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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

RE: Joint Petition of Charter Communications, Inc. and Time Warner Cable Inc. for Approval of a Transfer of Control of Subsidiaries and Franchises; for Approval of a Pro Forma Reorganization; and for Approval of Certain Financing Arrangements Case 15-M-0388

Request for Confidential Treatment of Exhibit A to Mr. Larry Kaschincke's Declaration submitted in Support of Charter Communications, Inc.'s Motion for Rehearing and Reconsideration of the Commission's June 14, 2018 Order denying Charter's response to the Commission's March 19, 2018 Order to Show Cause

Dear Ms. Vigars:

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), Charter Communications Inc. ("Charter") respectfully requests confidential treatment of specific portions of Exhibit A to Mr. Larry Kaschincke's Declaration submitted in Support of Charter Communications, Inc.'s Motion for Rehearing and Reconsideration of the Commission's June 14, 2018 Order denying Charter's response to the Commission's March 19, 2018 Order to Show Cause. (collectively the "Confidential Information").

Discussion

Confidential Information presents detailed information regarding specific addresses in Charter's passings buildout plan. The Confidential Information includes personally identifying information, as well as valuable insight into Charter's future deployments, and business plans. As discussed 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.

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."[1] The New York State Appellate Division, Third Department, recently 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 New York's Freedom of Information Law ("FOIL") and do not require an additional showing of substantial competitive injury.[2] 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.[3] 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.'"[4] This definition is also found in the Commission's Regulations under 16 NYCRR § 6-1.3(a). For the 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:
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> (1) the extent to which the information is known outside of the business;
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> (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;

[1] POL § 87(2)(d).

[2] *Verizon New York, Inc. v. New York State Public Service Commission*, 137 A.D.3d 66 (3d Dep't 2016).

[3] *Verizon*, 137 A.D.3d at 73.

[4] *Verizon*, 137 A.D.3d at 72.

(6) the ease or difficulty with which the information could be properly acquired or duplicated by others.[5]

The six factors are non-exclusive, and not all factors must be established to prove that a trade secret exists.[6] 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 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 and plan resources for future network and program expansions as well as implementation of particular 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 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. While some granular data may be released under certain circumstances, it is only after either a program or initiative has been rolled-out to the public, and even then, not all of the granular detail is disclosed. 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. It is a very valuable tool used by Charter to determine where, when, and if Charter should expand its network, staff, or develop marketing strategies. If disclosed, the Confidential Information would be valuable to competitors because it would provide insight into where and when Charter is actively looking to expand its footprint or initiate particular marketing campaigns, thus enabling incumbent providers to better prevent competitive entry. Charter has expended a significant amount of time, money, and effort to develop and compile the Confidential Information. If disclosed, competitors would unfairly

[5] *Verizon*, 137 A.D.3d at 72-73.

[6] The Commission has followed this approach in its recent 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").

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 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."[7] 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.[8] 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.[9] *Encore* remarked that "where [ ] disclosure is the sole means by which competitors can obtain the requested information, the inquiry ends [there]."[10] 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 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.

[7] Determination 16-02 at 8; 16 NYCRR § 6-1.3(b)(2).

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

[9] *Encore*, 87 N.Y.2d at 420-21.

[10] *Id*. at 420.

Conclusion:

Accordingly, Charter respectfully requests that the Confidential Information be protected from disclosure as it satisfies both the "trade secret" and the "substantial competitive injury" tests under the POL. 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

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