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Partner

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VIA ELECTRONIC MAIL

Records Access Officer
Jessica Vigars
New York State Department of Public Service
Three Empire State Plaza
Albany, New York 12223-1350

Proceeding to Investigate Whether Charter Communications, Inc. and its Subsidiaries Providing Service Under the Trade Name "Spectrum" Have Materially Breached Their New York City Franchises

Case: 18-M-0178

RE: Request for Confidential Treatment of Portions of Charter's Response to the Order to Show Cause issued in Case 18-M-0178

Dear Ms. Vigars:

On March 19, 2018, in Case 18-M-0178, the Commission also issued a One-Commissioner Order to Show Cause (the "NYC Franchise Order")¹ requiring Charter Communications, Inc. ("Charter") to provide evidence as to its compliance with certain requirements under its franchise agreements with New York City. In a Ruling issued on April 4, 2018, the Secretary to the Commission set the deadline to respond to the NYC Franchise Order as May 9, 2018.²

REQUEST FOR CONFIDENTIAL TREATMENT

Pursuant to the Public Officers Law ("POL") §§ 87(2), 89(5) and Part 6-1.3 of the Commission's Regulations (16 N.Y.C.R.R. § 6-1.3), and New York's Freedom of Information Law ("FOIL"), Charter respectfully requests confidential treatment of the portions of Charter's Response to the NYC Franchise Order (collectively, the "Confidential Information"). A complete list of the documents filed in response to the Order is attached to this request as

¹ Case 18-M-0178, *Proceeding to Investigate Whether Charter Communications, Inc. and its Subsidiaries Providing Service Under the Trade Name "Spectrum" Have Materially Breached Their New York City Franchises*, Confirming Order for the NYC Franchise Order was issued on April 20, 2018.

² See Case 18-M-0178, Ruling on Extension Request (issued on April 4, 2018).

Appendix A.³ Redacted versions of these documents have been filed with the Secretary to the Commission this afternoon.

Discussion

The Confidential Information presents detailed information regarding (i) confidential customer addresses;⁴ (ii) confidential financial data of Charter; and (iii) customer complaints, and Charter’s internal procedures for complaint escalation.

As discussed in detail below, the Confidential Information qualifies as a trade secret, which mandates exception from disclosure. In addition, the Confidential Information qualifies as confidential commercial information which, if publicly disclosed, would cause substantial injury to the competitive position of Charter. Finally, the Confidential Information contains critical infrastructure information, disclosure of which could endanger public safety.

Trade Secret and Confidential Commercial Information Tests:

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.”⁵ 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 FOIL and do not require an additional showing of substantial competitive injury.⁶ In its decision, the Third Department affirmed that the “trade secret” and “substantial competitive injury” tests are ***two alternate standards***, such that information satisfying either test must be exempted from public disclosure under FOIL.⁷ Charter respectfully submits that the Confidential Information satisfies each of these alternate standards and must, therefore, be exempted from disclosure.

1. Trade Secret

Relying on the Restatement of Torts definition of a trade secret, the Third Department’s *Verizon* decision laid out a “two-prong” approach to determine the existence of a trade secret. “First, it must be established that the information in question is a ‘formula, pattern, device or compilation of information which is used in one’s business, and which gives [one] an opportunity to obtain an advantage over competitors who do not know or use it.’”⁸ This definition is also found in the Commission’s Regulations under 16 NYCRR § 6-1.3(a). For the

³ Please note that the documents containing Confidential Information are labeled accordingly in Appendix A.

⁴ Also known as the Personally Identifiable Information (“PII”).

⁵ POL § 87(2)(d).

⁶ *Verizon New York, Inc. v. New York State Public Service Commission*, 137 A.D.3d 66 (3d Dep’t 2016).

⁷ *Verizon*, 137 A.D.3d at 73.

⁸ *Verizon*, 137 A.D.3d at 72.

second prong, *Verizon* laid out the factors enumerated in the Restatement:

Second, if the information fits [the] general definition, then an additional factual determination must be made concerning whether the alleged trade secret is truly secret by considering:

- (1) the extent to which the information is known outside of the business;
- (2) the extent to which it is known by employees and others involved in the business;
- (3) the extent of measures taken by the business to guard the secrecy of the information;
- (4) the value of the information to the business and its competitors;
- (5) the amount of effort or money expended by the business in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.⁹

The six factors are non-exclusive, and not all factors must be established to prove that a trade secret exists.¹⁰ It should be noted that many of these same factors are also used in the analysis for whether disclosure would result in substantial competitive injury, discussed below.

The Confidential Information included in Charter’s Response to the NYC Franchise Order to Show Cause meets the general definition of a trade secret. Assembled from a variety of sources including internal databases and public information, the Confidential Information is “compilation of information.” It is used in Charter’s business to develop strategies, analyze financial data and plan resources for future network and program expansions as well as implementation of ongoing build-out initiatives. It gives Charter an advantage over competitors who do not know or use the information because the Confidential Information is used as the basis for the planning of infrastructure investment and deployment as well as the basis to organize and launch marketing initiatives before competitors have the chance to deploy their own services in a particular area. The Confidential Information, therefore, meets the first prong of the trade secret analysis.

As to the second prong, the information in the Confidential Information is, indeed, a secret. The Confidential Information is not publicly available, is not readily disclosed in this granular form to the investment community, and is closely guarded internally. Only upper management, limited outside consultants who may have developed the underlying datasets, and necessary Charter employees that have prepared and compiled the Confidential Information have

⁹ *Verizon*, 137 A.D.3d at 72-73.

¹⁰ The Commission has followed this approach in its FOIL Determination in Case 14-C-0370, *In the Matter of a Study on the State of Telecommunications in New York State*, Determination of Appeal of Trade Secret Determination, 17 (issued March 23, 2016) (“Thus, in compliance with the Appellate Division’s decision, the entity resisting disclosure ‘must make a sufficient showing with respect to each of the six factors,’ any trade secret factor that is not established would be deemed to weigh against a finding that the information constitutes a trade secret”).

access to it such that internal access is given only on a need-to-know basis for implementation of the particular programs, initiatives, and marketing plans, or to allocate investment funds, staff, and materials. Therefore, the Confidential Information meets factors one, two and three of the secrecy analysis portion of the trade secret test.

The Confidential Information includes detailed information relative to Charter's operations and business plans that, if disclosed, could be used by competitors to obtain a highly disaggregated level of information that implicitly sets forth important aspects of Charter's network facility, operations, and investment plans. Charter has expended a significant amount of time, money, and effort to develop and compile the Confidential Information. If disclosed, competitors would unfairly obtain this information at "quite a bargain" without the same investment as Charter, and would be spared the cost of independently collecting market data and information about Charter's network, operations, and investments. Thus, factors four and five are met.

The Confidential Information does not constitute the type of information that competitors make available to each other in the normal course of business and could not be easily replicated without consent from Charter. The Confidential Information could be used to support detailed financial analyses, on a very granular level, of Charter's cost of doing business. Such information could not be developed independently by competitors, and any estimates developed through publicly available sources or from third-party sources, if possible at all, would be expensive and burdensome to assemble, and less accurate than the data provided in the Confidential Information. As such, the Confidential Information meets the sixth and final trade secret factor to show that the Confidential Information is, and should remain, a secret.

2. *Substantial Competitive Injury*

The "substantial competitive injury" test evaluates whether disclosure of the confidential information "would be likely to cause substantial injury to the competitive position of the subject commercial enterprise."¹¹ In *Encore College Bookstore v. Auxiliary Service Corporation of the State University of New York at Farmingdale* the New York Court of Appeals evaluated whether substantial competitive injury would result from disclosure of confidential information.¹² In *Encore*, the Court of Appeals found that whether substantial competitive harm exists turns on the commercial value of the requested information to competitors and the cost of acquiring it through other means.¹³ *Encore* remarked that "where [] disclosure is the sole means by which competitors can obtain the requested information, the inquiry ends [there]."¹⁴ It should be noted that much of the trade secret analysis and factors also support the substantial competitive injury test.

As presented above in the analysis of trade secret factors four and five, the Confidential Information has tangible value to Charter that would be severely diminished if the Confidential Information was disclosed. If given free, unfettered access to this information, competitors could

¹¹ Determination 16-02 at 8; 16 N.Y.C.R.R § 6-1.3(b)(2).

¹² Determination 16-02 at 8, citing *Encore College Bookstores v. Auxiliary Serv. Corp.*, 87 N.Y.2d 410 (1995).

¹³ *Encore*, 87 N.Y.2d at 420-21.

¹⁴ *Id.* at 420.

tailor their own networks, operations, marketing strategies, and budgets, and attempt to roll-out their own program prior to Charter or engage in negative marketing campaigns. As presented for trade secret factor six, the only way competitors could access the information in its compiled and granular form as presented in the Confidential Information would be through disclosure or by expending a significant amount of time and money to develop mere estimates of the information contained in the Confidential Information. Therefore, the Confidential Information has significant commercial value to Charter and its competitors, such that if it were disclosed, Charter would suffer substantial financial and competitive injury.

Critical Infrastructure Information:

POL § 89(5)(1-a) provides that an entity may “at any time, identify those records that or portions thereof that may contain critical infrastructure information, and request that the agency that maintains such records except such information from disclosure. . . .” The Critical Infrastructure Information included in the Confidential Information is granular enough to provide information that would allow those with a basic knowledge of networks to target the aspects of Charter network that would cause the greatest damage. As a result, if made public, this could make the network vulnerable to damage by criminals or others who have a reason to damage communications networks.

As the Department is aware, the Company’s network system has increasingly been the victim of serious acts of vandalism. If the Critical Infrastructure Information included in the Confidential Information is not protected, individuals intent on disrupting the Company’s system can combine the data with their own knowledge of the network to target the most vulnerable areas. The release of this information, therefore, poses a public safety risk in New York. Charter therefore seeks exemption from disclosure for the Confidential Information under POL § 87(2)(f) and POL § 89(5)(1-a).

Conclusion:

Accordingly, Charter respectfully requests that the Confidential Information included in the Company’s Response to the NYC Franchise Order to Show Cause be protected from disclosure as it satisfies both the “trade secret” and the “substantial competitive injury” tests under the POL. Additionally, the Confidential Information contains critical infrastructure information, disclosure of which would could endanger public safety. To protect the confidentiality of this information, the Confidential Information must be maintained in the Department of Public Service’s confidential files and must be provided only to interested members of the Commission and DPS Staff, and not otherwise be disclosed or made available, either through FOIL or otherwise.

Respectfully submitted,

/s/ Maureen O. Helmer

Maureen O. Helmer

Ekin Senlet

Counsel for Charter Communications, Inc.

APPENDIX A

* Includes Confidential Information

**Includes Personally Identifiable Customer Information (“PII”) Only

***Includes both Confidential Information and PII

Response of Charter Communications, Inc. to Order to Show Cause***

- Exhibit A
- Exhibit B
- Exhibit C
- Exhibit D

- Declaration of John Quigley***
 - Quigley Declaration Exhibit A***

- Declaration of Steven D. Lottman*
 - Lottman Exhibit A*
 - Lottman Exhibit B*
 - Lottman Exhibit C*
 - Lottman Exhibit D*
 - Lottman Exhibit E*
 - Lottman Exhibit F*
 - Lottman Exhibit G*
 - Lottman Exhibit H*
 - Lottman Exhibit I*