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via e-mail (secretary@dps.ny.gov)

June 20, 2016

Ms. Kathleen H. Burgess,  
Secretary to the Commission  
New York State Public Service Commission  
Agency Building 3  
Three Empire State Plaza  
Albany, New York 12223-1350

RE: Case No. 15-M-0388  
Appeal from Records Access Officer Determination 16-02

Dear Secretary Burgess:

By letter dated May 24, 2016, you provided Charter Communications, Inc. (Charter) ten business days to submit additional information with respect to the two-pronged test for "trade secret" status set forth in *Verizon New York Inc. v. New York State Public Service Commission*, 137 A.D.3d 66 (3d Dept. 2016) (*Verizon*), and ten business days for me to file a response.

On June 8, 2016, Charter submitted a Supplemental Statement and voluminous attachments, including Declarations of Noel Dempsey and James Gregory Mott. This letter is submitted on behalf of my clients, Alliance for Environmental Renewal, New Scotland Town Supervisor Douglas LaGrange, Nancy Lawson, Douglas Bullock, Jim and Lynn Cable, Priscilla and Robert Hannan (Requestors), in response to Charter's supplemental filing.

**RECORDS FOR WHICH TRADE SECRET STATUS IS SOUGHT**

Time Warner and Charter Communications, now formally merged as Charter, seek trade secret status for information that was redacted from their February 18, 2016 filings with the Commission. The filing consists of a list of municipalities where either Time Warner or Charter Communications has a franchise agreement, and the number of unpassed homes in each such municipality. The filing originally redacted the names of the municipalities, but they have now been provided: the issue on this FOIL appeal is whether the number of unpassed homes is entitled to trade secret protection.

Significantly, the information at issue consists solely of the number of housing units in a

particular municipality, Charter has not submitted any information to the Commission as to the location of these homes, the identity of those housing units, any of the source material that the companies may have used to compute the total of units in a particular municipality, or any information as to why these homes have not previously been connected.

Franchise agreements with municipalities are public records. Basically, a typical franchise agreement authorizes Time Warner or Charter to do business in the municipality (most commonly a town) in exchange for the payment of a franchise fee and requires the company to provide service to all areas of the town where a specific minimum concentration limit is reached. 16 NYCRR § 895.5 requires a cable television company to provide service to all areas of a municipality where there are at least 35 prospective customers per linear mile. However, many franchise agreements require that a cable television company provide service for areas where there are fewer prospective customers.

Unpassed units in a particular municipality are those units for which the companies have not provided service, presumably because the low density of residences make it uneconomical for the company to do so. Historically, the former Time Warner has only been willing to provide service to units in areas that do not have the requisite concentration of units if the prospective subscriber is willing to pay the costs of connection. These costs can run into the tens of thousands of dollars. Although the companies assert that they may have marketing plans to provide such a connection, the actual reality is that the unpassed units are undesirable markets, and cable companies such as Time Warner and Charter have never been interested in expanding into them.

The number of units was included in the February 18, filing with the Commission because that information is necessary to ascertain what Charter will need to do to comply with the January 8, 2016 Merger Order, which directed Charter to extend service to 145,000 unserved units at its own expense. Charter's claims that the number of homes is somehow related to any plan to market its services to them cannot be taken seriously; these are homes to which Charter would not have marketed in any event, and any expansion that may occur will occur only as the result of the Commission's Order.

As described below, Charter has still not, in its supplemental filing, met its burden of establishing that the number of homes that are unpassed in a particular municipality meets the particular legal requirements for trade secret status set forth in *Verizon*.

### **THE FIRST PRONG OF THE *VERIZON* TEST**

The first prong of the trade secret test set forth in *Verizon* requires a demonstration “that [1] the information is a ‘formula, pattern, device or compilation of information [2] which is used in one’s business, and [3] which gives [one] an opportunity to obtain an advantage over competitors who do not know or use it.’” (Quoting *New York Tel. v. PSC*, 56 N.Y. 2d at 219, n.3). *Verizon* 137 A.D.3d at 72.

Charter claims that the information at issue is a “compilation of information” because it consists of a wide array of information that has been combined to give insight into the

Companies' existing broadband deployment and future plans" (Supplemental Statement p.8). Charter describes the data sources that are used to generate this information and claims that this meets the criterion. However, the redacted data is not "a wide array of information;" it does not offer any information about the housing units that are unpassed, the plans, if any, of the companies, nor even any insight as to where the companies have devoted their resources; the data is merely a list of the number of unpassed housing units per municipality.

Even if we are to accept that these numbers themselves constitute a "compilation of information" under the first criterion of the first prong, Charter has failed to offer any explanation to satisfy the second criterion; that the information is used in its business. Charter does not offer any explanation or example of how it uses or plans to use the number of unpassed homes in a particular municipality "to develop short and long-term business and marketing strategies as well as prioritize and sequence plans for facilities investment." (Supplemental Statement, pps. 9-10).

Charter does not claim that it intends to market its services in areas where it already has franchises, but where it has been uneconomical to expand services to many of the homes. Even if Charter does have such plans, it does not offer any explanation as to how the mere number of unpassed homes in a particular town is or will be used to determine a marketing strategy.

Nor does Charter meet its burden with respect to the third criterion; that the information will provide a competitive advantage over competitors who are unaware of it. Although there may be other providers who offer cable television, broadband and telephone services, there is nothing to indicate that these competitors have ever had an interest in providing services in those areas of municipalities where it has not been economical for Time Warner or Charter to provide such service.

Noel Dempsey speculates that "access to this data would enable incumbent providers to better prevent competitive entry, as it would inform them of areas where TWC is actively looking to expand its footprint. Tipping off incumbent competitors gives them the opportunity to initiate marketing campaigns and otherwise locking their customers to long-term contracts to discourage TWC from entering their service areas." (Declaration ¶10).

Knowledge of the number of unserved units does not provide competitors any indication that Time Warner has any intention of expanding its footprint. The units are unpassed because Time Warner has never had any interest in expanding to them, and disclosure of the number of units does not change that fact. Nor is there any reason to assume that competitors would be incentivized to solicit long-term contracts in areas which have not been economical for any provider, simply because the competitors knew that there were unpassed units.

Furthermore, in all the municipalities at issue, it is Charter (or the former TWC) which is the incumbent provider, as evidenced by the franchise agreement. Therefore, TWC already has access to all of the relevant service areas. The municipalities have been trying to encourage the companies to expand their footprint; it has been TWC and Charter that have been unwilling to do so. There is no reason to believe, as Mr. Dempsey asserts, that other providers could, even if they wanted, exclude Charter from expanding its services in municipalities where it holds a

franchise agreement.

And, in any event, Charter's competitors are well aware that Charter may be required to offer service at no connection expense pursuant to the Merger Order. Therefore, it is hard to see why the competitors would want to expand marketing activities simply because they knew that there were numbers of unserved housing units in a particular municipality.

There is no reason to conclude that Charter's knowledge of the number of unpassed units provides any competitive advantage over its competitors in the absence of a demonstration, by Charter, that it actually has plans to develop in municipalities where such units are located, and without any evidence that competitors would obtain any benefit from the knowledge of how many such units exist.

### **THE SECOND PRONG OF THE *VERIZON* TEST**

The second prong of the *Verizon* test establishes six trade secret factors. The fourth factor, the value of the information to the business and its competitors, is of particular relevance to Charter's assertion of trade secret status in this case.

It is difficult for Requesters to argue against Charter's assertions that the information is not known outside of the business (the first factor), the extent to which the information is known by Charter's own employees (the second factor) or the extent of measures taken by Charter to guard the secrecy of the information (the third factor). Requesters have no knowledge of Charter's internal processes. We would concede that the information is not readily available and/or could only be acquired or duplicated with some difficulty (the sixth factor).

Charter argues that it spent a lot of money developing the information (the fifth factor). Charter claims that the information was derived from databases and networks that are very expensive to maintain. However, it should be noted that these databases are maintained for other reasons than the compilation of the information which is at issue in this case. Charter develops and maintains this information for its own business purposes, and would do so, even if it was not required to generate a number of unpassed homes per municipality to comply with a Commission Order.

The fourth factor, the value of the information, is the most critical. Charter conflates its alleged cost in developing the number of unpassed homes per municipality with the actual value of that information, both to Charter and to its competitors. Even if we were to accept Charter's assertions regarding the cost of developing this information, those costs were incurred as part of Charter's general business expenses. Those costs were incurred because the databases and networks have a variety of business uses, and Charter believes that maintaining such information is a good business practice, completely separate from generating a list of the number of unpassed housing units by municipality.

Because Charter maintains these databases and networks, Charter has the ability to generate the numbers of unpassed housing units in particular municipalities. That does not mean that the cost of generating the information should be deemed to include the cost of maintaining

the databases and networks. More importantly, whatever the cost of generating the number of unpassed housing units in particular municipalities, the value of that information is separate and apart from the cost of generating it.

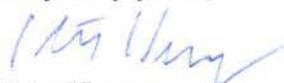
The value of the information is the extent to which it can actually be used, either by Charter or by its competitors. As noted in the discussion of the first prong of the *Verizon* test, Charter has not provided any basis for its conclusion that the mere numbers of unserved units per municipality has a particular value. Those numbers are not shown to be part of any marketing strategy of Charter, and it is not clear why they would be of any particular value to a competitor.

### CONCLUSION

Although Charter has offered a number of conclusory assertions that purport to show that it uses the number of homes per municipality in its business, it has failed to meet its burden of demonstrating how this information is actually used. Similarly, Charter has failed to offer anything besides wild speculation as to how this information provides Charter with any competitive advantage. Therefore, Charter has failed to establish that this information meets the first prong of the *Verizon* test, and for that reason alone, the information is not entitled to trade secret protection.

Even if Charter's filings are deemed to meet the first prong of the *Verizon* test, the failure to demonstrate that the information in question has actual value, either to Charter or to its competitors under the fourth criterion of the second prong of the *Verizon* test requires that trade secret status be denied.

Very truly yours,



Peter Henner

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