

STATE OF NEW YORK  
DEPARTMENT OF PUBLIC SERVICE

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Joint Petition of )  
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**TIME WARNER CABLE INC.** )  
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and )  
 ) Case 14-M-0183  
**COMCAST CORPORATION** )  
 )  
For Approval of a Holding Company Level )  
Transfer of Control )  
 )  

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**TIME WARNER CABLE INC. AND COMCAST CORPORATION APPEAL  
TO SECRETARY KATHLEEN H. BURGESS OF DETERMINATION ON REMAND  
TO PREVENT PUBLIC DISCLOSURE OF TRADE SECRET MATERIAL**

Pursuant to Section 89(5)(c)(1) of the N.Y. Public Officer’s Law (“POL”) and Title 16, Section 6-1.3(g) of the N.Y. Code of Rules and Regulations, Comcast Corporation (“Comcast”) and Time Warner Cable Inc. (“Time Warner Cable” or “TWC”) (collectively, the “Companies”) hereby appeal to the Secretary of the New York Public Service Commission (“Commission”) the September 3, 2014 determination of Administrative Law Judge David L. Prestemon (the “Determination on Remand”). The Determination on Remand did not apply the correct standard and failed to duly consider the demonstration by Comcast and TWC of the trade secret nature of the information. Secretary Burgess is therefore requested to issue a corrective determination to prevent the disclosure of confidential trade secret information that is entitled to exception from disclosure under New York law.

## I. Background

In this appeal of the Determination on Remand, Comcast and TWC further seek to prevent public disclosure of trade secret information, which is properly excepted from disclosure under New York's Freedom of Information Law ("FOIL").<sup>1</sup> Comcast and TWC previously filed an appeal relating to this same material,<sup>2</sup> appealing very limited findings in Judge Prestemon's July 22, 2014 determination (the "Initial Determination"). The Initial Determination granted in part and denied in part the Companies' requests for exception from public disclosure for certain information provided in response to Staff discovery requests. Notably, as part of the initial appeal, Comcast and TWC submitted two declarations (Declaration of Don A. Laub and Declaration of Terence Rafferty) demonstrating that the information at issue in the appeal was kept strictly confidential by Comcast and TWC, respectively, and why disclosure of the information would unfairly advantage the Companies' competitors and cause substantial competitive harm to Comcast and TWC.<sup>3</sup>

While the appeal of the Initial Determination was pending, the NYS Supreme Court (Albany County) issued a decision in *Matter of Verizon New York Inc. v. New York State Public Service Commission et al.* (Index No. 6735-13) ("*Verizon*"). The *Verizon* decision holds that the "substantial competitive harm" test – which Judge Prestemon had applied in his Initial Determination – "did not apply in determining whether to protect information sought to be

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<sup>1</sup> N.Y. POL §§ 85, 87(2)(d).

<sup>2</sup> See *Time Warner Cable Inc. and Comcast Corporation Appeal to Secretary Kathleen H. Burgess to Prevent Public Disclosure of Trade Secret Material* (filed Aug. 1, 2014).

<sup>3</sup> *Id.*

excepted from disclosure on the ground that it is a ‘trade secret.’”<sup>4</sup> Under *Verizon*, a showing of “substantial competitive harm” is not required to establish a FOIL exception; rather, a party seeking exception from FOIL disclosure need only establish that the information constitutes a “trade secret.”<sup>5</sup> As a result, Secretary Burgess remanded this matter back to Judge Prestemon for “a consideration of whether the information sought to be protected is ‘trade secret’”<sup>6</sup> under the standard established in *Verizon*.

By email dated August 18, 2014, Judge Prestemon established a schedule on remand, providing the Companies the option of submitting supplemental filings. Notably, however, Judge Prestemon specifically stated that “[i]f the companies choose not to supplement their previous submissions, I will reconsider this matter based on the information contained in the Statement of Further Support for Trade Secret Designations filed on July 15, 2014, *and the Appeal of ALJ Determination on Exception from FOIL filed August 1, 2014.*”<sup>7</sup>

Comcast and TWC carefully reviewed the *Verizon* decision and the Companies’ prior filings, including the Companies’ statement and the declarations filed with the initial appeal – which Judge Prestemon’s email represented would be considered on remand. Having determined that the initial appeal – and in particular the declarations – demonstrated that the information at

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<sup>4</sup> Letter from Hon. Kathleen H. Burgess, Secretary, State of New York Department of Public Service, to Gerald A. Norlander, Esq., Counsel for PULP, Andrew M. Klein, Esq., Counsel for Comcast, and Maureen O. Helmer, Esq., Counsel for TWC (dated Aug. 15, 2014) (“Remand Letter”).

<sup>5</sup> *Verizon*, at 24 (“In light of the legislative history of Public Officers Law § 87 (2) (d) and the relevant case law applying this provision, the Court finds that, once [the Commission] concluded that the [information] constituted trade secret material, the inquiry should have ended; no proof of ‘substantial competitive injury’ was required by statute, and the material should have been determined to be exempt from disclosure under FOIL.”).

<sup>6</sup> Remand Letter, at 2.

<sup>7</sup> Email Correspondence from Hon. David Prestemon, Administrative Law Judge, New York Department of Public Service, to Andrew M. Klein, Counsel for Comcast, and Maureen O. Helmer, Counsel for TWC (dated Aug. 18, 2014) (*emphasis added*), attached hereto as Exhibit 1.

issue constituted “trade secrets” consistent with the *Verizon* decision, the Companies concluded that any supplemental filing on remand would be superfluous of the filings made on appeal and thus declined the option to make a supplemental filing.

On September 3, 2014, Judge Prestemon issued the Determination on Remand, which again incorrectly denied the Companies’ request for exception from disclosure.<sup>8</sup> The Determination on Remand misapplies the trade secret standard established under *Verizon* and – critically – does not give consideration to the substantive declarations filed by Comcast and TWC with the initial appeal. Indeed, in reaching its conclusion, the Determination on Remand refers specifically to the submissions made by the Companies *prior* to the initial appeal, and completely disregards the declarations and additional demonstration made on the initial appeal.<sup>9</sup>

By not considering the Comcast and TWC declarations and misapplying the applicable trade secret standard, the Determination on Remand errs in concluding that the information at issue is not a trade secret protected from public disclosure under FOIL. Comcast and TWC therefore respectfully request that the Secretary reverse and vacate the ALJ’s findings regarding the specific information at issue (identified below) and determine that such information constitutes “trade secrets” that must be excepted from public disclosure under applicable law.

## **II. Legal Standard**

The POL requires the Commission to deny public access to records that are “trade secrets or are maintained for the regulation of commercial enterprise which if disclosed would cause

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<sup>8</sup> Determination on Remand, at 3.

<sup>9</sup> *Id.*

substantial injury to the competitive position of the subject enterprise.”<sup>10</sup> Under *Verizon*, records that are deemed to be “trade secrets” are “absolved from the separate requirement to show how disclosure would cause substantial injury to the subject entity[.]”<sup>11</sup> In other words, the Supreme Court held that the “trade secret” and the “substantial injury” tests are *alternate* standards, and thus a party seeking an exception from disclosure need only satisfy one of the two tests for the information to be protected from public disclosure.

To resolve whether the first test is satisfied, a determination must be made concerning whether the information at issue constitutes a “trade secret.” While the term “trade secret” is not defined in the POL, case law and the Commission’s regulations provide relevant guidance. The Court of Appeals has often referred to the definition in the Restatement of Torts, which states that: “A trade secret may consist of any formula, pattern, device or compilation of information which is used in [a] business, and which gives [the business] an *opportunity* to obtain an advantage over competitors who do not know or use it.”<sup>12</sup> This definition is also found in the Commission’s Regulations.<sup>13</sup>

To resolve whether the second test is satisfied, Commission Regulations also delineate factors to be considered in determining whether particular information “would be likely to cause substantial injury to the competitive position of the subject commercial enterprise.”<sup>14</sup> Although a

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<sup>10</sup> N.Y. POL § 87(2)(d); *see also Verizon*, at 13-23 (examining the legislative history of POL § 87(2)(d) and concluding a showing that information is a “trade secret” is alone sufficient to obtain an exemption from public disclosure).

<sup>11</sup> *Verizon*, at 13-14 (examining the legislative history of POL § 87(2)(d) and concluding a showing that information is a “trade secret” is alone sufficient to obtain an exemption from public disclosure).

<sup>12</sup> Restatement of Torts § 757, comment b (emphasis added). The Court of Appeals’ reference to this standard was duly noted in the Determination on Remand.

<sup>13</sup> 16 NYCRR § 6-1.3(a).

<sup>14</sup> 16 NYCRR § 6-1.3(b)(2).

finding of substantial competitive injury is not required, per the *Verizon* decision, the presence of any of these factors tends to show that the information at issue retains significant value by being kept secret, such that disclosure of the information would cause a substantial competitive injury.

These factors include:

- (i) the extent to which the disclosure would cause unfair economic or competitive damage;
- (ii) the extent to which the information is known by others and can involve similar activities;
- (iii) the worth or value of the information to the person and the person's competitors;
- (iv) the degree of difficulty and cost of developing the information;
- (v) the ease or difficulty associated with obtaining or duplicating the information by others without the person's consent, and
- (vi) other statute(s) or regulations specifically excepting the information from disclosure."<sup>15</sup>

The presence of one or more of these factors favors a finding that substantial competitive injury would result from disclosure of the information.

### **III. Statement in Support of Appeal**

The analysis set forth in the Determination on Remand contains two critical errors that, once corrected, clearly require the Companies' request for trade secret status to be honored. *First*, the Determination on Remand errs by failing to consider the Declaration of Don A. Laub and Declaration of Terence Rafferty that Comcast and TWC filed with the prior appeal. Indeed, despite the fact that Judge Prestemon's August 18<sup>th</sup> email to the parties stated that the filings made with the Companies' initial appeal *would* be considered on remand, the Determination on Remand fails to consider them. Instead, the analysis of the Determination on Remand states what the Judge's

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<sup>15</sup> *Id.*

conclusion *would have been* if the standard in *Verizon* had been applied to what was before the Judge for his Initial Determination.<sup>16</sup>

As further explained below, the declarations – which are re-submitted herewith – unequivocally establish that the information at issue is kept secret by the Companies and explain in detail why such information provides the Companies with an opportunity to obtain a competitive advantage over its competitors, who do not know the information. Thus, had the declarations been considered on remand, the Judge should have found that the Companies demonstrated that the information satisfies either the “trade secret” test or the “substantial injury” test and is thus excepted from disclosure under FOIL.

*Second*, the Determination on Remand also errs by misapplying the applicable standard for the “trade secret” test. As noted above, the Restatement of Torts and the Commission’s regulations define a trade secret as information that a business keeps secret and “gives [the business] an *opportunity* to obtain an advantage over competitors[.]”<sup>17</sup> After stating this definition, however, the Determination on Remand erroneously concludes that an *actual* demonstration of a competitive advantage – rather than a demonstration of an *opportunity* to obtain an advantage – is required.<sup>18</sup> As the declarations fully establish that the information at issue does in fact provide Comcast and TWC with a competitive advantage, the lower threshold demonstration of just the *opportunity* to obtain a competitive advantage is certainly evident in the Companies’ filed statements and declarations.

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<sup>16</sup> Determination on Remand, at 3 (stating that “[h]ad the standard applied been ‘any competitive injury,’ my conclusion would have been the same”).

<sup>17</sup> Restatement of Torts § 757, comment b (emphasis added) (emphasis added); *see also* 16 NYCRR § 6-1.3(a).

<sup>18</sup> Determination on Remand, at 3 (erroneously considering whether “the information claimed to be a trade secret *provides* a competitive advantage”) (emphasis added).

Given the above-noted errors, the Determination on Remand is subject to correction and reversal through this appeal. As fully discussed below and in the accompanying declarations, the information at issue qualifies as trade secret information that must be excepted from public disclosure under FOIL.

**A. Response to DPS-26, and Exhibits 24 and 26.**

Exhibits 24 and 26 “present detailed facility-by-facility location, hours, staffing, and call handling information for the Companies’ call centers,”<sup>19</sup> and the response to DPS-26 provides Comcast’s “call interflow parameters that direct calls to sister call centers.”<sup>20</sup> Further, Exhibits 24 and 26 identify the number of employees at each Comcast call center in the Northeast and each Time Warner Cable call center in New York and detailed facility-by-facility operational information. The exhibits specifically delineate how many employees at each call center are dedicated to each function, and during which hours. As the Initial Determination recognized, this information “*clearly seems to be of a type that businesses would not normally disclose publicly or share with competitors.*”<sup>21</sup> Thus, the only remaining question under the “trade secret” test is whether the information, if kept secret, provides the Companies with an opportunity to obtain a competitive advantage over competitors who do not know it.

The declarations fully explain why this information, if kept secret, provides the Companies with such opportunity. For example, the Declaration of Don A. Laub notes that the information Exhibit 26 and DPS-26 “reveals aspects of Comcast’s operational expertise, which Comcast developed through significant expense” and that disclosure of such information would be valuable

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<sup>19</sup> Initial Determination, at 10.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* (emphasis added); *see also* Determination on Remand, at 3 (stating that “[the Judge] did not dispute the fact that the Companies treated the information in DPS-26 and Exhibits 24, 26, and 46 as secret”).

to competitors since it “would assist them in the development of similar methods and procedures required to offer competitive products and services, and would give them detailed knowledge as to the expected costs and operational functions that would be required to compete against Comcast in given geographic markets.”<sup>22</sup> Thus, the secret status of the information gives Comcast a competitive advantage, because if such information were disclosed:

Less efficient competitors could, for example, attempt to mimic Comcast’s staffing levels, shift management strategies, call handling patterns, or call interflow parameters. In addition, competitors could attempt to exploit this granular information in their marketing efforts by, for example, misusing it in sales, retention, or win-back campaigns trumpeting purportedly higher staffing levels in a given geographic area. At the same time, Comcast would be deprived of any opportunity for comparative analysis or response, given that reciprocal information about its competitors’ operations is not public available.<sup>23</sup>

The Declaration of Terence Rafferty further avers that if the competitively sensitive information in Exhibit 24 were disclosed, “[c]ompetitors could unfairly exploit this detailed information” for similar reasons explained in the Laub Declaration.<sup>24</sup> For example, “[b]y mimicking Time Warner Cable’s staffing levels, competitors could...save the investment in research and operational ‘trial and error’ [used to establish current staffing levels] such that those competitors could enter the market at a lower cost than the costs incurred by Time Warner Cable.”<sup>25</sup> As such, the declaration establishes that “disclosure of this information will allow competitors to obtain information developed by Time Warner Cable at significant expense, which competitors could then use to their competitive advantage and Time Warner Cable’s

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<sup>22</sup> Laub Declaration, at ¶¶ 3-4.

<sup>23</sup> *Id.*, at ¶ 5.

<sup>24</sup> Rafferty Declaration, at ¶ 5.

<sup>25</sup> *Id.*

disadvantage.”<sup>26</sup> It is therefore well-established that the information, when kept secret, provides Comcast and TWC with an opportunity to obtain a competitive advantage over its competitors. The classification of such information as “trade secret” under the applicable standards is clearly warranted.

Although no longer required, it is worth noting that the “substantial injury” test is also met. Many, if not all, of the six factors set forth in the Commission’s Regulations support the conclusion that disclosure of the information would cause substantial injury to the Companies. The filed declarations demonstrate, for example, that (a) the information is kept strictly confidential and thus would not be known by others, (b) the information was developed by each of the Companies at significant expense and would be extremely difficult (if not impossible) for competitors to independently develop, and (c) disclosure of the information to competitors would cause competitive damage to the Companies.<sup>27</sup> Given the existence of these factors, the information is also entitled to exception from disclosure under the alternative “substantial injury” test.

In short, once the facts set forth in the declarations are given proper consideration under the appropriate standard of review, it is clear that the information is entitled to exception from disclosure under FOIL. Comcast and TWC thus respectfully request that the Secretary hold accordingly and except this information from public disclosure under applicable New York law.

#### **B. Exhibit 46.**

Exhibit 46 sets forth information concerning TWC’s broadband deployment projects, showing detailed build-out and deployment plans for individual projects in each affected TWC franchise area. The information is particularly granular, setting forth the plant mileage to be built

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<sup>26</sup> *Id.*, at ¶ 6.

<sup>27</sup> *See* Laub Declaration, at ¶ 3-6; Rafferty Declaration, at ¶ 4-6.

out, the number of premises to be passed by the build-out, and the expected completion date, on a project-by-project basis. As recognized in the Determination on Remand, the Judge “did not dispute the fact that the Companies treated the information in...[Exhibit] 46 as secret.”<sup>28</sup>

Under the “trade secret” test, the only remaining question is – again – whether the information, if kept secret, provides TWC with an opportunity to obtain a competitive advantage over competitors who do not know it. The opportunity for TWC to obtain such a competitive advantage is fully established in the Declaration of Terence Rafferty.

As explained in the Rafferty declaration, disclosure of Exhibit 46 would provide competitors with access to Time Warner Cable’s detailed build out and deployment plans in specific towns, which would “provide advance insight to competitors as to where Time Warner Cable plans to offer increase speeds and additional services.”<sup>29</sup> As such, “access to this information by competitors would allow them to gain an unfair competitive advantage by being able to respond to Time Warner Cable’s deployment and upgrade plans well before such plans are made public.”<sup>30</sup> TWC therefore obtains a competitive advantage by keeping this information secret, given that disclosure of the information would permit competitors to target specific geographic areas or with deployments or upgrades prior to the time TWC’s plans and upgrades would otherwise be made public.<sup>31</sup> The confidential status of this information clearly gives TWC an opportunity to obtain an advantage over its competitors, who do not know this information. The disclosure of such sensitive information would seriously disadvantage TWC in the competitive marketplace. Indeed, this is the very essence of what constitutes trade secret

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<sup>28</sup> Determination on Remand, at 3.

<sup>29</sup> Rafferty Declaration, at ¶ 8.

<sup>30</sup> *Id.*, at ¶ 9.

<sup>31</sup> *Id.*

information. With the support already in the record, it is indisputable that the information at issue satisfies the definition of “trade secret” information.

It is again noteworthy that even the alternative “substantial injury” test is also satisfied. Many, if not all, of the six factors set forth in the Commission’s regulations are again met. In addition to the practical impossibility of a competitor independently developing TWC’s deployment plans, TWC has incurred significant expense to develop such plans.<sup>32</sup> The disclosure of TWC’s deployment plans would cause significant competitive damage to TWC.<sup>33</sup> The presence of these factors demonstrates that disclosure of the information would cause substantial injury to the competitive position of TWC, such that the deployment information must be excepted from disclosure for this additional reason.

In short, when the record is fully considered and the tests properly applied, the information set forth in Exhibit 46 meets both of the alternative tests for a FOIL exception. The Companies respectfully request that the Secretary hold accordingly and except this information from public disclosure under applicable New York law.

#### **IV. Conclusion**

Comcast and TWC must appeal the Determination on Remand to prevent the disclosure of confidential trade secret information that is unmistakably entitled to exception from FOIL disclosure under New York law. In light of the demonstrated opportunity to obtain a competitive advantage by keeping the information secret, as well as the clear competitive harm that would flow from public disclosure of the information, the record is clear that the information at issue satisfies applicable standards for protection from disclosure. Comcast and Time Warner Cable therefore

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<sup>32</sup> See Rafferty Declaration, at ¶ 7-9.

<sup>33</sup> *Id.*

respectfully request that the Secretary except the redacted portions of the response to DPS-26 and Exhibits 24, 26, and 46 from public disclosure under the New York Public Officers Law.

Dated: September 15, 2014

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Andrew M. Klein  
Allen C. Zoracki  
KLEIN LAW GROUP<sup>PLLC</sup>  
1250 Connecticut Ave NW, Suite 200  
Washington, D.C. 20036  
(202) 289-6955  
AKlein@KleinLawpllc.com  
AZoracki@KleinLawpllc.com  
*Counsel for Comcast Corporation*

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Maureen O. Helmer  
Hiscock & Barclay, LLP  
80 State Street  
Albany, NY 12207  
(518) 429-4220  
MHelmer@hblaw.com  
*Counsel for Time Warner Cable Inc.*