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RE: RAO Determination 18-05

Case No. 15-M-0388 - Joint Petition of Charter Communications and Time Warner Cable for Approval of a Transfer of Control of Subsidiaries and Franchises, Pro Forma Reorganization, and Certain Financing Arrangements.

Dear Ms. Neubauer and Ms. Helmer:

This is a determination of the Department of Public Service (DPS or Department) Records Access Officer (RAO) under Public Officers Law (POL) § 89(5)(b)(3). It determines that certain information filed with DPS by Charter Communications, Inc. (“Charter” or “the Company”) in Case 15-M-0388, is entitled, in part (as identified with specificity below), to exception from disclosure under the Freedom of Information Law (FOIL) as a trade secret or confidential commercial information, while other information is not entitled to exception from disclosure.¹

¹ N.Y. Public Officers Law, Article 6.

BACKGROUND

On March 20, 2018, Ms. Suh Neubauer submitted a FOIL request seeking four specific unredacted (confidential) documents filed by Charter in Case No. 15-M-0388. The Department Records Access Officer (RAO) identified certain documents responsive to Ms. Neubauer's request and clarified the date/title of the specific documents Ms. Neubauer was seeking. After review and clarification, Ms. Neubauer confirmed that she was seeking the following documents:

1. November 7, 2017 Good Cause Shown Tracker Chart (DMM Item No. 229/230) (the "Good Cause Tracker");²
2. January 29, 2018 Submission of 2017 PSC Video Complaint Data Report (DMM Item No. 252/253) (the "2017 Video Complaint Report");
3. August 16, 2016 Charter 90-Day Report and Implementation Plan (DMM Item No. 125/126) (the "90-Day Report");
4. Exhibits to the January 8, 2018 Charter Build-Out Compliance Report (specifically Exhibits A and B) (DMM Item No. 245/246) (the "Build-Out Compliance Report Exhibits").

The documents at issue were filed with the RAO as documents that contain trade secret and/or confidential commercial information. However, only certain portions of the documents are claimed to be confidential by Charter. Charter has identified the scope of its requests for confidentiality in companion public/redacted documents filed simultaneously with each document at issue here. In addition, it is noted that Charter has revised the scope of its request for confidentiality with respect to the August 16, 2016 90-Day Report, as provided with Charter's May 9, 2018 Statement of Necessity.

The specific content of these documents and scope of Charter's claim of trade secret and/or confidential commercial information is as follows:

First, the November 7, 2017 Good Cause Shown Tracker Charter (the "Good Cause Tracker") was filed by Charter in compliance with the June 19, 2017 Settlement Agreement (Appendix A) (entered into by DPS Staff, the Commission and Charter) related to Charter's obligation to extend its network in New York State. The Good Cause Shown Tracker is a one-page chart titled "Tracking Chart – Settlement Agreement Requirements for Good Cause Due to Pole Owner Delay" and provides Charter's progress, in numeric form, across thirteen (13) categories of information related to Charter's deployment of network and attachment of equipment to poles. Charter has identified all columns of responsive information as trade secret and/or confidential information, specifically, numeric updates and dollar amounts.

² The FOIL request is for unredacted documents. In the course of this Determination, the RAO provided the parties with the relevant DMM Item No. to assist in identifying and reviewing the specific documents included in the scope of the FOIL request. The DMM Item No. for both the public redacted document and the confidential document is identified here.

Second, the January 29, 2018 Submission of 2017 PSC Video Complaint Data Report (the “2017 Video Complaint Report”) was filed by Charter in compliance with Ordering Clause III.B.3 (requiring annual filing) and Ordering Clause III.B.1 (ordering certain percentages of reduction in complaint rates) of the Commission’s Order approving the merger of Charter with Time Warner Cable, Inc.³ The 2017 Video Complaint Report is a 3-page letter wherein Charter identified as trade secret and/or confidential its reported number of complaints from 2016 and 2017 and, in addition, a paragraph description of its internal process for customer complaints.

Third, the August 16, 2016 Charter 90-Day Report and Implementation Plan (the “90-Day Report”) was filed by Charter to meet Ordering Clause VI.1 of the Commission’s Order approving the merger of Charter with Time Warner Cable, Inc. When submitting its Statement of Necessity, Charter provided a revised redacted 90-Day Report, limiting the scope of its requests for confidentiality. The 90-Day Report is a 13-page report from Charter updating the Commission on Charter’s progress of its compliance with the Merger Order. In the 90-Day Report, Charter identifies as trade secret and/or confidential commercial information the following portions: (i) target date for upgrading the Syracuse footprint (p.5), (ii) planned upgrade-related activities in the Chatham footprint (p.5); (iii) the dollar-amount of the average cost of a passing (p.6); (iv) information relating to customer eligibility (p.8); (v) specific groups included in Charter’s outreach efforts (p.9); (vi) details on Charter’s initial investments (p.9, 11); (vii) details on Charter’s initiatives to improve service, enhance consumer service and experience and reduce customer complaints (p.10-11); (viii) specifics of Charter’s internal examination of customer complaints (p.12); and (ix) the number of customer facing jobs in New York State (p.12).

Finally, Exhibits to the January 8, 2018 Charter Build-Out Compliance Report (specifically Exhibits A and B) (the “Build-Out Compliance Report Exhibits”) were filed by Charter in order to update the Commission on Charter’s progress in meeting the 145,000 passings required to be completed under the Merger Order by May 18, 2020. Both of the Build-Out Compliance Report Exhibits were filed as trade secret and/or confidential commercial information. With regard to Exhibit A, Charter identified all substantive information relating to the completed number of passing and its adjustments from the prior reporting as trade secret and/or confidential commercial information. With regard to Exhibit B, Charter identified all information as trade secret and/or confidential commercial information, namely, an Excel spreadsheet that identifies specific addresses and completion dates, among other metrics.

On April 25, 2018, the RAO informed the Company, via letter, that the Department would determine the status of the information contained in the identified documents in accordance with POL § 89(5). In the same letter, the RAO notified the Company of its opportunity to submit a written Statement of Necessity to support its request for confidential treatment. On May 9, 2018, the Company submitted a Statement of Necessity in Support of Nondisclosure (dated and received

³ Case 15-M-0388, Joint Petition of Charter Communications and Time Warner Cable for Approval of a Transfer of Control of Subsidiaries and Franchises, Pro Forma Reorganization, and Certain Financing Arrangements, Order Granting Joint Petition Subject to Conditions (January 8, 2016) (referred to as “the Merger Order”).

on May 9, 2018), along with the Declaration of Michael Chowaniec, dated May 9, 2018, and a Revised Redacted 90-Day Report (originally dated August 16, 2016).

STATEMENT OF APPLICABLE LAW

Pursuant to POL § 89(5)(b)(3), the RAO is required to issue a written Determination granting, continuing, or terminating an exception from disclosure and stating the reasons therefor.⁴ Here, the Company claims an exception to disclosure and asserts that the information constitutes a trade secret or, in the alternative, that the information is confidential commercial information, disclosure of which would cause substantial injury to the competitive position of the subject enterprise.⁵ This issue – whether the company has sustained its trade secret and confidentiality claims – will be determined herein.

Trade Secret

There is a two-prong approach to determine the existence of a trade secret. The party asserting such a claim must first establish 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.⁶ Second, if the information fits this 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; and
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.⁷

These trade secret factors are non-exclusive, and not all factors must be established to prove that a trade secret exists.⁸

Commercial Information/Substantial Competitive Injury

To establish substantial competitive injury it must be demonstrated that the disclosure of purportedly confidential information would be likely to cause substantial injury to the competitive

⁴ POL § 89(5)(b)(3).

⁵ *Matter of Verizon N.Y., Inc. v. New York State Pub. Serv. Commn.*, 137 A.D.3d 66 (3d Dept. 2016).

⁶ POL § 87(2)(d); *Matter of Verizon N.Y., Inc. v. New York State Pub. Serv. Commn.*, 137 A.D.3d 66, 72 (3d Dept. 2016).

⁷ *Id.* at 72-73.

⁸ 16 N.Y.C.R.R. §6-1.3(b)(2).

position of the subject enterprise.⁹ This “turns on the commercial value of the requested information to competitors and the cost of acquiring it through other means”; a showing of actual competitive harm is not required but “[r]ather, actual competition and the likelihood of substantial competitive injury is all that need be shown.”¹⁰ As part of assessing commercial value, it is necessary to consider whether the party opposing disclosure is subject to competition.¹¹

Under 16 N.Y.C.R.R. §6-1.3(b)(2), the Commission has delineated factors to determine whether confidential commercial information “would be likely to cause substantial injury to the competitive position of the subject commercial enterprise.”¹² Factors to be considered include, but are not necessarily limited to:

- (1) the extent to which the disclosure would cause unfair economic or competitive damage;
- (2) the extent to which the information is known by others and
- (3) can involve similar activities;
- (4) the worth or value of the information to the person and the person's competitors;
- (5) the degree of difficulty and cost of developing the information;
- (6) the ease or difficulty associated with obtaining or duplicating the information by others without the person's consent; and
- (7) other statutes or regulations specifically excepting the information from disclosure.¹³

While similar, these factors are not the same as the trade secret factors.¹⁴ It should be noted, however that factors (ii), (iii), (iv), and (v) of the competitive injury analysis overlap with trade secret factors (1), (4), (5), and (6), respectively.

CHARTER’S STATEMENT OF NECESSITY

In support of its position, on May 9, 2018, Charter submitted a Statement of Necessity and Declaration of Michael Chowanec, Vice President of State Government Affairs for Charter Communications, Inc. In its Statement of Necessity, Charter provided separate arguments with respect to each document at issue in this Determination. Each of the documents, and various claims within each document, will be addressed, in turn, throughout this Determination.

Generally, Charter contends that the redacted material qualifies as “trade secret” and “confidential commercial information.”¹⁵ Charter claims that the documents at issue are similar

⁹ *Matter of Encore Coll. Bookstores v. Auxiliary Serv. Corp. of the State Univ. of N.Y. at Farmingdale*, 87 N.Y.2d 410 (1995).

¹⁰ *Matter of Encore*, at 421.

¹¹ *Id.*

¹² 16 N.Y.C.R.R. § 6-1.3(b)(2).

¹³ *Id.*

¹⁴ Restatement of Torts § 757, Comment b; *see also Ashland Mgmt. v. Janien*, 82 N.Y.2d 395, 407 (1993).

¹⁵ Charter Communications, Inc.’s Statement of Necessity Pursuant to Public Officers Law § 89(5)(b)(2), dated May 9, 2018 (“Statement of Necessity”), at p. 2-6.

to those in prior RAO Determination 16-02 and 16-03.¹⁶ Specifically, Charter argues that RAO Determinations 16-02 and 16-03 found that a chart of broadband information showing unserved and underserved areas (also called deployment data) and Charter's Cable Customer Service Report were protected as trade secret and confidential commercial information and that these RAO Determinations are similar to the instant determination.

Charter argues that disclosure of the redacted material would provide a competitive advantage to Charter's video, voice and broadband competitors and would subject Charter to economic and competitive harm. Charter notes that it faces robust competition in all service areas from multiple providers throughout its New York State footprint.¹⁷

1. The Good Cause Tracker

With regard to the Good Cause Tracker, Charter contends that this chart contains detailed proprietary information related to Charter's build-out processes and is used in Charter's daily business activities to plan for future network and program expansions.¹⁸ Charter states that this information was assembled from a variety of sources, including internal databases, and is not known outside of the business.¹⁹ Charter argues that this information constitutes Charter's entire set of its information on the status of Charter pole attachments, related to its obligation to extend its network throughout New York State, and that this set (in its entirety) has not been shared with any parties or pole owners, other than the Department.²⁰ Charter contends that the Good Cause Tracker, if disclosed, would provide competitors with information about the likely timing of Charter's future build-out plans.²¹ Charter also argues that disclosure would allow Charter's competitors to derive Charter's cost of doing business.²² As a result, Charter contends that the Good Cause Tracker should be excepted from disclosure as trade secret and confidential commercial information.

2. The 2017 Video Complaint Report

With regard to the 2017 Video Complaint Report, Charter contends that the information related to Charter's operations "on a detailed level" constitutes trade secret and confidential commercial information and should be excepted from disclosure.²³ Charter argues that the information in the 2017 Video Complaint Report is derived from a variety of proprietary sources, is used in developing its strategies and allocating resources for resolving customer complaints and

¹⁶ Case 15-M-0388, RAO Determination 16-02 (May 4, 2016) ("RAO Determination 16-02"); Matter 09-01904, *In the Matter of Cable Company Filings of Annual Financial Reports and Customer Service Reports*, Determination of Records Access Officer 16-03 (August 30, 2016) ("RAO Determination 16-03").

¹⁷ Statement of Necessity, at p.12.

¹⁸ Statement of Necessity, at p.26.

¹⁹ Statement of Necessity, at p.26-27.

²⁰ Statement of Necessity, at p.25.

²¹ Statement of Necessity, at p.27.

²² Statement of Necessity, at p.28.

²³ Statement of Necessity, at p.21.

initiatives to improve service, and that the information is not publicly available.²⁴ Charter notes that the 2017 Video Complaint Report contains details on Charter's internal operations and sets forth aspects of Charter's internal methods and plans.²⁵ Charter also argues that it expended significant time, money and effort to "develop and hone" the information at issue and, if disclosed, competitors would be spared the substantial cost of independently collecting market data and information, if such collection is even possible.²⁶

Charter argues that the information in the 2017 Video Complaint Report is "very similar" to the outage and service quality information (within a Cable Customer Service Report) held as confidential in RAO Determination 16-03 and that RAO Determination 16-03 should be followed in the instant determination.²⁷ Charter believes that, if this information is disclosed, Charter would "risk loss of existing or future customers because Charter's competitors could inaccurately or inappropriately use the confidential data in marketing campaigns."²⁸

3. The 90-Day Report

With regard to the 90-Day Report (with revised redactions), Charter argues that this document contains detailed information on Charter's progress in meeting its commitment to add new broadband passings to unserved and underserved areas in New York. Charter specifies that the 90-Day Report contains details on Charter's planned speed and network upgrades, funding and investment for future network expansions and service quality improvements, internal methods and procedures used to analyze Commission complaint rates and detailed employment information related to customer facing jobs.²⁹ Charter's position is that the redacted information in the 90-Day Report concerns Charter's passings data and business and investment plans and would be valuable to Charter's competitors.³⁰ Charter argues that this information is similar to the material at issue in RAO Determination 16-02 and, similarly, should be excepted from disclosure by the RAO as trade secret and confidential commercial information.

Charter argues that certain information relates to its "infrastructure investment," including planned network deployment, speeds and upgrade activities in identified geographic areas, along with its identified average cost per passing (p.4-6 of the 90-Day Report), and should be kept confidential.³¹ Charter next argues that certain information relates to "universal access," which includes information on its specific actions to meet the requirement to offer low-income broadband, along with its internal business process to determine customer eligibility for the low-income broadband service, constitutes trade secret and confidential commercial information.³²

²⁴ Statement of Necessity, at p.22-23.

²⁵ Statement of Necessity, at p.23.

²⁶ Statement of Necessity, at p.24.

²⁷ Statement of Necessity, at p.5-6, 21.

²⁸ Statement of Necessity, at p.21.

²⁹ Statement of Necessity, at p.8.

³⁰ Statement of Necessity, at p.11.

³¹ Statement of Necessity, at p.9.

³² Statement of Necessity, at p 9-10.

Charter also argues that certain information relating to “customer service,” including expected investment amount and details on customer service spending and improvements (p.9-10 of the 90-Day Report), are internal business discussions and, when reported, were in the planning stages and, as such, should be withheld.³³ In a similar vein, Charter argues that information relating to its internal customer complaint escalation process (p.12 of the 90-Day Report) should be kept confidential and, if disclosed, would make Charter’s complaint process more vulnerable to exploitation and less efficient.³⁴ Finally, Charter argues that certain “economic development” information, i.e. specific number of customer facing jobs in New York State, is and has been kept confidential throughout the merger process and should remain confidential.

4. The Build-Out Compliance Report Exhibits

With regard to the Build-Out Compliance Report Exhibits, as described above, two Exhibits (Exhibit A and Exhibit B) are at issue. Charter argues that both Exhibits provide information related to specific addresses of customers and areas where Charter has expanded its network, but may or may not have begun marketing to.³⁵ Charter contends that any information related to “confidential passings” (whether in the Build-Out Compliance Report Exhibits or the 90-Day Report) was compiled from numerous sources (including Charter’s service territory maps, GIS databases, United States Census Bureau housing units and data) and reflects a calculation of the total number of homes passed in each individual franchise area and, if disclosed, would give insight into Charter’s existing broadband passings and investment, and its business and strategic plans related to future passings.³⁶ Charter contends that, although committed to expanding its network in New York State in accordance with the Commission’s Merger Order, Charter’s multi-year deployment plans may change over time and information at issue in the Exhibits (and 90-Day Report) would provide competitors insight into Charter’s network designs and expansion plan and, further, providing a competitor with granular information on the location of unserved customers would enable Charter’s competitors to build out in certain areas prior to Charter and/or target certain areas and customers.³⁷ Charter notes that the information is valuable to competitors, as a compilation of data, and notes that it provides this information for individual addresses through its interactive portal on the Charter website and to public officials, pursuant to non-disclosure agreements.³⁸ Charter emphasizes that this information is kept confidential and provided only on a need-to-know basis.³⁹

³³ Statement of Necessity, at p.10.

³⁴ Statement of Necessity, at p.10.

³⁵ Statement of Necessity, at p.11.

³⁶ Statement of Necessity, at p.11-13, 18, 19.

³⁷ Statement of Necessity, at p.14, 17-18.

³⁸ Statement of Necessity, at p.15-16.

³⁹ Statement of Necessity, at p.17, 20.

DISCUSSION

The Freedom of Information Law (FOIL) requires state and municipal agencies to make available for public inspection and copying all records, “subject to certain exemptions.”⁴⁰ Public Officers Law § 89(5)(b)(2) provides that the agency shall “permit the person who requested the exception, within ten business days of receipt of notification from the agency, to submit a written statement of the necessity for the granting or continuation of such exception.” Pursuant to Public Officers Law, “[t]he person requesting an exception from disclosure pursuant to this subdivision [POL § 89(5)] shall in all proceedings have the burden of proving entitlement to the exception.”⁴¹ Further, caselaw makes clear that “the entity claiming an exemption must show that the requested material ‘falls squarely within the ambit of one of the statutory exemptions,’”⁴² by “articulat[ing] a particularized and specific justification for denying access.”⁴³ The entity claiming an exemption must provide specific, persuasive evidence, and cannot rely on vague, conclusory, or speculative assertions.⁴⁴ While *Verizon v. PSC* clarified the exemptions and standards available under POL § 87(2)(d), a high bar and burden of proof is still required in order for a company to establish an exception under the “trade secret” provision. As explained by the Third Department, the exemption is available only for a “bona fide trade secret.”⁴⁵

1. The Good Cause Tracker

The Good Cause Tracker is a reporting tool from Charter to the Commission wherein Charter provides aggregated numbers of its progress in expanding its network, in accordance with the Settlement Agreement. The Settlement Agreement is a publicly available document and the public is aware of Charter’s obligation to expand its network and meet certain targets.⁴⁶ The Good Cause Tracker does not constitute trade secret. As Charter recognizes, portions of information in the Good Cause Tracker is shared with each applicable pole owner in Charter’s planned network

⁴⁰ *Matter of Verizon N.Y., Inc. v. Mills*, 60 A.D.3d 958, 959 (2d Dept. 2009), quoting POL § 87(2); see *Matter of Data Tree, LLC v. Romaine*, 9 N.Y.3d 454, 462 (2007).

⁴¹ POL § 89(5)(e).

⁴² *Matter of Verizon N.Y., Inc. v. Bradbury*, 40 A.D.3d 1113, 1114 (2d Dept. 2007).

⁴³ *Id.* at 1114, citing *Matter of Capital Newspapers Div. of Hearst Corp. v. Burns*, 67 N.Y.2d 562 (1986); see *Matter of Gould v. New York City Police Dept.*, 89 N.Y.2d 267 (1996); *Matter of Washington Post Co. v. New York State Ins. Dept.*, 61 N.Y.2d 557 (1984); *Matter of Fink v. Lefkowitz*, 47 N.Y.2d 567 (1979); *Matter of Madera v. Elmont Pub. Lib.*, 101 A.D.3d 726 (2d Dept. 2012); *Matter of Porco v. Fleischer*, 100 A.D.3d 639 (2d Dept. 2012); *Matter of Dilworth v. Westchester County Dept. of Correction*, 93 A.D.3d 722 (2d Dept. 2012); *Matter of Bahnken v. New York City Fire Dept.*, 17 A.D.3d 228 (1st Dept. 2005); *Visiting Nurse Service of New York Home Care v. NYS Department of Health*, 2012 N.Y. Misc. LEXIS 5701, 2012 N.Y. Slip. Op. 32975(U) (Sup. Ct., Albany County 2012).

⁴⁴ *Matter of Markowitz v. Serio*, 11 N.Y.3d 43, 51 (2008); *Matter of Newsday, LLC v. Nassau County Police Dept.*, 136 A.D.3d 828 (2d Dept. 2016); *Matter of Rose v. Albany County Dist. Attorney’s Off.*, 111 A.D.3d 1123, 1126 (3d Dept. 2013).

⁴⁵ *Matter of Verizon N.Y., Inc. v. New York State Pub. Serv. Commn.*, 137 A.D.3d 66, 70 (3d Dept. 2016).

⁴⁶ See Case No. 15-M-0388, *Joint Petition of Charter Communications and Time Warner Cable for Approval of a Transfer of Control of Subsidiaries and Franchises, Pro Forma Reorganization, and Certain Financing Arrangements*, Order Adopting Revised Build-Out Targets and Additional Terms of a Settlement Agreement (September 14, 2017) (referred to as “the Settlement Agreement”).

footprint.⁴⁷ As such, portions of this information is already within the possession of pole owners throughout New York State. In addition, the chart is a reporting tool from the Company to Department Staff and does not constitute a bona fide trade secret.

Turning to Charter's argument that the records are confidential commercial information, disclosure of which would cause substantial injury to the competitive position of the subject enterprise, Charter has failed to meet its burden. The information, while compiled by a commercial entity, should not be excepted from disclosure as confidential commercial information. The Good Cause Tracker does not include granular detail about the location of passings or poles, nor does it identify any specific utility, pole owner, or geographic territory. Instead, the Good Cause Tracker is a high-level overview of Charter's passings and pole attachments throughout the State. In addition, it is noted that the Good Cause Tracker reflects the status of Charter's compliance with the Settlement Agreement as of November 1, 2017 – approximately seven (7) months ago – and Charter's claimed completed work. Contrary to Charter's assertions, the Good Cause Tracker does not provide any insight into Charter's build-out plan, intended investment or intended deployment. The fact that Charter is expanding its network throughout New York State is well within the public domain. Further, Charter has not met its burden in demonstrating that it would suffer "substantial competitive injury." Its attempted allegation of substantial competitive injury is only supported by conclusory, speculative assertions that are insufficient to support its request for exception from disclosure.⁴⁸

As such, the information in the Good Cause Tracker, generally, does not constitute "trade secret" or "confidential commercial information" as it is a compliance filing and Charter's applied redactions are not appropriate, in total. However, Charter has met its burden with respect to the "Cumulative Total" dollar amount for "Payment of any additional resources required by the pole owner to permit poles" (line E1 of the Good Cause Tracker) as this specific information is not regularly reported to pole owners or the public and disclosure of the dollar amount spent by Charter would provide insight into Charter's business dealings with pole owners and may cause substantial injury to the competitive position of Charter. This piece of information is excepted from disclosure and will remain redacted, at this time.

2. The 2017 Video Complaint Report

The 2017 Video Complaint Report is Charter's annual report of customer complaints relating to its video service. In the Report, Charter redacted the total number of initial "QRS" complaints for 2016 and 2017 and the escalated "SRS" complaints for 2016 and 2017 (p.1 and 2 of the 2017 Video Complaint Report).

The Quick Resolution System ("QRS") and Standard Resolution System ("SRS") are complaint processing systems within an electronic database managed by the Department of Public

⁴⁷ Chowaniec Declaration, at ¶25.

⁴⁸ *Matter of Markowitz v. Serio*, 11 N.Y.3d 43, 51 (2008); *Matter of Verizon N.Y., Inc. v. Bradbury*, 40 A.D.3d 1113, 1114-1115 (2d Dept. 2007); *Matter of Bahnken v. New York City Fire Dept.*, 17 A.D.3d 228, 230 (1st Dept. 2005); *see also Matter of Newsday, LLC v. Nassau County Police Dept.*, 136 A.D.3d 828 (2d Dept. 2016); *Matter of Rose v. Albany County Dist. Attorney's Off.*, 111 A.D.3d 1123, 1126 (3d Dept. 2013).

Service. The Department's Office of Consumer Services receives customer complaints and communications with regulated entities using the QRS/SRS systems. This database (QRS and SRS) is used across all utilities and regulated entities. This system is not specific to Charter in any way. In any event, the redacted numbers contained in the 2017 Video Complaint Report reflect numbers reported in the Department's monthly consumer complaint reports. The Department publishes monthly reports on its website for all regulated entities, including Charter.⁴⁹ The figures in the 2017 Video Complaint Report are public information and do not constitute trade secret or confidential commercial information. These redactions should be removed and Charter should refrain from making such redactions in the future. Given the public nature of this information, RAO Determination 16-03 is not instructive of the issues here.

With regard to the paragraph bulk redaction on p.2 of the 2017 Video Complaint Report, this redacted information is a summary of Charter's internal process and staff support for handling customer complaints. This generalized description of internal procedures is not a bona fide trade secret. In addition, it does not constitute confidential commercial information and Charter has failed to meet its burden in demonstrating that it would suffer "substantial competitive injury." This information is a generic description of Charter's efforts to address customer complaints. The information emphasizes the Company's contact with customers and, by its very description, any member of the public with an escalated complaint would experience and be aware of the internal processing. Enhanced customer service is a common goal of many regulated entities and there is no obvious competitive advantage, let alone "substantial injury" if this information is disclosed. More to the point, this information is a compliance filing by Charter in conformance with the Merger Order. As such, the redacted information in the 2017 Video Complaint Report does not constitute trade secret or confidential commercial information and the information is subject to disclosure.

3. The 90-Day Report

The numerous requests for exception from disclosure in the 90-Day Report will be addressed, in order of appearance in the report as follows:

First, the target date for upgrading the Syracuse footprint and planned costs in the Chatham footprint (p.5 of the 90-Day Report), along with the dollar amount of the average cost per passing (p.6 of the 90-Day Report) will be excepted from disclosure as confidential commercial information. This information provides insight into Charter's network deployment, including anticipated costs, in specific geographic areas and represents work that may or may not be completed. Although this information does not constitute a bona fide trade secret, the RAO agrees with Charter's arguments that this information is kept confidential and, if disclosed, would be likely to cause substantial injury to the competitive position of the subject commercial enterprise.

However, Charter's description of planned upgrade-related activities in the Chatham footprint (p.5 of the 90-Day Report) does not constitute confidential commercial information. The

⁴⁹ See Consumer Complaint Statistics – Office of Consumer Services, *available at* http://www.dps.ny.gov/ocs_stats.html.

bulk of this information is general in nature. Charter's description of its activities is similar to build-out activities throughout the industry and there is nothing inherently confidential or trade secret about this generic information. In addition, it is noted that this information was filed in order to demonstrate compliance with the Merger Order and does not have any bearing on Charter's pending business plans or activities. This generalized description of internal procedures is not a bona fide trade secret. And, further, does not constitute confidential commercial information and Charter has failed to meet its burden in demonstrating that it would suffer "substantial competitive injury." As such, lines 5-7 of paragraph 2 (p.5 of the 90-Day Report) are subject to disclosure and the last sentence of paragraph 2 will be excepted from disclosure, as discussed above.

Next, information relating to customer eligibility in the low-income broadband program (p.8 of the 90-Day Report) does not constitute trade secret or confidential commercial information and will be subject to disclosure. The information at issue is generic, in nature, and relates to Charter's low-income broadband program (referred to as Spectrum Internet Assist) which has already been rolled out to the public and implemented throughout Charter's footprint. The information at issue is from an August 16, 2016 filing (one year and 8 months ago) and, like other documents at issue here, was filed by Charter in order to demonstrate its compliance with the Merger Order. The information does not have any bearing on Charter's pending business plans or activities and there is no competitive harm to Charter if information on the low-income broadband program is publicly available. As such, it does not constitute trade secret or confidential commercial information and Charter has failed to demonstrate any "substantial injury" if this information was disclosed. In addition, the portion of the 90-Day Report naming certain community groups included in Charter's outreach efforts (p.9 of the 90-Day Report) cannot be considered trade secret or confidential commercial information. There is no basis for Charter's claim that this information, if disclosed, would cause substantial injury. This is simply a reporting of community groups included in outreach for Charter's specific low-income broadband program and is not confidential. In addition, it is noted that Charter stated that it intended to roll out the program by mid-May 2017 and that, as of August 16, 2016 (the date of the 90-Day Report), outreach to these specific groups was already underway. Charter subsequently represented to the Commission that the low-income program (Spectrum Internet Assist) was rolled out to the public and, as such, this program is no longer in the planning stages.⁵⁰ Charter provides no explanation for keeping confidential this outdated information.

Similarly, the information relating to customer service in the 90-Day Report does not constitute trade secret or confidential commercial information. In this portion of the 90-Day Report, Charter provides information on general initiatives and programs related to the Commission's requirement that Charter invest a minimum of \$50 million in service improvement programs. The identified initiatives and/or programs are described in a cursory manner – typically in one or two sentences. This information, included in the 90-Day Report, was filed by Charter in order to demonstrate its compliance with Condition III.A.1 of the Merger Order. The information

⁵⁰ Case 15-M-0388, Charter October 27, 2017 Letter to Chair Rhodes, at p.3, 6.

is general in nature, is related to a compliance issue and was reported in August 2016. Charter has failed to demonstrate that this information has commercial value or how disclosure would result in possible competitive injury. As such, this information does not constitute trade secret or confidential commercial information and Charter has failed to demonstrate any “substantial injury” if this information was disclosed. However, Charter’s specified expected spending amount (referenced three times in p.9-11 of the 90-Day Report) will be excepted from disclosure as confidential commercial information. This information details Charter’s expected amount of spending and it appears to be held as confidential by the Company, at this point. The RAO agrees with Charter’s arguments that this information, if disclosed, would be likely to cause substantial injury to the competitive position of the subject commercial enterprise. This information has value to Charter’s competitors and disclosure would allow competitors insight into Charter’s business plans. While the dollar amounts in p.9-11 may be excepted from disclosure, all other information related to “customer service initiatives” are subject to disclosure.

Charter’s next claimed redaction, which describes Charter’s internal examination of customer complaints (p.12 of the 90-Day Report), does not constitute trade secret or confidential commercial information. This description of Charter’s review of escalated complaints is generic in nature and does not include any specifics that would provide insight into Charter’s operations or business plans. Instead, it is merely a description of Charter’s review of escalated SRS complaints. As noted above, this information was submitted as part of Charter’s August 16, 2016 compliance and Charter has failed to demonstrate that this information constitutes trade secret or confidential commercial information.

Finally, Charter’s represented total number of combined Charter and Time Warner Cable customer facing jobs in New York State does not constitute trade secret or confidential commercial information. Charter’s primary argument for exception from disclosure is that the number of customer facing jobs in New York State “has always been kept confidential throughout the merger process and its aftermath.”⁵¹ Charter has not demonstrated how this information would cause competitive injury, let alone “substantial competitive injury,” if this information is disclosed. This information is related to an aspect of Charter’s compliance with the Merger Order and serves as the baseline data for Charter’s compliance with its obligation not to cause a net loss in customer facing jobs in New York State. This baseline metric constitutes information necessary to measure Charter’s compliance with the Merger Order. Charter has failed to meet its burden demonstrating entitled to exception from disclosure for this piece of information.

4. The Build-Out Compliance Report Exhibits

With regard to the Build-Out Compliance Report Exhibit A and Exhibit B, each of these will be addressed, in turn. First, Exhibit A provides Charter’s numeric explanation of its completed total number of passings and any adjustments from the prior filing. This information constitutes aggregated totals for Charter’s network expansion plan and identifies certain counties where adjustments were made. This information does not provide any specific addresses or demonstrate

⁵¹ Chowaniec Declaration, at ¶18.

Charter's build-out plans. Instead, it is a reporting that justifies and explains Charter's "New Completed Total" of 42,889 passings in the accompanying Build-Out Compliance Report. Contrary to Charter's assertions, Exhibit A does not provide any insight into Charter's build-out plan, intended investment or intended deployment. The fact that Charter is expanding its network throughout New York State is well within the public domain. This information does not constitute trade secret, nor is it confidential commercial information. Further, Charter has not met its burden in demonstrating that it would suffer "substantial competitive injury." Charter makes only cursory arguments relating to Exhibit A and, instead, focuses its attention on the information contained in Exhibit B. Charter's attempted allegation of substantial competitive injury is only supported by conclusory, speculative assertions that are insufficient to support its request for exception from disclosure.⁵²

In contrast, Exhibit B is a highly detailed Excel spreadsheet that provides locations of passings by street address, latitude and longitude, census block and franchise and provides information on completion, among other metrics. Exhibit B provides specific, detailed information on Charter's deployment State-wide. This information is held as confidential by the company and would provide a clear advantage to Charter's competitors by offering insight into the exact status of Charter's expansion and targeted geographic areas. While certain information is available through Charter's online portal, Exhibit B is the full compilation of this information. As such, RAO agrees that this information constitute trade secret and will be excepted from disclosure. It is noted that Exhibit B also provides customer addresses and would be excepted from disclosure pursuant to Public Officers Law § 87(2)(b) as information, which if disclosed, would constitute an unwarranted invasion of personal privacy.

CONCLUSION

Charter argued for protection from disclosure pursuant to POL § 87(2)(d) and 16 NYCRR § 6-1.3 as trade secret and/or confidential commercial information. The Company did not satisfy its burden of persuasion and present convincing arguments for exemption as: (1) trade secret or (2) confidential commercial information, disclosure of which would cause substantial injury to the competitive position of the subject enterprise, for all redactions sought in its filings at issue. In light of the forgoing, certain portions of the information claimed to be trade secret or confidential commercial information, as identified with specificity above, does not warrant an exception from disclosure and the request for continued exception from disclosure is denied. However, as identified above, Charter is entitled, in part, to certain exceptions from disclosure under the Freedom of Information Law (FOIL) as a trade secret or confidential commercial information. Charter is directed to re-file corrected documents with limited redactions, pursuant to this Determination, no later than May 31, 2018, pending the appeal process.

⁵² *Matter of Markowitz v. Serio*, 11 N.Y.3d 43, 51 (2008); *Matter of Verizon N.Y., Inc. v. Bradbury*, 40 A.D.3d 1113, 1114-1115 (2d Dept. 2007); *Matter of Bahnken v. New York City Fire Dept.*, 17 A.D.3d 228, 230 (1st Dept. 2005); see also *Matter of Newsday, LLC v. Nassau County Police Dept.*, 136 A.D.3d 828 (2d Dept. 2016); *Matter of Rose v. Albany County Dist. Attorney's Off.*, 111 A.D.3d 1123, 1126 (3d Dept. 2013).

Review of this Determination may be sought, pursuant to POL § 89(5)(c)(1), by filing a written appeal with Kathleen H. Burgess, Secretary to the Commission, at the address given above, within seven business days of receipt of this Determination. Receipt of this determination will be presumed to have occurred on May 18, 2018; accordingly, the deadline for the receipt of any such written appeal by the Secretary is May 30, 2018. Any requests for an extension of time to file a written appeal of this Determination should be directed to Secretary Burgess.

Sincerely,

/s/ Jessica R. Vigars

Jessica R. Vigars
Assistant Counsel
Records Access Officer

cc: Robert J. Freeman, Committee on Open Government (via e-mail)