STATE OF NEW YORK DEPARTMENT OF PUBLIC SERVICE

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www.dps.ny.gov

July 25, 2014

Via Electronic Mail
Gerald Norlander, Esq.
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RE: Case 13-C-0193 Order issued October 21, 2013 directing TWCIS to file reports relating to the number of "core" customers and service quality data. (1) Copy of all reports filed by TWCIS in response to said Order, to date, and (2) Correspondence or decisions from the DPS or its Director of the Office of Telecommunications regarding the TWCIS reports filed in response to said Order.

(DETERMINATION – Trade Secret 14-03)

Dear Mr. Norlander and Ms. Helmer, et. al:

This letter constitutes my Determination as Records Access Officer (RAO) pursuant to §89(5) of the Public Officers Law (POL). It discusses the entitlement to an exception from disclosure as trade secrets, POL §89(5)(a)(1) of certain records submitted by Time Warner Cable Information Services (New York) LLC [TWCIS(NY) or the Company] the above-entitled matter.

FOIL PROCEDURAL BACKGROUND

On June 11, 2014, TWCIS(NY) submitted a request to the RAO for trade secret protection for Service Quality Reports filed in Case 13-C-0193.[1] At that time TWCIS(NY) did

[1] Case 13-C-0193, Petition of Time Warner Cable Information Services (New York), LLC for Waivers of Certain Commission Regulations Pertaining to Partial Payments, Directory Distribution, Timing for Suspension or Termination of Service, and a Partial Waiver of Service Quality Reporting Requirements. Order Granting in Part and Denying in Part Requests for Waivers or Rules.

not submit redacted copies to the Secretary. On June 12, 2014, the RAO received a request pursuant to the Freedom of Information Law (FOIL) under POL Article 6, from Gerald Norlander, Esq., Executive Director of the New York Utility Project for a "(1) Copy of all reports filed by TWCIS in response to said Order, to date, and (2) Correspondence or decisions from the DPS or its Director of the Office of Telecommunications regarding the TWCIS reports filed in response to said Order."

On June 19, 2014, the RAO sent a letter to Mr. Norlander and TWCIS(NY)'s attorneys both acknowledging the former's request and informing the latter that prior to proceeding under POL §89(5)(b)(1)(2), a separate copy of each document, with appropriate redactions of the allegedly confidential statements in the documents, must be filed with the Secretary pursuant to the Secretary's filing guidelines.[2] The RAO stressed that blanket-redacted documents filed with the Secretary were not acceptable. The RAO directed TWCIS(NY) to submit the aforementioned documents within seven business days - June 30, 2014. She further advised that thereafter, Mr. Norlander would be given a reasonable amount of time to determine if the documents are responsive to his request before the process for a written Determination would be commenced pursuant to law.

On June 30, 2014, TWCIS(NY), by its attorneys, submitted reacted versions of the Service Quality Reports. These documents were entered into the Department's Document Matter Management System (DMM) and made available for public inspection.

On July 1, 2014, the RAO contacted Mr. Norlander by electronic mail to advise him that the redacted documents were available for his inspection. Shortly thereafter Mr. Norlander advised the RAO that he would like to have a written determination regarding the request and the sufficiency of the response. Specifically, the redacted[3] documents "do not disclose the number of 'core customers,' service to whom was measured for the various performance metrics. Without knowing the core customer sample size it is difficult to draw any conclusions about service quality performance."

Also on July 1, 2014, the RAO informed TWCIS(NY) of Mr. Norlander's request stating that access to the records would be determined in accordance with POL §89(5), and of the opportunity to submit a written statement of necessity for such exception pursuant to POL §89(5)(b)(2). Mr. Norlander was duly advised of the process to be followed. On July 16, 2014 TWCIS(NY) submitted its Statement of Necessity to the RAO.

DETERMINATION

Arguments of TWCIS(NY)

TWCIS(NY) argues that only the redacted version of its filed reports should be released in response to Mr. Norlander's request for its detailed service quality reports, and that the

[2] See www.dps.ny.gov – Filing Guidelines – Filing Documents with the Secretary.

[3] Redacted documents appear with those portions for which protection from disclosure is claimed as "blacked out" in the document.

information redacted from those reports should be kept confidential as it consists of specific regional, local and operational data regarding TWCIS(NY)'s network facilities, architecture and capacity utilization; operational management and organization; market penetration and regional customer patterns. The Company states that these data are competitively sensitive and considered trade secret material under POL§87(2)(d) and 16 N.Y.C.R.R. § 6-1.3(b)(2). The unredacted versions filed by the Company on June 30, 2014[4] disclose aggregated, statewide data but excludes the granular data that qualifies as confidential trade secret material that need to remain confidential and only accessible to DPS Staff for regulatory purposes.

The Company claims that release of the unredacted portions, which consist of very detailed and sensitive regional, local and operational data specific to TWCIS(NY), would be contrary to the Legislature's intention to exempt information that would be likely to cause substantial competitive injury to an entity that is required to provide sensitive information to DPS Staff in furtherance of the state's public policy goals. TWCIS(NY) outlined the applicable standard for a trade secret determinations, citing statutory[5], regulatory[6] and case law authority[7] in its Statement of Necessity.

The Company contends that the unredacted filings that are not available to the public include regional, local and operational information that would provide specific insight into the nature of TWCIS(NY)'s network facilities, architecture and capacity utilization; its operational management and organization; as well as market penetration and regional customer patterns at the regional and local level. This information is represented in the aggregate in the statewide numbers provided by TWCIS(NY) and is available publicly.

The Company maintains that release of such granular data would unfairly benefit competitors and thereby cause TWCIS(NY) substantial competitive injury. Here, the Reports include commercially-sensitive information relative to TWCIS(NY)'s performance for specific, local customer service centers and provides TWCIS(NY)'s service quality information by hub, and on a monthly basis, consistent with law.[8]

According to TWCIS(NY), the hub-specific information that has been redacted is granular, extremely detailed, location-specific and not aggregated, and that it can be used by competitors to infer the location, density and the level of service quality provided to small localized clusters of TWCIS(NY)'s customers. The Company reasons that accordingly, release

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[4] Unredacted versions of documents allegedly containing confidential information are maintained apart by the agency from all other records until 15 days after the entitlement to such exception has been finally determined or such further time as ordered by a court of competent jurisdiction. POL §89(5)(a)(3).

[5] POL §87(2)(d).

[6] 16 N.Y.C.R.R. §6-1.3(b)(2).

[7] Encore Coll. Bookstores v. Auxiliary Serv. Corp. of State Univ. of N.Y., 87 N.Y.2d 410, 419-420 (1995).

[8] 16 N.Y.C.R.R. Part 603 (2013).

of this granular data - that is currently redacted in the reports TWCIS(NY) submitted June 30, 2013 - would enable competitors to specifically target their marketing and communications strategies efforts based on TWCIS(NY) current customer information.

The Company contends that releasing the Reports in their entirety would give rise to unfair competition for TWCIS(NY), as many of its competitors are non-regulated or more lightly regulated companies that are not required to report or publicize similar information. The net result would be harmful to TWCIS(NY), which would shoulder an asymmetrical competitive burden that is only advantageous to its competitors.

TWCIS(NY) argues that the Reports contain proprietary information that is not known to others or generally available to the public and that it is not the type of information that competitors make available to each other in the normal course of business. The Company asserts that there is significant competition for telecommunication service in New York State, and there are substantial costs incurred by telecommunications providers in order to obtain and retain customers; and that while the requested data may be helpful and necessary for the DPS to monitor performance, its disclosure would cause substantial injury to the competitive position of TWCIS(NY), essentially allowing competitors to turn operational and customer service information provided to the Commission by TWCIS(NY) to their own private advantage. The Company avers that competitors could use the granular data unfairly, for example, by selectively targeting marketing campaigns to certain customer clusters or investing strategically only in areas where TWCIS(NY) is perceived to be vulnerable or reducing investment where the competitor perceives that it is unnecessary to improve its services in order to compete with TWCIS(NY). The Company notes that while such activities may be beneficial when founded upon the competitor's own research and effort, they become anticompetitive when based on unfair, asymmetric access to another company's confidential information. Given that TWCIS(NY) does not have reciprocal access to the same type of information about its competitors, it would be difficult for TWCIS to obtain equivalent insight, make competitive determinations, or defend against unfair marketing campaigns.

The Company avows that the Reports include information that is valuable and, if made public, would injure it by providing a competitive windfall to competitors. First, if released to the public, the information contained in the Reports would allow TWCIS(NY)'s competitors to tailor their own investment, marketing and sales strategies to work against TWCIS(NY). Second, the Reports contain highly-sensitive business information which, if released, would provide competitors valuable insights into TWCIS(NY)'s network, business organization and operation strategies on a highly localized basis.

Lastly, the Company emphasizes that the Reports contain information that was developed specifically for TWCIS(NY) at great cost and is not readily available to its competitors – absent long hours of preparation and research and thus should be exempt from public disclosure. The month-to-month data collection and preparation of the relevant reports could not be replicated by competitors without incurring significant costs, including conducting extensive customer surveys. Therefore, it argues, the RAO should not award competitors with information that TWCIS(NY) collected and prepared at great cost to its own detriment.

In closing, the Company requests that the RAO continue to grant trade secret status to the unredacted Reports in a manner that is consistent with the POL and consequently deny public access to the unredacted Reports.

DISCUSSION

Statement of Applicable Law

POL §87(2) provides, in pertinent part: Each agency shall, in accordance with its published rules, make available for public inspection and copying all records, except that such agency may deny access to records or portions thereof that: . . . (d) 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 Court of Appeals, in Matter of New York Telephone Co. v. Public Service Commission,[9] held that the Commission had not only the power but also the affirmative responsibility to provide for the protection of trade secrets and cited the definition of "trade secret" contained in Restatement of Torts §757, comment (b) (1939).[10] Thereafter, the Commission adopted a virtually identical definition of "trade secret".

According to 16 NYCRR §6-1.3(a): "A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which provides an opportunity to obtain an advantage over competitors who do not know or use it."

In Matter of Capital Newspapers v. Burns,[11] the Court of Appeals held that the exceptions from disclosure in POL §87(2) are to be narrowly construed, that the party resisting disclosure bears the burden of proof, and that such party must demonstrate a particularized and specific justification for denying access.

The Court of Appeals, in Matter of Ashland Management, Inc. v. Janien,[12] again cited the Restatement of Torts definition of "trade secret." In addition, the Court noted that Restatement §757, comment b suggested the following factors be considered in deciding a trade secret claim:

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 expended in developing the information; and

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[9] 56 N.Y.2d 213, 219 – 220 (1982).

[10] Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1973) in which the Court discussed what might constitute a "trade secret", citing Restatement of Torts, §757, comment b (1939).

[11] 67 N.Y.2d 562, 566, 570 (1986).

[12] 82 N.Y.2d 395, 407 (1993).

6. the ease or difficulty with which the information could be properly acquired or duplicated by others.

The explicitly non-exclusive list of factors to be considered in explaining whether information constitutes a trade secret that is set forth in 16 NYCRR §6-1.3(b)(2) is similar, though not identical, to the Restatement list. The only substantial dissimilarities between the two lists are that the list adopted by the Commission does not explicitly contain a factor like the third factor quoted above and that it does include two additional factors, as follows: "(i) the extent to which the disclosure would cause unfair economic or competitive damage; [and] (vi) other statute(s) or regulations specifically excepting the information from disclosure."[13]

The Court of Appeals, in Encore Coll. Bookstores v Auxiliary Serv. Corp. of State Univ. of N.Y.,[14] stated that the Legislature had signaled its intent that the "substantial injury to the competitive position" language of POL §87(2)(d) should be similar in scope to the "substantial competitive harm" test announced in National Parks and Conservation Association v. Morton,[15] a case that arose under the federal Freedom of Information Act.[16] In particular, the Court paraphrased and quoted with approval from another D.C. Circuit Court of Appeals decision in Worthington Compressors v. Costle.[17]

Thus, the Court in Encore stated that, where government disclosure is the sole means by which competitors can obtain the requested information, the inquiry ends with a consideration of how valuable the information at issue would be to a competing business and how much damage would result to the enterprise that submitted the information. By contrast, the Court held that, where the material is available from another source at some cost, consideration must be given not only to the commercial value of such information but also to the cost of acquiring it through other means, because competition in business turns on the relative costs and opportunities faced by members of the same industry, which might be substantially different if one could obtain information by paying the copying cost rather than the cost of replication.

The Court also observed that the reasoning underlying these considerations is consistent with the policy behind POL §87(2)(d) to protect businesses from the deleterious consequences of disclosing confidential commercial information to further the state's economic development efforts and attract business to New York. Finally, in applying the test to Encore's request, the Court concluded that the information submitting enterprise was not required to establish actual competitive harm. Rather, it was required, in the words of Gulf and Western Industries v. United States, to show "actual competition and the likelihood of substantial competitive injury".[18]

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[13] 16 N.Y.C.R.R. §6-1.3(b)(2) also provides: "In all cases, the person must show the reasons why the information, if disclosed, would cause substantial injury to the competitive position of the subject commercial enterprise."

[14] 87 N.Y.2d 410 (1995).

[15] 498 F.2d 765, 770 (D.C. Cir., 1974).

[16] Encore, supra at 419 – 420.

[17] 662 F.2d 45, 51 (D.C. Cir., 1981).

[18] 615 F. 2d 527, 530 (D.C. Cir., 1979).

While "competitive injury" is not defined by the statutes, regulations, or case law, the Court of Appeals has interpreted the phrase on various occasions since its 1995 decision in Encore. In 2008, the Court appears to have "raised the bar" as to what is necessary to sustain the burden of proof required to exempt information from public disclosure in Markowitz v. Serio,[19] a case involving the New York State Insurance Department and the issue of "redlining." There the Court stated that "to meet its burden, the party seeking exemption must present specific, persuasive evidence that disclosure will cause it to suffer a competitive injury; it cannot merely rest on a speculative conclusion that disclosure might potentially cause harm."[20]

In at least one lower court case since Markowitz, the evidence offered to sustain a finding of competitive injury was quite extensive and sophisticated. In Saratoga Harness Racing, Inc. v. Task Force on the Future of Off-Track Betting,[21] petitioners Saratoga Harness Racing, Inc. (Saratoga) and Finger Lakes Racing Association, Inc. (Finger Lakes) sought exemption from disclosure of information contained in their 2004-2008 year-end financial statements. Petitioners provided this information to the New York State Racing and Wagering Board (RWB), which compiled it into chart form and provided it to respondent, Task Force on The Future of Off-Track Betting (FOTB). The FOTB planned to publish the chart on its website. The Court found that petitioners had demonstrated that the information they sought to prevent from disclosure was not publically available and had exhausted their administrative remedies for challenging disclosure.

Saratoga submitted affidavits of its executives and of experts in gaming market analysis and labor negotiations. The affidavit submitted by Saratoga's General Manager established the competitive pressures Saratoga faces. It detailed Saratoga's racing and gaming competitors, outlined its food and beverage competitors, set forth Saratoga's current and future labor negotiations and the potential for outside competitors to enter the market that Saratoga serves. The injuries that the disputed information would cause Saratoga were detailed by its General Manager, along with a gaming market analysts' expert opinion affidavit. The injury it would suffer by the disclosure of the disputed information was detailed by its Human Resources Director and an expert in labor negotiations. The court found that Saratoga demonstrated "specific, persuasive evidence" that Respondents' dissemination of its financial data falls "squarely within a FOIL exemption."[22]

Likewise, the court found that Finger Lakes demonstrated the applicability of Public Officers Law § 87(2)(d)'s exemption. Its Director of Labor Relations detailed the competitive pressures of Finger Lakes' labor market, and the injury that Finger Lakes would suffer if the disputed financial information were released. Finger Lakes submitted the affidavit of a Vice President of its parent company which oversees its financial performance. That affidavit set forth the specific racing and gaming venues Finger Lakes competes against, explained the potential for competition from national gaming companies, and corroborated Finger Lake's labor market

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[19] 11 N.Y.3d 43 (2008).

[20] Markowitz, supra at 51; Encore, supra.

[21] Saratoga Harness Racing, Inc. v. Task Force on the Future of Off-Track Betting, 2010 N.Y. Misc. LEXIS 2531 (Sup. Ct. Albany Co. 2010).

[22] Markowitz, supra.

pressures. Finger Lakes also submitted affidavits of a gaming market analyst and an expert in labor negotiations. The court found that Finger Lakes had outlined the competitive pressures facing it and had adequately described the injury it would incur if the disputed financial information were released, and therefore, demonstrated that the trade secret exception squarely applied.[23]

Since Markowitz and Saratoga, the Second Department has held that such evidence may be provided by affidavits that demonstrate the likelihood of substantial competitive injury, and that are based upon the personal knowledge of people employed or retained by the party seeking such exemption.[24]

Application of Pertinent Law

On the issue of trade secrets or confidential commercial information, the two-pronged test established by the Court in Encore is applicable. The general statements and summary assertions of the Company do not constitute the particularized and specific justification for an exception from disclosure as contemplated by the Court in Capitol Newspapers.[25]

In applying the first prong of the Encore test, (in which the Court implicitly assumed the non-public nature of the information in question), the existence of competition must first be established. The Company briefly mentions the existence of competition, that disclosure would affect its competitive position and that of others in the industry, but offers only sweeping generalities. Its statements are not illustrative and offer only conclusions. However, for the sake of this discussion, I will assume that TWCIS(NY) faces actual competition with regard to the number of "core" customers and service quality data.

The question of whether the information at issue is entitled to an exception from disclosure as trade secrets or confidential commercial information turns on the proper application of the second prong of the test — whether disclosure would be likely to cause substantial injury to the competitive position of the subject enterprise. In this regard, I first note that almost all information possessed by a business would have some commercial value to its competitors; however, the question is whether the information at issue is sufficiently valuable that its disclosure would be likely to cause substantial competitive injury. Because the information in question appears to be available solely through disclosure by DPS, I must consider only the commercial value of such information to competitors and the competitive injury to the commercial enterprise possessing the information that would likely result.

Because the overall purpose of FOIL is to ensure that the public is afforded access to governmental records to the greatest extent possible, FOIL exemptions are interpreted narrowly.[26] To meet its burden, the party seeking the exemption must present specific,

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[23] POL§87(2)(d).

[24] See Dilworth v. Westchester County Dep't of Correction, 93 A.D.3d 722, 724-25 (2d Dep't 2012) holding that an affidavit sworn by a Sergeant with the Westchester County Department of Correction provided sufficient evidence to support an exception from disclosure.

[25] Supra at 570 (1986).

[26] Washington Post Co. v New York State Ins. Dept., 61 NY2d 557, 564 (1984).

persuasive evidence that disclosure will cause it to suffer a competitive injury; it cannot merely rest on a speculative conclusion that disclosure might potentially cause harm.[27]

Arguably, TWCIS(NY) has shown that the information in question likely fits within the definition of trade secret. It has also postulated that disclosure of the Reports would be likely to cause substantial injury to the competitive position of a commercial enterprise. The Company has made generalized arguments but has failed to provide the detail necessary to meet the burden of proof it bears pursuant to POL §89(5)(e). In order to meet this burden, TWCIS(NY) must provide the necessary causal link between the disclosure of the information and the likelihood that it would cause substantial injury to the competitive position of a commercial enterprise. It has not done that. Mere conclusory allegations, without persuasive factual support, are insufficient to sustain non-disclosure.[28] The party resisting disclosure must demonstrate a particularized and specific justification for denying access.[29]

In numerous Determinations where the RAO has found that the company did not provide the necessary causal link between the disclosure of the information and the likelihood that it would cause substantial injury to the competitive position of a commercial enterprise, the RAO observed that the inclusion of an affidavit of an economist or other expert can help the party seeking protection from disclosure meet the burden of proof it bears pursuant to POL §89(5)(e), but only if the affidavit contains more compelling facts and stronger arguments. The courts have recognized this concept as well.[30] While the courts have not ruled that the inclusion of an affidavit is required to demonstrate competitive injury, such additional information is of significant assistance to the RAO and the Secretary on Appeal.

It is only with more convincing facts (perhaps submitted in an affidavit by an economist or other expert) that TWCIS(NY) can meet the burden of proof it bears pursuant to POL §89(5)(e). Even if TWCIS(NY) had conclusively proved that the trade secret test cited in New York Telephone and Ashland had been met on the basis of the factors set forth in 16 NYCRR §6-1.3(b)(2), it has not shown that public disclosure of the information would be likely to cause substantial injury to the competitive position of a commercial enterprise.

The party seeking protection from disclosure must satisfy both prongs of the test enunciated in Encore. TWCIS(NY) has not satisfied the second prong. The Encore Test must be met before an exception from disclosure may be granted because that test is essentially reflected in the Commission's regulations. Furthermore, the Court in Bahnken v. New York City Fire Department[31] implicitly concluded that the Encore Test is the one to be used in determining whether portions of records should be excepted from public disclosure pursuant to POL §87(2)(d).

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[27] Markowitz, supra at 51.

[28] See, Church of Scientology of New York v. State of New York, 46 N.Y.2d 906 (1979).

[29] Capital Newspapers v. Burns, supra.

[30] See Dilworth v. Westchester County Dep't of Correction, supra.

[31] 17 A.D.3d 228 (1st Dept., 2005).

CONCLUSION

In light of all the forgoing, the request of TWCIS(NY) that trade secret protection continue to be granted to the redacted information in the Service Quality Reports submitted by it in Case 13-C-0193 under POL§87(2)(d) and 16 N.Y.C.R.R. §6-1.3(b)(2) is denied.

Review of my determination may be sought, pursuant to POL §89(5)(c)(1), by filing a written appeal with Kathleen H. Burgess, Secretary at the address given above, within seven business days of receipt of this determination. Because this determination is being served electronically, unless a contrary showing is made, receipt will be presumed to have occurred on July 25, 2015 so the deadline for the receipt of any such written appeal is August 5, 2014.

Sincerely,

/s/

Donna M. Giliberto
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