140 West Street
6th Floor
New York, NY 10007-2109
Tel (212) 519-4716
Fax (212) 962-1687
keefe.b.clemons@verizon.com

Keefe B. Clemons
General Counsel – Northeast Region

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Ms. Jessica Vigars
Records Access Officer
New York State Department of Public Service
Three Empire State Plaza
Albany, NY 12223

Re: Case 00-C-2051 — Request for Confidential Treatment

Dear Ms. Vigars:

Verizon New York Inc. ("Verizon") respectfully requests that the accompanying Special Services Monthly Performance Reports be treated by the Commission and the Department of Public Service as trade secret and confidential commercial information within the meaning of the State Freedom of Information Law ("FOIL"), Publ. Off. L. §§ 87(2)(d) and 89(5), and the Department's regulations implementing FOIL. These reports identify performance in Special Services reporting entities. Confidential treatment is sought on the grounds that public disclosure of the information contained in the reports would place Verizon at an unfair competitive disadvantage.

STANDARD FOR CONFIDENTIAL TREATMENT

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 enterprise and which if disclosed would

cause substantial injury to the competitive position of the subject enterprise." The section thus provides two alternative bases for exempting a document from disclosure: the fact that it includes trade secrets *or* the fact that it includes confidential commercial information.[1] Further, Publ. Off. L. § 89(5)(a), not only authorizes but *requires* agencies to "except[] from disclosure" any information submitted pursuant to a claim of confidential treatment under § 87(d)(2) "until fifteen days after the entitlement to such exception has been finally determined."

The state courts have clarified the standards applicable to the two branches of the § 87(2)(d) test.

Trade Secrets. The State Supreme Court has held that "[a]lthough the term 'trade secret' is not defined under FOIL, 'courts applying New York law generally follow Section 757 of the Restatement of Torts in determining whether information is entitled to protection as a trade secret' . . . . The Restatement defines a trade secret as any formula, pattern, device or compilation of information which is used in one's business, and which gives him *an opportunity to obtain an advantage over competitors who do not know or use it* (Restatement [First] of Torts § 757, Comment b) (emphasis added)."[2] The court also noted that "[i]mportantly, the Restatement does not require that the advantage be 'substantial.'"[3]

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[1] *See Verizon v. Publ. Serv. Comm'n*, 46 Misc. 3d 858, 874, 991 N.Y.S.2d 841, 855 (N.Y. Sup. Ct. 2014), *aff'd*, 137 A.D.3d 66, 23 N.Y.S.3d 446 (3d Dep't 2016) ("Once a document has been found to be a trade secret under Public Officers Law § 87 (2) (d), the analysis ends [citing cases] . . . . These cases appear, to this Court, to be consistent with the legislative intent of the amendment and with the legislative policy that trade secrets, by their very nature, should be protected from disclosure . . . ."). *See also id.*, 46 Misc. 2d at 868, 991 N.Y.S.2d at 851.

[2] *Verizon v. Publ. Serv. Comm'n, supra,* 46 Misc. 2d at 872, 991 N.Y.S.2d at 853-54.

[3] *Id.*, 46 Misc. 2d at 873, 991 N.Y.S.2d at 854. *See also* 46 Misc. 2d at 876-77, 991 N.Y.S.2d at 856-57. The Restatement identifies a number of factors that may be relevant to a determination of trade-secret status: "(1) the extent to which the information is known outside of his business; (2) the extent to which it is known by employees and others involved in his business; (3) the extent of measures taken by him to guard the secrecy of the information; (4) the value of the information to him and to his competitors; (5) the amount of effort or money

(continued . . .)

Confidential Commercial Information. The controlling precedent on the scope of the separate "confidential commercial information" prong of § 87(2)(d) is the 1995 decision of the State Court of Appeals in *Encore College Bookstores v. Auxiliary Service Corp.*[4] The Court of Appeals noted in *Encore* that the exemption was intended to track the parallel exemption in the federal Freedom of Information Act ("FOIA"), and that "whether 'substantial competitive harm' exists for purposes of FOIA's exemption for commercial information turns on the commercial value of the requested information to competitors and the cost of acquiring it through other means." The *Encore* court also quoted with approval federal precedent holding 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 the 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.
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> The reasoning underlying these considerations is consistent with the policy behind [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 . . . .[5]

Applying this standard to the document at issue in the case (a list compiled by Barnes & Noble, identifying the textbooks that professors at a branch of the State University planned to use

(. . . continued)

expended by him in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others."

[4] 87 N.Y.2d 410, 663 N.E.2d 302, 639 N.Y.S.2d 990.

[5] *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).

for their courses, which a competing bookstore operator sought to obtain under FOIL), the Court concluded that "the booklist has obvious commercial value to Encore [the competitor] since it would enable Encore to offer the precise inventory that its target clientele . . . is required to purchase . . . . The *potential* damage to Barnes & Noble as a result is the loss of student customers to its competitor and a corresponding loss of profits." (Emphasis supplied.) The Court went on to note that "[t]he likelihood of harm to Barnes & Noble is enhanced by the economic windfall conferred upon Encore were it to receive the booklist at the mere cost of FOIL fees. . . . Disclosure through FOIL . . . would enable Encore to obtain the requisite information without expending its resources, thereby reducing its cost of business and placing Barnes & Noble at a competitive disadvantage."[6]

Thus, under *Encore*, the windfall resulting from the free disclosure of competitively valuable information to a submitting party's competitors is *itself* a "substantial competitive harm" sustained by the submitting party, or at a minimum gives rise to a clear likelihood of such harm. The Court specifically rejected the contention that actual consequential harm beyond that free-ride need be shown.[7]

APPLICATION OF THE STANDARD

For the following reasons, the Special Services Monthly Performance Reports satisfy the standards summarized above.

[6] 87 N.Y.2d at 421, 663 N.E.2d at 308, 639 N.Y.S.2d at 996.

[7] *See id.* at 421 ("ASC was not required to establish actual competitive harm to Barnes & Noble. Rather, '[a]ctual competition and the likelihood of substantial competitive injury is all that need be shown' . . . .").

First, the reports are not made publicly available, so competitors would not have access to them other than through the FOIL process. Moreover, the information in the reports could only be replicated, if at all, by performing special studies requiring significant effort, time and expense; and even then the results would not be as accurate as complete as the data that could be derived from the reports.

Second, disclosure of the reports would provide competitors with valuable information that they could use to obtain a competitive advantage over Verizon. With the information included in the reports, competing carriers can determine, among other things: (1) Verizon's "percent on-time performance" in installing DS0s and DS1s and above in each of the carrier account team centers ("CATCs") from which Verizon serves carriers, each of the overall control offices ("OCOs") from which it serves end-user (large business) customers, and in LATA 132 and the rest of the State;[8] (2) missed installation appointment delays on each of those services in each of those areas; (3) the number of customer trouble reports per 100 special access circuits that are reported during the first 30 days of installation of each of those services in each of those areas; (4) the percent of orders missed due to lack of facilities on each of those services in each of those areas; (5) the percent of missed orders where advance notice is provided on each service in each area; (6) the number of customer trouble reports per month per one 100 special access circuits for each service in each area; and (7) the average duration in hours between customer reporting and telephone company clearing time on each service in each area.

If competitors were to obtain this information, they could determine specific areas where Verizon is experiencing provisioning and maintenance issues relating to these competitively

[8] LATA 132 is widely regarded as the most competitive telecommunications market in the nation.

provided services and, in turn, target customers for those services in those areas. They would also have a unique ability to assess generally Verizon's strengths and weaknesses in provisioning and maintaining these specific types of special services. They could use such information to target areas where Verizon is weakest and then market to their own customers in those areas. Therefore, allowing a competitor to have access to the information would clearly put Verizon at a competitive disadvantage.

Competitors would find information included in Verizon's monthly reports to be extremely valuable in that they could use it determine, among other things: (1) where Verizon has available facilities and where it does not; (2) the intervals of time Verizon requires to fill orders for DS0s and DS1s and above; (3) the intervals of time Verizon requires to clear troubles on these services; and (4) the number of trouble reports experienced on Verizon special access circuits. Competitors could use the information to modify their own provisioning capabilities in response to Verizon's strengths and weaknesses, as perceived from these reports.

Moreover, the information in the monthly reports is "not known by others," and Verizon would not readily make it available to them. Competitors could not easily come upon information concerning Verizon's provisioning and maintenance of DS0 and DS1 (or any) services, as best evidenced by their past requests that Verizon provide them with its special services performance reports. Verizon would certainly not alert competitors to provisioning or maintenance issues it might be experiencing in any part of its service area, let alone in its CATCs and OCOs. Making these reports available to competitors would provide them with an opportunity to pursue Verizon customers who might be experiencing service issues on specific services and/or in specific areas. Competitors should not be permitted to gain access to such

competitively sensitive information by virtue of Verizon's compliance with Commission reporting requirements.

Verizon must undertake a substantial effort each month to compile the information included in the reports. These reports are the product of an elaborate mechanized reporting process involving numerous disciplines within the corporation (including the engineering and regulatory organizations). Numerous employees devote several hours to the compilation of these reports each month, all at substantial cost to Verizon. Thus, competitors could not readily duplicate or obtain the information included in the monthly reports without Verizon's consent. Indeed, if it were possible for competitors to do so, they would not have sought the information from Verizon in the past.

For these reasons, disclosure of the reports would give competitors an opportunity to obtain a competitive advantage over Verizon and would cause substantial injury to Verizon's competitive position. The reports therefore meet the criteria for exemption from disclosure in Publ. Off. L. §87(2)(d).

Please feel free to call me or David Hayes (518-396-1043) if you have any questions.

Respectfully submitted,

Keefe B. Clemons