

**BEFORE THE
NEW YORK PUBLIC SERVICE COMMISSION**

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Joint Petition of)	
)	
CHARTER COMMUNICATIONS, INC.)	
)	
and)	Case 15-M-0388
)	
TIME WARNER CABLE INC.)	
)	
For Approval of a Transfer of Control of)	
Subsidiaries and Franchises; for Approval of)	
a Pro Forma Reorganization; for Approval of)	
Assignment of 16 Franchises; and for Approval)	
of Certain Financing Arrangements)	
_____)	

**Charter Communications, Inc. and Time Warner Cable Inc.’s Statement of Necessity
Pursuant to Public Officers Law § 89(5)(b)(2)**

April 20, 2016

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Time Warner Cable Inc.*

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**Charter Communications, Inc. and Time Warner Cable Inc.’s Statement of Necessity
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Charter Communications, Inc. (“Charter”), and Time Warner Cable Inc. (“TWC”) (collectively, “Companies”) respectfully request that the Records Access Office deny the request of Mr. Peter Henner for the release of certain information that the Companies produced in response to Department of Public Service Staff Information Requests in this case and for which the Companies sought confidential treatment under Sections 87 and 89 of the New York State Public Officer’s Law (“POL”).

The information at issue contains non-public, competitively-sensitive information and trade secrets with respect to TWC and Charter’s broadband deployment, including information regarding the number of unserved homes (also known as “not passed homes” in the telecom industry) (“Deployment Data”). As discussed below in detail, disclosure of the Deployment Data would provide an advantage to the Companies’ competitors to the detriment of the Companies, and subject the Companies to significant economic and competitive harm.

I. BACKGROUND

The Companies originally filed the Deployment Data with the Commission's Records Access Officer ("RAO") and the Broadband Program Office ("BPO") on February 18, 2016. On March 28, 2016, Mr. Henner requested an unredacted copy of this filing. On April 1, 2016, the RAO requested that the Companies file a revised redacted version of the data, which the Companies filed on April 4, 2016. In the revised redacted document, the Companies disclosed the municipality and franchise information, and redacted the approximate number of homes not passed in each franchise. On April 6, 2016, Mr. Henner responded stating that his office still sought disclosure of the Deployment Data ("Henner Letter"). On the same day, the RAO issued a two-fold letter to respond to Mr. Henner and offered an opportunity to the Companies to submit a Statement of Necessity for non-disclosure of the Deployment Data by April 20, 2016.

Accordingly, this filing reiterates the Companies' position that the number of unserved homes should be granted confidential protection because it includes trade secret and confidential commercial information relative to TWC and Charter's broadband deployment. Along with this Statement, the Companies also submit the Declarations of Noel Dempsey of TWC and James Gregory Mott of Charter.

Disclosure of the Deployment Data would provide an advantage to the Companies' competitors at a competitive loss to the Companies, and subject the Companies to significant economic and competitive harm. The Companies, therefore, respectfully submit this Statement of Necessity to demonstrate that the Deployment Data qualifies as "trade secret," and also as "confidential commercial information" exempt from disclosure under Public Officers Law ("POL") §§ 87(2)(d) and 89(5)(a)(1).

II. THE LEGAL STANDARD FOR EXEMPTION FROM DISCLOSURE

The Commission's Regulations require the Commission to deny public access to records that are "trade secrets or are maintained for the regulation of commercial enterprise which if disclosed would cause substantial injury to the competitive position of the subject enterprise."¹ The New York State Appellate Division, Third Department, recently upheld the lower court's decision in *Verizon v. Public Service Commission* that the "trade secret" and "substantial competitive injury" tests are two *separate* standards such that a party need only satisfy either test to meet the exception from disclosure under POL Sections 87 and 89.² Therefore, once it is established that a trade secret exists, the information will be exempted from disclosure without an additional showing of a "likelihood of substantial competitive injury." If, however, material is not considered to be a "trade secret," it may be exempted from disclosure under the catchall category of "confidential commercial information" if there is a "likelihood of substantial competitive injury."³ As will be discussed further below, the Companies believe the Deployment Data meets both of these tests.

i. Trade Secret

New York Courts have long followed the Restatement of Torts definition of trade secret, which states that: "A trade secret may consist of any formula, pattern, device or compilation of information which is used in [a] business, and which gives [the business] an opportunity to

¹ 16 N.Y.C.R.R 6-1.3(a)

² *Verizon New York, Inc. v. New York State Public Service Commission*, 2016 NY Slip Op 00239, 23 N.Y.S. 3d 446 (3d Dep't 2016).

³ *Id* at 448-49. ("Accordingly, we agree with Supreme Court that the plain language of Public Officers Law § 87 (2) (d) confirms that the Legislature intended to create *two separate* FOIL exemptions in the same statutory provision, one that exempts all records proven to be bona fide trade secrets, and another that requires a showing of substantial competitive injury in order to exempt from FOIL discovery all other types of confidential commercial information imparted to an agency") (*emphasis added*).

obtain and 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). The Third Department reconfirmed the trade secret test in its recent *Verizon* decision:

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”⁵ (*citations omitted*); 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;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.⁶

The six factors are non-exclusive, and not all factors must be established to prove that a trade secret exists.⁷ Specific and detailed evidence that the Deployment Data meets the trade secret definition and each of the six factors is supported by the declarations of Noel Dempsey and James Gregory Mott, as further discussed below.

⁴ Restatement of Torts § 757, comment b. *See, Ashland Mgmt v. Janien*, 82 N.Y.2d 395, 407 (1993).

⁵ *Matter of New York Tel. Co. v. New York State Public Service Commission.*, 56 N.Y.2d at 219 n 3, quoting Restatement of Torts § 757, Comment b.

⁶ *Verizon Appellate Decision*, at pp. 7-8.

⁷ 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”).

ii. Substantial Competitive Injury

Under 16 N.Y.C.R.R Section 6-1.3(b)(2), the Commission delineates factors to determine whether confidential commercial information “would be likely to cause substantial injury to the competitive position of the subject commercial enterprise.” Factors the Commission has considered in determining whether disclosure would cause substantial competitive injury include:

- (i) the extent to which the disclosure would cause unfair economic or competitive damage;
- (ii) the extent to which the information is known by others and can involve similar activities;
- (iii) the worth or value of the information to the person and the person’s competitors;
- (iv) the degree of difficulty and cost of developing the information;
- (v) the ease or difficulty associated with obtaining or duplicating the information by others without the person’s consent, and
- (vi) other statute(s) or regulations specifically excepting the information from disclosure.⁸

Specific and detailed evidence regarding how the Deployment Data meets these factors such that disclosure would be likely to cause substantial competitive injury to the position of the Companies is presented in the declarations of Noel Dempsey and James Gregory Mott, as further discussed below.

III. ARGUMENT

1. Deployment Data is Entitled to Trade Secret Status

i. Trade Secret - Definition

“A trade secret may consist of any formula, pattern, device *or compilation of information* which is used in [a] business, and which gives [the business] an *opportunity to*

⁸ 16 NYCRR § 6-1.3(b)(2); *see also* Case 11-E-0408, *Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of Orange and Rockland Utilities, Inc. for Electric Service*, Ruling Denying Trade Secret Request And Adopting Protective Order (Issued Oct. 25, 2011)

obtain and advantage over competitors who do not know or use it.”⁹ The Deployment Data includes the number of unserved homes in the TWC and Charter franchise areas in New York. The Deployment Data constitutes 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.¹⁰ The information was compiled from a number of sources and databases, including a significant analysis of TWC and Charter’s service territory maps, GIS databases, United States Census Bureau housing units data and data obtained from the National Telecommunications & Information Administration. Dempsey Declaration ¶ 5, Mott Declaration ¶ 6. Data from these individual sources, including the county, municipal type (village, town or city), specific franchise area, and the number of homes not passed, was used to calculate the total number of homes not passed for each individual franchise area, and then consolidated into one table. Therefore, the Deployment Data clearly meets the first part of the definition that the information is a “compilation of information.”

As to the second part of the Trade Secret definition, the Deployment Data gives the Companies “an opportunity to obtain advantage over competitors who do not know or use it” because the information (1) is based on internal databases and information that is not publicly known or available; and (2) provides the Companies with insight into which homes in its franchises would be prime candidates for deployment of services, marketing efforts to that extent, and overall strategic business plans to extend service, thus providing the Companies with

⁹ Restatement of Torts § 757, comment b. (*emphasis added*).

¹⁰ See *Verizon Decision* at 33 discussing the Secretary and RAO’s findings that Verizon’s cost studies were trade secrets. Note that the Commission did not undertake a detailed inquiry into whether the information could be regarded as a pattern or device. Similarly, in Case 14-M-0183, *Joint Petition of Time Warner Cable Inc. and Comcast Corporation for Approval of a Holding Company Level Transfer of Control*, Determination of Appeal, p. 3 (issued on January 9, 2015), the Commission determined that the number of passings was a compilation of information.

an advantage over competitors also seeking to expand their own service territories to acquire new customers. Dempsey Declaration ¶¶ 5 and 7, Mott Declaration ¶¶ 7 and 8.

As both of the declarations filed by the Companies discussed in detail, much of the information was developed from Companies' databases, and it would be extremely costly, complex, time-consuming and extraordinarily difficult for others to duplicate the information. Dempsey Declaration ¶ 13, Mott Declaration ¶ 13.

The Deployment Data is an important tool that the Companies use to define their short and long term business strategies and prioritize their plans for facilities investment. Dempsey Declaration ¶ 7, Mott Declaration ¶ 7. By the same token, the data has tangible financial and strategic value to the Companies' competitors. If allowed access to the data, competitors in these franchise areas will receive a tangible financial benefit, in terms of being spared the cost of independently collecting market data and information about facilities deployment. While New Charter is committed by the Commission's Merger Order to building out in these areas, it will happen over several years. A competitor's ability to have granular information regarding where there are higher concentrations of unserved customers will enable it to attempt to build out these areas prior to New Charter's doing so.

With regards to the Companies' "market position," there are numerous and varied providers located in these franchise areas, competing to serve the same customers as the Companies.¹¹ Competitors include voice, video and data providers, insofar as the Companies' networks provide each of these services. These competitors will receive valuable insight into the Companies' basis for strategic decision-making involving its future investments, facilities

¹¹ In his letter, Mr. Henner makes a bald statement that there are no competitors for the business of connecting these unserved homes. *See* Henner Letter, p. 2. This is simply not true. As stated below, competitors include voice, video and data companies. For a complete list of TWC's competitors in these franchise areas, please refer to Dempsey Declaration, Exhibit 1. For a list of Charter's competitors, please refer to Mott Declaration ¶ 8.

construction, and marketing plans. For example, competitors will market in the areas the Companies are not currently serving by promoting rate decreases, implementing new services, and proposing new contracts leveraging new products. Conversely, competitors will refrain from targeting certain areas where the Companies are competitively strong. As discussed by Mr. Dempsey, in the long term, this could result in market balkanization, as competitors could avoid the cost and risk of independent market analysis and simply pick and choose only the most ripe market opportunities. Dempsey Declaration ¶ 9. This will, in the long run, be at odds with competition in New York and will be directly in conflict with the Commission's vision for a healthy competitive telecommunications environment.

Moreover, the Commission has found that the non-disclosure of build-out information for future projects, including the number of homes to be passed or not passed in a particular area, would provide a company with competitive advantage as long as the existence of the project was not publicly known and until construction of the project began.¹² Here, the Deployment Data shows the number of homes not passed, which will become the basis for the future deployment plans and projects of the Companies, the information is not publicly known, and no projects have been made publicly available with regards to the Companies' deployment plans. Dempsey Declaration ¶ 10, Mott Declaration ¶ 11. As such, the information provides the Companies with a competitive advantage until particular build-out project are advertised to the public or once construction begins. While some individual fields of the Deployment Data might be publicly available (such as the county and franchise names), it is the *compilation* of the publicly available data combined with the number of unserved homes in each locality that elevates the data to trade

¹² See n. 10, *supra*.

secret status.¹³ “[A] trade secret can exist in a combination of characteristics and components, each of which, by itself, is in the public domain, but the unified process, design and operation of which, in unique combination, affords a competitive advantage and is a protectable secret.”¹⁴ Simply because a researcher could determine the names of the Companies’ individual franchises from discrete public sources, albeit at great effort and expense, does not mean that the information is publicly available. Therefore, even if parts of the Deployment Data are derived from public sources, it does not diminish its competitive value or the fact that the Companies use the *compiled* information to their competitive advantage.

ii. The Trade Secret Test – Factors

The Deployment Data also satisfies the rest of the “Trade Secret” factors.

1. The Deployment Data is not Publicly Available and Its Access is Limited to Employees on a Need-to-know Basis.

Only the upper management, outside consultants who developed these datasets, and limited TWC and Charter employees that have prepared and compiled the Deployment Data have access to the information. Dempsey Declaration ¶ 11, Mott Declaration ¶ 12. After compilation of the information, employees only have access on a need-to-know basis for implementation of the marketing plans or to plan time and materials for the physical deployment. This data is also not otherwise publicly available, and is not disclosed to the investment community. Dempsey Declaration ¶¶ 10, 11, 12. The Companies employ a variety of measures to restrict access to sensitive information such as the Deployment Data, including the use of password-protected shared document libraries, restring access to information by job description

¹³ *Integrated Cash Management Services, Inc. v. Digital Transactions, Inc.*, 920 F.2d 171, 174 (2d Cir. N.Y. 1990)

¹⁴ *Id.*

and category also annual training for their employees to ensure compliance with data protection practices.

2. The Compilation of the Deployment Data was a Significant Investment

Compilation of the Deployment Data was costly and complex. As Mr. Dempsey noted in his Declaration, for TWC's Deployment Data a number of databases were used to develop the information with the help of employees within the OSP Design Leadership and Market Development Departments. Data sources include information drawn from (i) internal resources, such as Companies' GIS database; and (ii) public resources, such as the United States Census Bureau housing units data and data obtained from the National Telecommunications & Information Administration. Dempsey Declaration ¶ 11. The Charter Deployment Data was compiled at Charter' direction with the assistance of a vendor, Frontier GeoTek, Inc. ("Frontier"), and incorporates information from multiple data public resources listed above and Charter's GIS data. Mott Declaration. ¶¶ 5,6.

In sum, the annual cost to procure and maintain these data assets is a significant investment for the Companies. For example, TWC has been investing in updating its GIS system that enables the Company to analyze, manage and present spatial and geographic data to drive intelligent network expansion. TWC's financial investment in this effort exceeds \$128 million dollars. Dempsey Declaration ¶ 8. Charter has also incurred expense associated with developing and maintaining the underlying non-public data upon which Frontier relied. Mott Declaration. ¶ 6. For example, creation of Charter's internal data is a multi-step process, including but not limited to, field walks, desktop surveys, field surveys and the development of special algorithms. *Id.*

3. The Deployment Data is Extremely Valuable to the Companies' Competitors

The Deployment Data is valuable to the Companies' competitors because if they were given access to this data, they would gain free information that the Companies compiled at their own cost and effort. They will also use this information to identify markets that present significant opportunities. Armed with that cost and effort-free information, the competitors could engage in "red lining" or "cherry-picking" hot spots and build their own networks only in the most lucrative and low-risk markets. Access to this data would enable incumbent providers to better prevent competitive entry, as it would inform them of areas where TWC and Charter are actively looking to expand their footprint. Dempsey Declaration ¶ 8, Mott Declaration ¶ 9.

In his letter, Mr. Henner argues that the Deployment Data does not provide detailed information regarding unserved and served homes, instead, it merely provides aggregated data which consists of a single number of units unserved within each municipality.¹⁵ This is exactly the type of information the Companies are trying to protect. If competitors were to obtain the Deployment Data, they could identify and target their resources to invest and market in areas where the Companies currently have no service and could refrain from targeting certain areas where the Companies are is competitively strong. While the Deployment Data may not contain specific street addresses, it provides valuable information about the concentrations of unserved premises in the Companies service territories.

4. Competitors Cannot Duplicate the Deployment Data without Tremendous Effort

Because the Deployment Data was developed from TWC and Charter databases, including company specific maps, GIS databases, and Census Bureau data blocks, it would be extremely costly, complex, time-consuming and extraordinarily difficult for others to duplicate

¹⁵ Henner Letter, p. 2.

the information. At best, anyone attempting to replicate this data would only be able to achieve rough estimates after expending a tremendous amount of time and money by, for instance, sending a team to walk every mile of the Companies' infrastructure. Therefore, the Deployment Data could not be properly acquired or duplicated by others. Dempsey Declaration ¶ 13, Mott Declaration ¶ 13.

iii. The Deployment Data qualifies as a Trade Secret under State and Federal Law

Both state and federal courts have recognized that strategic business information, including information used for marketing plans, can constitute a trade secret.¹⁶ The New York State Supreme Court has noted that “strategic business information has, in some cases, been held to constitute a trade secret.”¹⁷ Also, in *Lehman v. Dow Jones & Co.*, the U.S. Court of Appeals for the Second Circuit acknowledged that information regarding business opportunities qualifies as a trade secret.¹⁸ Here, the Deployment Data is used to identify business opportunities and formulate the Companies' strategic business plans for marketing to new areas and customers. Therefore, as recognized in state and federal courts, the Deployment Data should not be disclosed because it constitutes strategic business information.

iv. Deployment Data is Available For DPS Staff's Review

According to Mr. Henner, Deployment Data shall be made publicly available so that the Commission could ascertain whether the Companies are complying with the Commission's January 8, 2016 Merger Order.¹⁹ In fact, it is the Commission that is responsible to enforce its

¹⁶ See *Spinal Dimensions, Inc. v. Chepenuk*, 16 Misc. 3d 1121(A), 1121A (N.Y. Sup. Ct, Albany Co., 2007); (“[S]trategic business information has, in some cases, been held to constitute a trade secret (see *Estee Lauder Cos. v. Batra*, 430 F. Supp. 2d 158, 175 (SDNY 2006)); *PepsiCo, Inc. v. Redmond*, 54 F.3d 1262, 1268-70 (7th Cir. 1995) (discussing the valuable and sensitive nature of an employer's ‘Strategic Plan’ and ‘Annual Operating Plan’”).

¹⁷ *Spinal Dimensions, Inc. v. Chepenuk*, 16 Misc. 3d 1121(A), 1121A (N.Y. Sup. Ct, Albany Co., 2007);

¹⁸ *Lehman v. Dow Jones & Co.*, 783 F.2d 285, 298 (2d Cir. N.Y.1986).

¹⁹ Henner Letter, p. 2.

Order, not the public or Mr. Henner. The purpose of confidentially filing the Deployment Data under the FOIL exemptions is to give the Commission and the Department of Public Service Staff unfettered access to this data without the fear that the data would fall into a competitor's hands. DPS Staff and the BPO have had access to this information since February 18, 2016, and the Companies are working diligently with both the Commission and the BPO to make sure that the regulators can perform their duties seamlessly.

In sum, the Deployment Data filed by the Companies qualifies as a trade secret. The information at issue is a "compilation of information" not otherwise publicly available that was specifically derived by data manipulation conducted the Companies. The Deployment Data identifies service areas that are ripe for new development and new business opportunities. If disclosed, competitors would have free access to the same information, and unfairly exploit this information for their own benefit to the detriment and at the economic expense of the Companies.

2. Substantial Competitive Injury would Result From Public Disclosure of the Deployment Data

The Deployment Data also meets the alternative "substantial competitive injury" test. It should be noted that many of the factors used to meet the "substantial competitive injury" test in the Commission's regulations overlap with the "trade secret" factors discussed above.²⁰ As such, evidence that supports that the Deployment Data qualifies as a trade secret also supports that the substantial competitive injury test is met. As discussed previously, the Deployment Data is (a) kept strictly confidential and thus would not be known by others; (b) the information was developed by TWC and Charter at significant expense and would be extremely difficult for

²⁰ See 16 NYCRR § 6-1.3(b)(2).

competitors to independently develop; and (c) disclosure of the information to competitors would cause competitive damage to the Companies. *See* Dempsey Declaration and Mott Declaration.

The declarations of Noel Dempsey and James Gregory Mott provide specific evidence that these factors are met. Therefore, disclosure of the information would cause substantial injury to the competitive position of the Companies, such that the Deployment Data must be exempted from disclosure as confidential commercial information that would be likely to cause substantial competitive injury if released.

IV. CONCLUSION

For the reasons set forth above, the Companies have demonstrated that the Deployment Data satisfies both the trade secret test and the substantial competitive injury test. The information at issue must, therefore, be exempted from public disclosure and the Records Access Officer should reject Mr. Henner's request.

Respectfully submitted,

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