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***Re: Case 16-C-0122 – Request for Confidential Treatment Pursuant to State
Freedom of Information Law***

Dear Ms. Giliberto:

Verizon New York Inc. (“Verizon”) respectfully requests that the Department of Public Service and the Public Service Commission treat the accompanying documents as trade secrets and confidential commercial information within the meaning of the State Freedom of Information Law (“FOIL”), N.Y. Publ. Off. L. Article 6, and the Department’s regulations implementing FOIL. The documents consist of the confidential version of Verizon’s initial testimony on service quality issues in Case 16-C-0122 (two pages of which contain confidential information), and Confidential Exhibit K to that testimony. Redacted copies of the documents are being submitted today to Hon. Sean Mullany, the Presiding Officer for this proceeding, and filed with the Secretary’s Office.

STANDARD FOR CONFIDENTIAL TREATMENT

Section 87(2)(d) of the Public Officers Law authorizes state agencies to deny access to records that either “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 section thus provides two alternative bases for exempting a document from disclosure: the fact that it includes trade secrets *or* the fact that it includes confidential commercial information.¹ Further, Publ. Off. L. § 89(5)(a), not only authorizes but *requires* agencies to “except[] from disclosure” any information submitted pursuant to a claim of confidential treatment under § 87(d)(2) “until fifteen days after the entitlement to such exception has been finally determined.”

The state courts have clarified the standards applicable to the two branches of the § 87(2)(d) test.

Trade Secrets. The State Supreme Court has held that “[a]lthough the term ‘trade secret’ is not defined under FOIL, ‘courts applying New York law generally follow Section 757 of the Restatement of Torts in determining whether information is entitled to protection as a trade secret’ The Restatement defines a trade secret as any formula, pattern, device or compilation of information which is used in one’s business, and which gives him *an opportunity to obtain an advantage over competitors who do not know or use it* (Restatement [First] of Torts § 757, Comment b) (emphasis added).”² The court also noted that “[i]mportantly, the Restatement does not require that the advantage be ‘substantial.’”³

¹ See *Verizon v. Publ. Serv. Comm’n*, 46 Misc. 3d 858, 874, 991 N.Y.S.2d 841, 855 (N.Y. Sup. Ct. 2014), *aff’d*, 137 A.D.3d 66, 23 N.Y.S.3d 446 (3d Dep’t 2016) (“Once a document has been found to be a trade secret under Public Officers Law § 87 (2) (d), the analysis ends [citing cases] These cases appear, to this Court, to be consistent with the legislative intent of the amendment and with the legislative policy that trade secrets, by their very nature, should be protected from disclosure”). See also *id.*, 46 Misc. 2d at 868, 991 N.Y.S.2d at 851.

² *Verizon v. Publ. Serv. Comm’n*, *supra*, 46 Misc. 2d at 872, 991 N.Y.S.2d at 853-54.

³ *Id.*, 46 Misc. 2d at 873, 991 N.Y.S.2d at 854. See also 46 Misc. 2d at 876-77, 991 N.Y.S.2d at 856-57. The Restatement identifies a number of factors that may be relevant to a determination of trade-secret status: “(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

(continued . . .)

Confidential Commercial Information. The controlling precedent on the scope of the separate “confidential commercial information” prong of § 87(2)(d) is the 1995 decision of the State Court of Appeals in *Encore College Bookstores v. Auxiliary Service Corp.*⁴ The Court of Appeals noted in *Encore* that the exemption was intended to track the parallel exemption in the federal Freedom of Information Act (“FOIA”), and that “whether ‘substantial competitive harm’ exists for purposes of FOIA’s exemption for commercial information turns on the commercial value of the requested information to competitors and the cost of acquiring it through other means.” The *Encore* court also quoted with approval federal precedent holding that:

Because competition in business turns on the relative costs and opportunities faced by members of the same industry, there is a potential windfall for competitors to whom valuable information is released under FOIA. If those competitors are charged only the minimal FOIA retrieval costs for the information, rather than the considerable costs of private reproduction, they may be getting quite a bargain. Such bargains could easily have competitive consequences not contemplated as part of FOIA’s principal aim of promoting openness in government.

The reasoning underlying these considerations is consistent with the policy behind [Public Officers Law § 87(2)(d)] — to protect businesses from the deleterious consequences of disclosing confidential commercial information, so as to further the State’s economic development efforts and attract business to New York⁵

Applying this standard to the document at issue in the case (a list compiled by Barnes & Noble, identifying the textbooks that professors at a branch of the State University planned to use for their courses, which a competing bookstore operator sought to obtain under FOIL), the Court

(. . . continued)

expended by him in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.”

⁴ 87 N.Y.2d 410, 663 N.E.2d 302, 639 N.Y.S.2d 990.

⁵ *Id.*, 87 N.Y.2d at 420, 663 N.E.2d at 307, 639 N.Y.S.2d at 995, *quoting Worthington Compressors, Inc. v. Costle*, 662 F.2d 45, 51 (D.C. Cir. 1981).

concluded that “the booklist has obvious commercial value to Encore [the competitor] since it would enable Encore to offer the precise inventory that its target clientele . . . is required to purchase The *potential* damage to Barnes & Noble as a result is the loss of student customers to its competitor and a corresponding loss of profits.” (Emphasis supplied.) The Court went on to note that “[t]he likelihood of harm to Barnes & Noble is enhanced by the economic windfall conferred upon Encore were it to receive the booklist at the mere cost of FOIL fees. . . . Disclosure through FOIL . . . would enable Encore to obtain the requisite information without expending its resources, thereby reducing its cost of business and placing Barnes & Noble at a competitive disadvantage.”⁶

Thus, under *Encore*, the windfall resulting from the free disclosure of competitively valuable information to a submitting party’s competitors is *itself* a “substantial competitive harm” sustained by the submitting party, or at a minimum gives rise to a clear likelihood of such harm. The Court specifically rejected the contention that actual consequential harm beyond that free-ride need be shown.⁷

APPLICATION OF THE STANDARD

The accompanying documents consist of: (a) Table 1 of Verizon’s testimony, which lists the company’s adjusted net income for the years 2008-2015,⁸ (b) data on trouble report rates and

⁶ 87 N.Y.2d at 421, 663 N.E.2d at 308, 639 N.Y.S.2d at 996.

⁷ *See id.* at 421 (“ASC was not required to establish actual competitive harm to Barnes & Noble. Rather, ‘[a]ctual competition and the likelihood of substantial competitive injury is all that need be shown’ . . .”).

⁸ Although Verizon publicly reports its net income in annual financial reports that it files with the Commission, the information in the table has been adjusted to incorporate, among other things, actuarial gains/losses and actual returns on the plans that finance Verizon’s pensions and other post-employment benefits. Information on those gains, losses, and returns could be derived from the adjusted net income figures together with publicly-available financial data.

repair-time metrics for customers served on Verizon's copper network,⁹ and (c) an exhibit showing investments and expenses related to Verizon's copper network, by year for the period 2004 – 2015.

For the following reasons, both the criteria for trade secrets and those for confidential commercial information under § 87(2)(d) are satisfied by this information.

1. As the Commission has frequently recognized, Verizon offers the voice services at issue in this proceeding in highly competitive markets in which it faces robust competition from other providers offering conventional landline service, as well as from “intermodal” providers utilizing alternative technologies such as VoIP and wireless. Verizon competes fiercely with such providers based on the price, functionality, brand reputation, and customer service it can offer.

2. The information in the accompanying documents is not publicly disclosed by Verizon, and would not be available to Verizon's competitors except through disclosure under FOIL. Any attempt to estimate or replicate the data would require burdensome and expensive surveys or analyses, and in any event would not provide data as accurate as what is available from the accompanying documents.

3. Verizon's competitors do not make comparable information available to the public or to Verizon.

4. The information in the documents has significant competitive value.

The adjusted net income data can be used to determine actuarial gains/losses and returns on assets in Verizon benefit plans. This is material financial information that Verizon does not

⁹ Although Verizon publicly reports similar metrics on an aggregate basis, it does not report data separately for customers served by copper facilities.

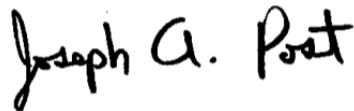
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disclose publicly, and it could be used by competitors to assess aspects of Verizon's financial strengths and weaknesses. Data on service quality metrics can be used by Verizon's competitors and others as a basis for disparaging the company and attempting to persuade its customers to switch providers. Investment and expense data for the copper network provides information on Verizon's cost structure and would thus provide a useful input to competitors setting prices for their own products. Indeed, information very similar to the service quality and network cost information at issue here was held to be protected in a recent determination by the Secretary.¹⁰

* * *

For these reasons, disclosure of the information in the documents would give competitors an opportunity to obtain a competitive advantage over Verizon and would cause substantial injury to Verizon's competitive position. The documents therefore satisfy the exemptions from disclosure in both Publ. Off. L. § 87(2)(d) and *id.* § 87(2)(b).

Respectfully submitted,

A handwritten signature in black ink that reads "Joseph A. Post". The signature is written in a cursive, slightly stylized font.

Joseph A. Post

cc (without attachments):
Hon. Sean Mullany
Secretary's Office
Party List

¹⁰ Case 14-C-0370, "Determination of Appeal of Trade Secret Determination" (issued March 23, 2016).