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June 17, 2013

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

Re: Case 13-C-0197

Dear Ms. Giliberto:

Attached to this letter is the response of Verizon New York Inc. ("Verizon") to certain information requests submitted by Staff in Case 13-C-0197. Verizon respectfully requests that Exhibits 1A, 2, 3, 4, 5, and 6, and designated portions of the response[1] be treated by the Commission and the Department of Public Service as trade secret and confidential commercial information pursuant to the Freedom of Information Law and 16 NYCRR § 6-1.3. Those exhibits and portions of the response have been redacted from the copy of the response that has been provided to Staff.

Section 87(2)(d) of the New York Public Officers Law authorizes agencies to 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

[1] This request is limited to the portions of the response that are included between the notations "**[[BEGIN CONFIDENTIAL INFORMATION]]**" and "**[[END CONFIDENTIAL INFORMATION]]**."

enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise." The Commission implemented the § 87(2)(d) standard in § 6-1.3 of its Rules of Procedure.[2] Part (a) of that section defines a "trade secret" as including "*any* . . . 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." (Emphasis supplied.) It should be noted that the term "trade secret" is not limited here to its technical sense in intellectual property law. The factors to be considered by the Commission in making a determination of trade secret and confidential commercial information status "include, but are not necessarily limited to," factors bearing on two issues: the difficulty of generating or obtaining the information independently (*i.e.*, other than from records produced to the Commission), and the value of the information (*i.e.*, to the extent to which the providing party will be harmed, and the receiving party will be benefited, by the disclosure of the information in question).

Additionally, Publ. Off. L. § 87(2)(f) creates an exemption from disclosure for information that "if disclosed, would jeopardize an agency's capacity to guarantee the security of its information technology assets, such assets encompassing both electronic information systems and infrastructures." Section 89(5)(a)(1-a) establishes a procedure by which a person submitting records to a State agency can "identify those records or portions thereof that may contain critical infrastructure information, and request that the agency that maintains such records exempt such information from disclosure under [Publ.

[2] 16 NYCRR § 6-1.3.

Off. L. § 87(2).]" Finally, Commission Rule 6-1.3 specifically provides for the protection of "critical infrastructure information."[3]

These criteria are satisfied by the designated portions of Verizon's response to Staff's information requests. Those portions provide information on the costs of providing landline local exchange service and Voice Link services, the results of technical and market testing related to Voice Link, the locations of network facilities such as cables and remote terminals on Fire Island, historical and projected data on service revenues, and highly granular (neighborhood-specific) information on the volume of services provided by Verizon on Fire Island. Protection of this information is warranted for the following reasons:

First, data on the location of specific network facilities such as remote terminals and buried cable can provide information that can be used by vandals and others in support of attempts to harm Verizon's network or to impair Verizon's services. Such information is clearly subject to the provisions of the Public Officers Law and the Commission's regulations related to the protection of critical infrastructure information.

Second, the remaining categories of data meet the standards for trade-secret protection of competitively sensitive information. Verizon's services — both wireline and wireless — compete with wireless services available from other providers on Fire

[3] *See, e.g.*, 16 NYCRR §§ 6-1.3(b), (b)(1), (b)(3); Case 05-M-0603, Notice of Proposed Consensus Rulemaking (issued June 21, 2005) (pages 4-5 of Proposed Resolution attached to the Notice); *id.*, Memorandum and Resolution Adopting Amendments to 16 NYCRR Section 5.8(e) and Part 6 (issued and effective September 29, 2005). "Critical infrastructure" is defined in Publ. Off. L. § 86(5) as "systems, assets, places or things, whether physical or virtual, so vital to the state that the disruption, incapacitation or destruction of such systems, assets, places or things could jeopardize the health, safety, welfare or security of the state, its residents or its economy."

Island. Moreover, Verizon offers wireline service in other parts of the State, using facilities similar to the wireline facilities deployed on Fire Island. It also seeks to deploy Voice Link in other parts of the State, both as an optional service in areas where the company also offers tariffed wireline local exchange service, and (subject to the Commission's approval) as a sole service offering in particular locations and circumstances. Information on costs, marketing trials, technical characteristics, demand, and service economics (revenues and costs) can provide a competitive roadmap to companies whose service offerings compete or may in the future compete with Verizon's, both in Fire Island and in other parts of the State. Such information can show a competitor the cost it has to meet or beat to succeed competitively, and levels of demand it can expect to find, and the technical and marketing characteristics of Verizon's services.

Such information would not be available to current or potential competitors other than through the regulatory process, and competitors do not make comparable information available to Verizon. Although it might be possible for competitors to develop surrogate data through their own surveys and other investigations, such efforts would be burdensome and costly, and the results would be far less accurate than Verizon's own information.

The importance of limiting competitor access to such information has been recognized in Commission proceedings. Former Administrative Law Judge Joel A. Linsider observed that "[p]ublic disclosure of information by government agencies is an extremely important policy; but we would frustrate our own efforts to promote

competition if those very efforts, which require us to obtain competitively sensitive information, led to the release of that information to competitors of the firm providing it and, in consequence, to market distortions."[4] A similar point was made by the State Court of Appeals in a case involving the application of the confidentiality provisions of the Public Officers Law. In the *Encore College Bookstores* case,[5] the Court found that Public Officers Law § 87(2) should be interpreted in a manner consistent with the standards applied under the federal Freedom of Information Act ("FOIA"). In discussing the federal FOIA standard, which it adopted for purposes of applying New York's § 87(2), the Court stated in part that:

> Because competition in business turns on the relative costs and opportunities faced by members of the same industry, there is a potential windfall for competitors to whom valuable information is released under FOIA. If those competitors are charged only minimal FOIA retrieval costs for the information, rather than the considerable costs of private reproduction, they may be getting quite a bargain. Such bargains could easily have competitive consequences not contemplated as part of FOIA's principal aim of promoting openness in government. . . .
>
> The reasoning underlying these considerations is consistent with the policy behind subdivision [Public Officers Law § 87](2)(d) — to protect businesses from the deleterious consequences of disclosing confidential commercial information, so as to further the State's economic development efforts and attract business to New York . . . .[6]

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[4] Case 99-C-0529, "Ruling Concerning Proprietary Material" (issued December 13, 1999), at 2. *See also* Case 00-C-2051, "Ruling Concerning Trade Secret Status" (issued October 29, 2001), at 3.

[5] *Encore College Bookstores v. Auxiliary Service Corp.*, 87 N.Y.2d 410, 663 N.E.2d 302, 639 N.Y.S.2d 990 (1995).

[6] *Id.*, 87 N.Y.2d at 420, 663 N.E.2d at 307, 639 N.Y.S.2d at 995, *quoting Worthington Compressors, Inc. v. Costle*, 662 F.2d 45, 51 (D.C. Cir. 1981).

In light of these considerations, the attachments to this letter should be accorded protection as trade-secret information, confidential commercial information, and critical infrastructure information under the Public Officers Law and the Commission's rules.

If you have any questions, or require further information, please contact me at 212-321-8126.

Respectfully submitted,

Joseph A. Post

Joseph A. Post

cc: Brian Ossias, Esq.
Keith Gordon, AAG