deputy Attorney General

DATE: February 18, 2016

RE: Objections of Suez Water Delaware (formerly United Water Delaware), Tidewater Utilities, Inc., and Commission Counsel to the Production of Certain Documents in Free Freedom of Information Act ("FOIA") Requests of Artesian Water Company, Inc. and Tidewater Utilities, Inc.

On December 17, 2015, the Public Service Commission ("Commission") received a Freedom of Information Act Request ("FOIA") request from Artesian Water Company, Inc. ("Artesian") for the following:

Annual Reports for 2014 filed by United Water Delaware and Tidewater Utilities with the Public Service Commission

On January 5, 2016, Artesian withdrew its request, and on January 6, 2016, Artesian refiled its request for the same information.

On December 30, 2015, Tidewater Utilities, Inc. ("Tidewater") filed a FOIA request with the Commission for the following:

Annual Reports for 2014 filed by United Water Delaware and Tidewater Utilities with the Public Service Commission Annual Report for 2014 filed by Artesian Water Company with the Public Service Commission

On January 5, 2016, Tidewater amended its FOIA request as follows:

Annual Report for 2014 filed by Artesian Water Company with the Public Service Commission

Commission Staff identified the documents responsive to the request and provided an update regarding the status of the requests to both requesting parties within 15 business days of the respective requests, explaining that the Commission would require additional time to respond because the responsive documents were filed as Third Party Confidential Records per the Commission's FOIA regulations, 8 *Del. Admin. C.* § 1202, and would require notice to United Water Delaware ("United"), Tidewater, and Artesian, as well as legal review and approval of any denials by the Commission.

The responsive documents were filed as Third Party Confidential Records per the Commission's FOIA regulations, 8 *Del. Admin. C.* sec. 1202. Pursuant to the Commission's FOIA regulations, the filing party was notified of the FOIA request and given the opportunity to timely object to the disclosure of the documents. The filing party "bears the burden of establishing confidentiality under FOIA." 8 *Del. Admin. C.* § 1202-6.2.4

Artesian did not object to the disclosure of its 2014 Annual Report.

Both Tidewater and United filed timely objections to the disclosure of certain information and specific pages within the responsive documents.

In addition, "[p]rior to disclosure, records may be reviewed by the Commission to ensure that those records or portions of records deemed non-public may be removed pursuant to 29 *Del. C.* § 10002(l) or any other applicable provision of law." 8 *Del. Admin. C.* § 1202-3.7.1.

The question before the Commission at the February 23, 2016 meeting will be whether Tidewater and United have met their burdens of proof, based upon a preponderance of the evidence (i.e., "more likely than not"), with respect to their claims of confidentiality for the pages at issue. If the Commission determines that Tidewater and United have met their burdens of proof, then the Commission should determine that these pages should not be disclosed and that the requests for these pages should be denied. If the Commission determines that Tidewater and United have not met their burdens of proof, then the Commission should determine that these pages should be disclosed. **Furthermore, if the Commission determines on its own, pursuant to 8 *Del. Admin. C.* § 1202-3.7.1, that portions of the requested records contain non-public information as defined by 29 *Del. C.* § 10002(l) or any other applicable provision of law, then the Commission should determine that these pages should not be disclosed and that the requests for these pages should be denied.**

The pages for which Tidewater and United have objected to disclosure are marked in the attachments with an "R" (i.e., "REDACT") for partial-page redaction as indicated or with "®" (i.e., an "R" in a circle) for the entire-page redaction in the upper-right corner of the page. The pages for which there is no objection (and thus would be disclosed) are unmarked.

With respect to the pages for which Tidewater and United have objected to disclosure (the "R" and "®" pages), my review has determined that these pages contain "non-public"

information under 29 *Del. C.* § 10002(L)(2) (“Trade secrets and commercial or financial information obtained from a person which is of a privileged or confidential nature”) and 29 *Del. C.* § 10002(L)(17)a.2. (records which “could facilitate the planning of a terrorist attack, or could endanger the life or physical safety of an individual” including “Building plans, blueprints, schematic drawings, diagrams, operational manuals or other records of ... waste and water systems ... the disclosure of which would reveal the building's or structure's internal layout, specific location, life, safety and support systems, structural elements, surveillance techniques, alarm or security systems or technologies, operational and transportation plans or protocols, or personnel deployments”). If the Commission determines that Tidewater and United have met their burdens of proof with respect to the “non-public” nature of this information, then the Commission should decide that these pages should not be disclosed and that the requests for these pages should be denied.

The information at issue for Tidewater and United meeting the “trade secrets and commercial or financial information” exemption appears to include sensitive financial data, which could be used by a competitor to gain an advantage if disclosed under FOIA. Furthermore, it is in the Commission’s interest in performing its regulatory function to have regulated entities freely provide such information – without the possibility of future disclosure to a competitor under a FOIA request.

Although Artesian did not have any objections to the disclosure of its entire Annual Report, my review determined that several pages contain information that is “non-public” information under 29 *Del. C.* § 10002(L)(17)a.2. (records which “could facilitate the planning of a terrorist attack, or could endanger the life or physical safety of an individual” including “Building plans, blueprints, schematic drawings, diagrams, operational manuals or other records of ... waste and water systems ... the disclosure of which would reveal the building's or structure's internal layout, specific location, life, safety and support systems, structural elements, surveillance techniques, alarm or security systems or technologies, operational and transportation plans or protocols, or personnel deployments”). These pages have been marked in the same manner as Tidewater and United’s reports (with an “R” (*i.e.*, “REDACT”) for partial-page redaction as indicated or with “®” (*i.e.*, an “R” in a circle) for the entire-page redaction in the upper-right corner of the page). If the Commission agrees that this is “non-public” information, the Commission may determine on its own, pursuant to 8 *Del. Admin. C.* § 1202-3.7.1, that these pages should not be disclosed and that the requests for these pages should be denied.

The information at issue for all three companies meeting the “terrorist attack” exemption includes specific locations and schematics for the water supply infrastructure of Tidewater, United, and Artesian, which could be used to target these vital components of infrastructure.

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