

APPENDIX A

- **Charter Communications, Inc. and Time Warner Cable, Inc.’s Statement of Necessity, dated April 20, 2016**
 - **Declaration of James Gregory Mott in Support of the April 20, 2016 Statement of Necessity**
 - **Declaration of Noel Dempsey in Support of the April 20, 2016 Statement of Necessity**
- **Determination of the Records Access Officer 16-02, dated May 4, 2016**
- **Charter Response in Opposition to Mr. Henner’s Appeal of the Record Access Officer’s Determination 16-02.**

**BEFORE THE
NEW YORK PUBLIC SERVICE COMMISSION**

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Joint Petition of)	
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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,

/s/ *Maureen O. Helmer*

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DECLARATION OF JAMES GREGORY MOTT

1. My name is James Gregory Mott, and I am the Vice President of Field Operations Engineering for Charter Communications, Inc. (“Charter”). My business address is 6399 South Fiddlers Green Circle, Greenwood Village, Colorado 80111. I am responsible for design, construction, and maintenance of Charter’s approximately 210,000 miles of plant, including Charter’s New York State systems. I have held this position since November 30, 2015. I hold a B.A. in geology from The Colorado College, and a Master of Science in Engineering from the University of Michigan, Ann Arbor.

2. I have more than 18 years of experience in the cable industry, and prior to my current position I was Vice President of Field Engineering for Charter’s Northeast Region and had responsibility for approximately 35,000 miles of plant in that region. Prior to joining Charter, I was Senior Vice President of ISP, Construction, and Critical Systems at Cablevision Systems Corporation in Bethpage, New York, where I was also responsible for plant design and construction. Previously I served as Area Director of Technical Operation and Engineering at

Comcast Cable Communications, Inc. in Millersville, Maryland, where I was responsible for all technical operations.

3. I submit this Declaration in connection with the Statement of Necessity submitted in the above-referenced proceeding with regards to the request for confidential treatment of the broadband deployment information (“Deployment Data”) submitted on behalf of Charter and Time Warner Cable Inc. (“TWC”). This declaration addresses the Deployment Data for Charter only.

4. The Charter Deployment Data contains an estimate of the number of homes not served, or not “passed,” by Charter’s broadband-enabled network in each municipality in New York served by Charter’s Plattsburgh System. I have been advised that, on February 18, 2016, the Deployment Data was submitted to the New York Public Service Commission (“Commission”) and the Broadband Program Office with much of the information redacted. Subsequently, on April 8, 2016, Charter and TWC submitted the Deployment Data in a manner that made public all of the information in the document with the exception of the detailed number of homes not passed, the information at issue here.

5. The purpose of this Declaration is to explain how the Charter Deployment Data is of substantial competitive value, and how public disclosure of the information would give unfair advantage to competitors to the detriment of Charter. The Charter Deployment Data was compiled at Charter’s direction with the assistance of a vendor, Frontier GeoTek, Inc. (“Frontier”), and incorporates information from multiple data sources and geographic information systems (“GIS”).

6. I am informed and believe that in preparing the Charter Deployment Data, Frontier drew from data sources including (i) Charter’s internal resources, such as its GIS

database; and (ii) public resources, such as the United States Census Bureau housing unit data and data obtained from the National Telecommunications & Information Administration. Preparation of the Deployment Data required both effort and expense, as Frontier had to evaluate the boundaries of Charter's franchise areas as compared to its deployed network plant, mapping Census Bureau data blocks, and evaluating other data inputs necessary to ultimately derive the estimated number of unserved housing units in Charter's current Plattsburgh System franchise footprint. Charter also incurs expense associated with developing and maintaining the underlying non-public data upon which Frontier relied. 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.

7. The Deployment Data results from Charter's detailed analysis of its existing and potential service territories and is an important tool that Charter will use to define its short and long term business strategy and prioritize its plans for facilities investment in the near future. As such, the Deployment Data has tangible value, in terms of the financial and operational investment Charter has made to create the data and the competitive and strategic insight that the data provides to Charter.

8. Perhaps even more importantly, the Deployment Data has tangible financial and strategic value to Charter's competitors. There are a number of other providers in Charter's Plattsburgh service area that compete with Charter for voice, broadband, and video customers. The two major satellite video providers (Dish and DirecTV) provide near ubiquitous service throughout the area. The four major wireless carriers (Verizon, AT&T, T-Mobile, and Sprint), and resellers operating on their networks, also offer competitive voice and broadband services throughout most of the area. Incumbent local exchange carriers (and, in the enterprise market,

competitive local exchange carriers) compete with Charter for wireline and broadband customers. This means that Charter is in constant competition with numerous other providers across all of its lines of service.

9. If allowed access to the data, Charter's competitors would receive a tangible financial benefit, gaining insight into where Charter does and does not currently offer broadband service. The Deployment Data, if made public, would give Charter's competitors a road map to develop strategic business plans for future deployment, including sequencing of construction for the most efficient use of manpower, resources, and money, and to target specific geographic areas for marketing strategies. Competitors could—and given the opportunity would—identify and target their resources to invest and market in areas where Charter is competitively vulnerable or conversely, refrain from targeting certain areas where Charter is competitively strong.

10. Charter's competitors would also benefit by avoiding the significant cost of independently collecting data and information about Charter's deployment of facilities. Competitors could avoid the cost and risk of independent market analysis and simply focus on the easiest market opportunities.

11. The Deployment Data is also not publicly available and it is not disclosed to the investment community. While Charter does provide investors high-level data concerning the aggregate number of homes passed by its network, that data is not specific to a particular system or municipality, and reflects the number of new residential passings and new commercial buildings only after the conclusion of construction.

12. Charter ensures that the Deployment Data is made available within the company only to those who need to access the data to perform their job functions. Only Charter management who are involved in the strategic planning and high-level business decisions have

access to the Deployment Data. To the extent Charter relies on an outside vendor (Frontier) to assist with preparing the Deployment Data, I am informed that Charter's contract with Frontier contains comprehensive terms ensuring that Charter's confidential, proprietary, and trade secret information is handled properly and not disclosed to third parties.

13. Because preparation of the Deployment Data requires access to information available only to Charter or Frontier, it would be costly, complex, time-consuming, and extraordinarily difficult for others to duplicate the Deployment Data. Even to replicate rough estimates of the Deployment Data, a third party would have to expend a tremendous amount of time and money by, for instance, performing a complete visual assessment of every mile of outside plant deployed in the Plattsburgh System. The third party would then have to develop a methodology for matching Charter's defined franchise areas to U.S. Census data and then calculating the number of unserved homes based on all of this information.

14. Disclosure of the Deployment Data will harm Charter if it is made public because (a) it will allow competitors to benefit from Charter's own costly efforts to develop data, thus reducing the competitors' costs as compared with Charter's; and (b) it will provide a road map on how to compete against Charter more effectively. In either case, the result will be competitive harm to Charter in terms of lost customers, lost revenues, lost investments, and lost future business opportunity.

I declare under penalty of perjury that the foregoing is true and correct to the best of my information and belief.



James Gregory Mott

April 20, 2016

**BEFORE THE
NEW YORK PUBLIC SERVICE COMMISSION**

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)	
)	

DECLARATION OF NOEL DEMPSEY

1. My name is Noel Dempsey, and I am the Group Vice President in the Department of Network Expansion and Outside Plant Design at Time Warner Cable Inc. (“TWC” or the “Company”). I have held this position since April 2013, and my responsibilities include outside plant expansion, construction, activation and design for residential and commercial services. I have more than twenty years of experience in the cable industry and I have held positions in the Regional Engineering Operations and Regional Network Engineering departments at TWC prior to my recent position.

2. I submit this Declaration in connection with the Statement of Necessity submitted in the above referenced proceeding with regards to the request for confidential treatment of the broadband deployment information (“Deployment Data”), as submitted on behalf of TWC and Charter Communications (“Charter”). My declarations are limited to the Deployment Data for TWC only.

3. I have been advised that, on February 18, 2016, the Deployment Data was previously submitted to the Commission and the Broadband Program Office with much of the information redacted, and that the subsequent April 8, 2016 submission released all information with the exception of the detailed number of homes not passed, the information at issue here. The TWC Deployment Data contains the number of homes not served, or not “passed,” by TWC in each municipality in New York by franchise.

4. The purpose of this Declaration is to explain how the TWC Deployment Data is of substantial competitive value to TWC, and how public disclosure of the information would give unfair advantage TWC’s competitors to the detriment of TWC.

5. The TWC Deployment Data was compiled by TWC through a process that incorporates information from multiple data sources and geographic information systems (“GIS”). Pursuant to this process, TWC combines internal data and data from publicly available sources to create a proprietary data resource that it uses to analyze potential opportunities, such as potential residential and commercial passings, and to evaluate and plan strategic and speculative builds that may correspond to a significant residential, commercial or combined revenue opportunity. Data sources include information drawn from (i) TWC’s internal resources, such as TWC’s 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 (“NTIA”) that TWC acquires, combines and analyzes at its own expense for its own purposes. TWC has invested significant financial and employee resources to procure this data and continues to incur costs to maintain these data assets. The creation of TWC’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. The Deployment Data that was sent to the

Commission includes the output of an analysis conducted by a team of GIS engineers and TWC's internal and consulting data analysts. This effort required mapping of the Census Bureau housing units data blocks, NTIA broadband provider service level data blocks to TWC's proprietary GIS service area environment and other data inputs necessary to ultimately derive the number of unserved housing units in TWC's current franchise footprint outside of New York City.

6. The Deployment Data results from TWC's detailed analysis of existing and potential service territories and is an important tool that the Company may use to define its short and long term business strategy and prioritize its plans for facilities investment. As such, the Deployment Data has tangible value, in terms of the financial and operational investment TWC has made to create the data and the competitive and strategic insight that the data provides to TWC.

7. While the Deployment Data represents homes that are not yet served by TWC, there are other providers in these areas with which TWC faces fierce competition.¹ With the near ubiquitous availability of Satellite, wireless providers, competitive service providers and incumbent carriers, TWC is in constant competition with numerous other providers. As such, the data has tangible financial and strategic value to TWC's competitors. If allowed access to the data, TWC's competitors would receive a tangible financial benefit, in terms of being spared the cost of independently collecting market data and information about facilities deployment. TWC's competitors would also receive competitively valuable insight into TWC's basis for strategic decision-making involving the Company's future investments, facilities construction

¹ For a complete list of the TWC's competitors in the franchise areas outside of New York City, please refer to Dempsey Declaration, Exhibit 1.

and marketing plans. Clearly, if the situation were reversed, TWC's competitors would be loath to release such information to TWC and other competitors.

8. For the past 10 years, TWC has been investing in updating its plant records to ensure that they are spatially accurate and consolidated into a single 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. If given access to these data, TWC's competitors would gain a significant unfair advantage, not only because they would gain free information that TWC compiled at its own cost and effort, but also because they could use that information to identify markets that present significant opportunities with little or no competition. Armed with this cost and effort-free information, TWC's 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. Additionally, 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 lock in their customers to long term contracts to discourage TWC from entering their service areas. This could materially change the penetration rate assumptions on the Company's build plan if the potential customers were all locked into contracts.

9. TWC also uses the Deployment Data to develop strategic business plans for future deployment, including sequencing of deployment for the most efficient use of manpower, resources, and money, and to target specific geographic areas for marketing strategies. If competitors were to obtain TWC's Deployment Data, they could identify and target their resources to invest and market in areas where TWC is competitively vulnerable or conversely,

refrain from targeting certain areas where TWC is competitively strong. In the long term, this will 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. Moreover, TWC's competitors could use the Deployment Data to gauge the success of TWC's market penetration such that competitors would use that information to develop competitive strategies or in negative marketing campaigns.

10. The Deployment Data is also not publicly available, and is not disclosed to the investment community. TWC's passings data and deployment plans are provided to the investment community only after the conclusion of construction.

11. Within TWC, only TWC employees and vendors who have prepared and compiled the information and only TWC management who are involved in strategic planning and high-level business decisions have access to the Deployment Data. In fact, these data sets in their uncompiled formats are available only to certain teams within TWC. These data sets in their compiled forms are available only to market development and network expansion designers. Otherwise, data sets are compiled only for specific reasons, for example, in this instance, to respond to a Commission request. Compilation of the information was a costly and complex endeavor. As mentioned above, a number of database and information resources are used to develop the information, not to mention the combined efforts of a variety of TWC organizations and outside contractors.

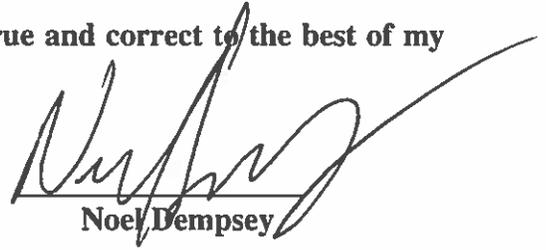
12. After compilation of the information, employees only have access on a need-to-know basis for strategic, facilities and network planning and development and implementation of marketing plans. TWC takes the protection of the Deployment Data very seriously and, in fact, employs a variety of measures to restrict access to sensitive and confidential information,

including the use of password-protected shared document libraries, restring access to information by job description and category also by requiring all employees to participate in annual training to ensure compliance with data protection practices.

13. Because much of the information was developed from TWC databases, it would be extremely costly, complex, time-consuming and extraordinarily difficult for others to duplicate the information. At best, anyone attempting to replicate the Deployment Data would only be able to achieve rough estimates without expending a tremendous amount of time and money by, for instance, going door-to-door to query individual homes.

14. In sum, in my judgment, disclosure of the Deployment Data will harm TWC as (a) it will allow competitors to benefit from TWC's own costly efforts to develop data, thus reducing the competitors' costs as compared with TWC's; and (b) it will provide guidance on how to compete against TWC more effectively. In either case, the result will be competitive harm to TWC in terms of lost customers, lost revenues, and lost investments.

I declare under penalty of perjury that the foregoing is true and correct to the best of my information and belief.



Noel Dempsey

April 20, 2016

DEMPSEY DECLARATION - EXHIBIT 1

ALTERNATIVE PROVIDERS IN TWC FRANCHISE AREAS OUTSIDE OF NYC

Adams CATV Inc.
Deposit Telephone Company, Inc.
Alteva Hometown, Inc.
Frontier Communications Corporation
Armstrong Telephone Co of New York
Atlantic Broadband (Penn), LLC
Berkshire Cable Corp.
Berkshire Telephone Company
Cablevision Lightpath, Inc.
Cogent Communications Group
Level 3 Communications, LLC
Light Tower Fiber LLC
Verizon New York Inc.
Cassadaga Telephone Corporation
Castle Cable TV, Inc.
Champlain Telephone Company
Charter Communications Inc.
Chautauqua & Erie Telephone Corporation
Chazy & Westport Telephone Corporation
Citizens Telephone Company of Hammond, NY
Comcast of New York, LLC
Crown Point Network Technologies, Inc.
CSC Holdings, Inc.
Delhi Telephone Company
MTC Cable
Delhi Telephone Company
DFT Local Service Corporation
Dunkirk and Fredonia Telephone Company
Edwards Telephone Company, Inc.
Empire Long Distance Corporation
Empire Telephone Corp.
Fiber Technologies Networks, L.L.C.
Finger Lakes Technologies Group
Haefele TV Inc.
Keene Valley Video, Inc.
Mid-Hudson Cablevision, Inc.
Margaretville Telephone Co Inc
MegaPath Corporation
MTC Cable
Newport Telephone Company, Inc.
Nicholville Telephone Company, Inc.

Slic Network Solutions, Inc.
Northland Networks
Oneida County Rural Telephone Co.
Ontario Telephone Company Inc.
Oriskany Falls Telephone Corp
Pattersonville Telephone Company
Port Byron Telephone Company
Primelink, Inc.
Slic Network Solutions, Inc.
Southern Cayuga County Cablevision, LLC
State Telephone Company, Inc.
Taconic Telephone Corporation
The Middleburgh Telephone Co
Township Telephone Company, Inc.
Trumansburg Telephone Company, Inc.
Westelcom Network
Vernon Telephone Company, Inc.
Windstream Corporation



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May 4, 2016

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

**DETERMINATION OF THE
RECORDS ACCESS OFFICER 16-02**

This letter is a Determination of the Department of Public Service (DPS) Records Access Officer (RAO) under Public Officers Law (POL) §89(5)(b)(3). It determines that certain information for which Charter Communications (Charter) and Time Warner Cable (TWC) (collectively, the Companies) have requested confidential treatment under POL §87(2)(d) and Commission regulations 16 NYCRR §6-1.3, is entitled to an exception from disclosure as trade secrets or confidential commercial information under the Freedom of Information Law (FOIL).¹

BACKGROUND

On March 28, 2016, Mr. Peter Henner, on behalf of his clients,² sought access to the un-redacted broadband franchise information filed by Time Warner Cable and Charter Communications (the Companies) in PSC Case 15-M-0388 on February 18 or 19, 2016.

¹ N.Y. Public Officers Law Article 6.

² Alliance for Environmental Renewal, New Scotland Town Supervisor Douglas LaGrange, Nancy Lawson, Douglas Bullock, Jim and Lynn Cable, Priscilla and Robert Hannan, Jr.

On February 18, 2016, in response to the Commission's Order, specifically, Appendix A, pages 1 – 3, the Companies submitted broadband franchise information showing unserved and underserved areas. The TWC and Charter sought trade secret and confidential commercial information protection from disclosure of the aforementioned information arguing that it would provide an advantage to the Companies competitors and a competitive loss to the Companies and subject them to significant economic and competitive harm. The information in the documents, which included headers for the county, municipality type, franchise, and homes not passed, was otherwise redacted from public view except for the company name and headings. While blanket redactions are unacceptable,³ DPS is required to provide trade secret protection from disclosure when requested⁴ and does not normally make a determination on the trade secret statute until a third party makes such a request.⁵

Following receipt of Mr. Henner's FOIL request, the RAO issued a letter to Mr. Henner and the TWC and Charter' attorneys advising them of Mr. Henner's request and advising them that the Companies were being provided with an opportunity to "re-submit redacted documents with only those redactions necessary to support their request for confidential treatment."⁶ It was noted that justification must be provided for those redactions, and that, thereafter, if Mr. Henner and his clients find this submission unresponsive to their March 28, 2016 request, the RAO would proceed with a Determination in accordance with POL §89(5).

On April 5, 2016, the Companies filed a revised redacted version of the aforementioned documents with the Secretary to the Commission. The redacted information was limited to the "homes not passed" category. The Companies continued "to request confidential treatment for this information because it allegedly includes trade secret and confidential commercial information relative to TWC's and Charter's deployment of broadband including granular information regarding the number of unpassed homes."⁷

On April 6, 2016, Mr. Henner sent a letter to the RAO noting that the Companies' latest submission was not responsive to his FOIL request. "The crucial information in the document that has been filed is the number of unserved housing units in each municipality.

³ See Gould v. New York City Police Department, 87 N.Y.2d 67 (1996), Matter of Hanig v. State of New York Dept. of Motor Vehicles, 79 N.Y.2d 106, 109 (1992); and Matter of Fink v. Lefkowitz, 47 N.Y.2d, 567, 571 (1979).

⁴ Matter of New York Telephone Company v. Public Service Commission of the State of New York, 56 N.Y.2d 213 (1982).

⁵ See POL §89(5)(a)(3).

⁶ See Case 15-M-0388 – Joint Petition of Charter Communications and Time Warner Cable for Approval of a Transfer of Control of Subsidiaries and Franchises, Pro Forma Reorganization, and Certain Financing Arrangements. Copy of the un-redacted broadband franchise information filed by Time Warner Cable and Charter Communications February 18 or 19, 2016. Letter to parties dated April 1, 2016.

⁷ See Case 15-M-0388 – Revised Redacted Documents and letter to RAO dated April 5, 2016.

Since the Companies are still redacting this information and claiming “trade secret” protection for it, their new submission is “unresponsive” and it will be necessary for you to make a Determination with respect to their claim.”⁸

On April 6, 2016, the RAO sent another letter to the parties, advising them of the Department’s intention to make a Determination pursuant to POL §89(5)(b)(3) regarding the Companies’ requests for protection from disclosure as outlined above. The Companies were given ten business days in accordance with the statute to submit a written Statement of the Necessity for such exception from disclosure pursuant to POL §89(5)(b)(2) to the RAO.

On April 8, 2016, TWC and Charter filed their confidential copy with the RAO along with justification as required for protection from disclosure under the statute. According to the cover letter submitted by the Companies, the un-redacted version of this information was also submitted to the Governor’s Broadband Program Office (BPO).

On April 20, the Companies filed a Statement of Necessity for non-disclosure of the deployment data. Along with the Statement, TWC and Charter also submitted Declarations of Noel Dempsey⁹ of TWC¹⁰ and James Gregory Mott¹¹ of Charter.

STATEMENT OF NECESSITY

Charter Communications and Time Warner Cable

The Companies respectfully request that the RAO deny the Henner request for release of certain information that the Companies produced in response to DPS Staff Information Requests (IRs) in this case and for which the Companies sought confidential treatment under POL §§87(2)(d) and 89(5)(a)(1) and the Commission’s regulations.¹²

According to the Companies, 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 in certain municipalities in which TWC and Charter provide service - also known as “not passed

⁸ See Case 15-M-0388 – FOIL Request: Time Warner Cable – Charter Communications Broadband Franchise Information Letter to RAO from Mr. Henner, dated April 6, 2016.

⁹ Noel Dempsey is the Group Vice President in the Department of Network Expansion and Outside Plant Design at TWC, and has been since April 2013.

¹⁰ Including a complete list of TWC’s competitors in the franchise areas outside of NYC.

¹¹ James Gregory Mott is Vice President of Field Operations Engineering for Charter and is responsible for design, construction, and maintenance of Charter’s approximately 210,000 miles of plant, including its NYS systems. With more than 18 years of experience in the industry, he was Vice President of Field Engineering for Charter’s Northeast Region, responsible for 35,000 miles of plant.

¹² 16 N.Y.C.R.R 6-1.3(a)

homes” or Deployment Data. They contend that disclosure of the Deployment Data would provide an advantage to the Companies’ competitors to the detriment of TWC and Charter, and subject the Companies to significant economic and competitive harm.

With regard to the Deployment Data containing trade secrets, they cite that the Commission’s regulations require it to deny public access to records that are “trade secret or are derived from . . . maintained for the regulation of commercial enterprise which if disclosed would cause substantial injury to the competitive position of the subject enterprise.”¹³ The Companies also point out the New York Courts’ adherence to 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 obtain an advantage over competitors who do not know or use it.”¹⁴

Under the initial definition of trade secret, the Companies claim that the Deployment Data includes the number of unserved homes in the TWC and Charter franchise areas in New York, and as such constitutes a “compilation of information” under the trade secret definition 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.¹⁵ 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, U.S. Census Bureau housing unit data and data obtained from the National Telecommunications & Information Administration.¹⁶ According to the Companies, data from these individual sources, including the county, municipal type, 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. As a result, the Companies maintain, the Deployment Data meets the definition that the information is a “compilation of information.”

As to the trade secret factors, TWC and Charter state that the Deployment Data is based on internal databases and information that is not publicly known or available; and provides the Companies with insight into which homes in their franchise territories 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 an advantage over competitors also seeking to expand their own service territories to acquire new customers.¹⁷

¹³ Id.

¹⁴ Restatement of Torts § 757, comment b. See, Ashland Management v. Janien, 82 N.Y.2d 395, 407 (1993). See also 16 N.Y.C.R.R. § 6-1.3(a).

¹⁵ See Verizon Decision at 33 discussing the Secretary and RAO’s findings that Verizon’s cost studies were trade secrets.

¹⁶ See Dempsey at ¶ 5; Mott at ¶ 6.

¹⁷ Id. at ¶¶ 5 and 7; Id. ¶¶ 7 and 8.

There are numerous providers in these franchise areas, competing to provide the same services to the same customers as the Companies¹⁸ including telephone, satellite, and other cable providers. According to the Companies, these competitors would receive valuable insight into the Companies' basis for strategic decision-making involving their future investments, facilities construction, and marketing plans. TWC and Charter provide the example that 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 noted in the Dempsey Declaration, this could result in market fragmentation, as competitors could avoid the cost and risk of independent market analysis and simply pick and choose only the most ripe market opportunities.¹⁹ They reason this result would be at odds with the Commission's vision for a healthy competitive telecommunications environment.

Here, the Deployment Data shows the number of homes not passed, which will become the basis for the future deployment plans and projects of TWC and Charter. This information is not publicly known, and no project plans are publicly available..²⁰ As such, the information provides the Companies with a competitive advantage until particular build-out projects are advertised to the public or once construction begins.

The Companies also aver that 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 at issue.²¹ 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, is not disclosed to the investment community, and is closely guarded internally.²²

As to the compilation of the Deployment Data representing a significant investment, the Dempsey declaration notes that the exercise was costly and complex as a number of TWC's databases were used to develop the information with the help of employees within the OSP Design Leadership and Market Development Departments. Many of these arguments mirror

¹⁸ 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 at ¶ 8.

¹⁹ Dempsey at ¶ 9.

²⁰ Dempsey at ¶ 10; Mott at ¶ 11.

²¹ Id. ¶ 11, Id. ¶ 12.

²² Id. at ¶¶ 10, 11, 12.

those in earlier statements of Dempsey and Mott.²³ TWC estimates its financial investment in these sources exceeds \$128 million.²⁴ Charter has also incurred expense associated with developing and maintaining the underlying non-public data upon which Time Warner relied.²⁵

TWC and Charter further argue that the Deployment Data is extremely valuable to competitors, especially incumbent providers because if they were given access to this data, they could use it to identify markets that present significant new business opportunities. Armed with that cost and effort-free information, the competitors could 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.²⁶ Conversely, armed with that cost and effort-free information, new competitors could avoid building their own networks in all but the most lucrative and low-risk markets, reducing consumer choice for communications services.

The Companies profess that competitors cannot duplicate the Deployment Data without tremendous effort because this information was developed from TWC and Charter databases, including company specific maps, GIS databases, and Census Bureau data blocks. As such, it would be extremely costly, complex, time-consuming and extraordinarily difficult for others to duplicate 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 TWC's and Charter's infrastructure. Therefore, the Deployment Data could not be properly acquired or duplicated by others.²⁷

TWC and Charter also note that in Verizon v. PSC,²⁸ the Third Department recognized a second component: where disclosure could subject a company to significant economic and competitive harm, it must be protected from disclosure. The Companies assert that the Deployment Data also meets this test and 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.²⁹ 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 kept strictly confidential and thus would not be known by others, including many within the Companies' own organizations; the information was developed by TWC and Charter at significant expense and would be extremely difficult for

²³ Id. at ¶ 5; and Id. at ¶ 6.

²⁴ Dempsey at ¶ 8.

²⁵ Mott at ¶ 6.

²⁶ Dempsey at ¶ 8, Mott at ¶ 9.

²⁷ Id. at ¶ 13; Id. at ¶ 13.

²⁸ 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).

²⁹ See 16 NYCRR §6-1.3(b)(2).

competitors to independently develop; and disclosure of the information to competitors would cause competitive damage to the Companies.³⁰

The Henner Response

On April 22, 2016, Mr. Henner (Henner response) submitted a response to the Companies' Statement of Necessity in which he contends that there are no grounds for TWC and Charter to receive confidential treatment and redact the number of unserved homes from their filing with the PSC and the BPO.

He disputes that the "Deployment Data" at issue consists only of the number of unserved units within a particular municipality. This is not the "granular" information regarding company operations. He reasons that as a result of the Merger Order, they will be required to build out these areas in any event, regardless of the activities of their competitors. He notes that it is a matter of public knowledge that the build out will occur. He debates that the Companies fail to offer an explanation as to how a competitor can use the knowledge of the number of presently unserved units to its benefit.

The Henner response notes that the PSC will conduct further public proceedings with respect to the administration of its Merger Order. In particular, decisions will need to be made as to the locations of the units to be connected, when the connections will be made, and the relationship between the unserved units identified in the Companies' February 18 filing and the "underserved" units that are also part of the Merger Order.

The Henner response maintains that the duties of the PSC and the BPO must be performed in public and that the municipalities where the Companies hold franchise agreements which stand to benefit from the extension of service, as well as the hundreds of thousands of New Yorkers who are anxiously awaiting the extension of service have a right to know when or if they are likely to receive it, and to participate in the administrative review processes by which the relevant decisions will be made. The Deployment Data is very much a part of that decision making process, and should be available, not only to those entities that formally participate in the administrative proceeding conducted by the PSC, but to the general public.

³⁰ See both Dempsey and Mott Declarations.

DISCUSSION

Applicable Law

Pursuant to POL §89(5)(b)(3), the RAO is required to issue a written Determination granting, continuing, or terminating such exception and stating the reasons therefor,³¹ based on the Appellate Division’s decision in the Verizon case.³²

In this case, the Companies cite to the Verizon case and have the burden of proving with specific and persuasive evidence that either (1) the information constitutes trade secrets by addressing not only the definition of “trade secret” but also the six relevant factors or (2) there is a likelihood TWC and Charter will suffer a substantial competitive injury if the information at issue is disclosed.³³ With regard to the second part of the Verizon test, DPS continues to rely on Encore College Bookstores, Inc. v. Auxiliary Service Corporation of the State University of New York at Farmingdale³⁴ for a showing that the disclosure of purportedly confidential information would be likely to cause substantial injury to the competitive position of the subject enterprise.³⁵

With the assistance of two Declarations submitted by an expert employed by each TWC and Charter, the Companies make a compelling case for trade secret protection for the information limited to the “homes not passed” category. Through the use of these comprehensive declarations and well-reasoned legal and factual arguments, they demonstrate in detail compliance with the Restatement definition of a “trade secret” as well as the six factors which supplement the “trade secret” definition as outlined as well in the Commission regulations and the Verizon case. TWC and Charter meet each factor of the initial two-part trade secret test established in the Verizon case with significant statements, arguments, and facts that establish the existence of a trade secret. Their consistent use of specific and persuasive historical factual data and data from a wide variety of sources establishes that the “homes not passed” category was compiled with internal expertise.

The second test described in the Verizon case requires that the party seeking protection from disclosure as confidential commercial information must demonstrate that disclosure of the information would be likely to cause substantial competitive injury.³⁶ In order to make this showing, the Company must demonstrate that disclosure of the information would be likely to cause substantial competitive injury,³⁷ by providing a causal link between the

³¹ POL §89(5)(b)(3).

³² Verizon, supra.

³³ See Verizon at 6.

³⁴ Encore v. ASC SUNY Farmingdale, 87 NY2d 410 (1995).

³⁵ Id.

³⁶ Encore v. ASC SUNY Farmingdale, supra at 421.

³⁷ Id. See also, Ashland Management v. Janien, 82 N.Y.2d 395, 407-408 (1993); New York State Electric & Gas Corp. v. New York State Energy Planning Board, 21 A.D. 2d 121, 124-125 (1996); Glens Falls Newspaper, Inc. v. Counties of Warren & Washington Indus. Dev.

disclosure and the injury.³⁸ The Dempsey Declaration, Exhibit 1, establishes the existence of competition in the telecommunication industry in the areas outside of New York City which are the subject of this matter³⁹ and therefore sets the foundation for causation of substantial competitive injury and its subsequent review. It is in fact, the causal link.

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 and time-consuming, and extraordinarily difficult for others to duplicate the information.⁴⁰ Further, the Companies have maintained that the Deployment Data is an important tool that they use to define their short and long term business strategies and prioritize their plans for facilities investment.⁴¹ Both TWC and Charter avow that the data has tangible financial and strategic value to their competitors. If allowed access to the data, competitors in these franchise areas would receive a tangible financial benefit, in terms of being spared the cost of independently collecting market data and information about facilities deployment.

The new Company will be 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 the newly-merged Company doing so. As a result, I find that TWC and Charter have met their burden with regard to the competitive injury test as well as the trade secret test.

CONCLUSION

In light of the forgoing, the information claimed to be trade secrets or confidential commercial information warrants an exception from disclosure and the request for continued protection from disclosure is granted.

Review of my Determination may be sought, pursuant to POL §89(5)(c)(1), by filing a written appeal with Kathleen H. Burgess, Secretary to the Commission, at the address given above, within seven business days of receipt of this Determination. Receipt will be

Agency, 257 A.D.2d 948 (1999); Troy Sand & Gravel Co. v. New York State DOT, 277 A.D.2d 782 (2000); Verizon N.Y., Inc. v. Bradbury, 40 A.D.3d 1113 (2007); Schenectady v. O'Keefe, 50 A.D.3d 1384 (2008); New York Racing Assn. Inc. v. State of NY Racing & Wagering Bd., 21 Misc. 3d 379 (2008); Hearst Corp. v. State, 24 Misc. 3d 611 (2009).

³⁸ See Markowitz v. Serio, 11 N.Y.3d 43 (2008); Saratoga Harness Racing, Inc. v. Task Force on the Future of Off-Track Betting, 2010 N.Y. Misc. LEXIS 2531 (Sup. Ct. Albany County 2010).

³⁹ Case 15-M-0388 – Dempsey Declaration, Exhibit 1, pages 1 -2. Dated April 20, 2016.

⁴⁰ Id. at ¶ 13; and ¶ 13.

⁴¹ Id. at ¶ 7; Id. at ¶ 7.

presumed to have occurred on May 4, 2016, accordingly, the deadline for the receipt of any such written appeal by the Secretary is May 13, 2016. Any requests for an extension of time in which to file a written appeal of this Determination should be directed to Secretary Burgess.

Sincerely,

Donna M. Giliberto
Assistant Counsel &
Records Access Officer

Maureen O. Helmer
Partner

May 19, 2016

VIA ELECTRONIC MAIL

Hon. Kathleen H. Burgess
Secretary to the Commission
New York State Public Service Commission
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**

Dear Secretary Burgess:

On behalf of Charter Communications, Inc. (“Charter”), attached is the Charter Response in Opposition to Mr. Henner’s Appeal of the Record Access Officer’s Determination 16-02, issued on May 4, 2016.

Respectfully submitted,

/s/ Maureen O. Helmer

Maureen O. Helmer
Counsel for Charter Communications, Inc.

:llm

**BEFORE THE
NEW YORK PUBLIC SERVICE COMMISSION**

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.’s Opposition to Mr. Henner’s
Appeal from the Records Access Officer Determination 16-02**

May 19, 2016

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Counsel for Charter Communications, Inc.

**BEFORE THE
NEW YORK PUBLIC SERVICE COMMISSION**

Joint Petition of)	
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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.’s Opposition to Mr. Henner’s
Appeal from the Records Access Officer Determination 16-02**

Charter Communications, Inc. (“Charter”), and its new affiliate Time Warner Cable Inc. (“TWC”) (collectively, “Charter Companies” or “Companies”)¹ respectfully request that the Secretary to the Commission deny the appeal of Mr. Peter Henner, on behalf of his clients, regarding the Records Access Officer’s Determination 16-02 (“Determination”).² The RAO’s Determination found that the Companies’ broadband franchise information (“Deployment Data”) was entitled to an exception from disclosure as it met the trade secrets test and would also be deemed confidential commercial information that would cause substantial competitive injury to the position of the Companies, if disclosed. The RAO’s determination thoroughly evaluated the

¹ Note that while the documents at issue in this appeal were submitted by the individual Companies, the Companies have officially merged as of May 18, 2016 such that this is filed on behalf of the newly merged company.

² Case 15-M-0388, *Joint Petition of Charter Communications and Time Warner Cable for Approval of a Transfer of Control of Subsidiaries and Franchises, Pro Forma Reorganization, and Certain Financing Arrangements*, Determination of the Records Access Officer 16-02 (May 4, 2016) (“Determination 16-02”).

issues and facts presented by all parties, and carefully considered the underlying declarations in support of the Statement of Necessity submitted in this matter. As such, the RAO's determination should not be disturbed, and Mr. Henner's appeal should be denied.

I. BACKGROUND

On February 18, 2016, the Companies filed Deployment Data with the Commission's Records Access Officer ("RAO"). On March 28, 2016, Mr. Peter Henner, on behalf of his clients, 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 documents, the Companies disclosed the municipality and franchise information, and retained redaction for the approximate number of homes not passed in each franchise. On April 6, 2016, Mr. Henner responded, stating that the latest submission by the Companies was not responsive to his request. On the same day, the RAO advised that the Companies could file a Statement of Necessity in furtherance of the RAO's intention to make a formal determination regarding the Companies' requests for protection from disclosure. On April 20, 2016, the Companies filed their Statement of Necessity along with the supporting declarations of Noel Dempsey of TWC and James Gregory Mott of Charter, both attached again here, for convenience.

On May 4, 2016, the RAO issued Determination 16-02 and found that the Companies' Deployment Data warranted exception from disclosure as both a trade secret and confidential commercial information. In granting the Companies' request for continued protection from disclosure, the RAO found that "the Companies make a compelling case for trade secret

protection for the information limited to the ‘homes not passed’ category.”³ On May 10, 2016, Mr. Henner filed an appeal of the RAO’s determination.

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 the Charter Companies’ broadband deployment. Disclosure of the information 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.

II. APPLICABLE LAW

Although the Companies’ Statement of Necessity and the RAO’s Determination provide ample discussion and background regarding the legal standard for exemption from disclosure, a brief review is included here to respond to Mr. Henner’s appeal and clarify some points of law that may be misconstrued or confused in his appeal. As noted in the RAO’s Determination, the New York State Appellate Division, Third Department’s, recent decision in *Verizon v. Public Service Commission* found that Public Officers’ Law § 87(2)(d) provides two *alternate* standards, or “tests,” to determine whether information should be excepted from public disclosure.⁴ As such, information will be exempted from disclosure if it is *either* (1) a trade secret; or (2) if disclosure would result in a likelihood of substantial competitive injury, referred to as the “substantial injury test.” Therefore, if *either* test is met, the information must be excepted from disclosure.

The Commission recently applied the findings from the Third Department’s *Verizon* decision in a lengthy and detailed March 23, 2016 Determination of Appeal of Trade Secret

³ Determination 16-02 at 8.

⁴ *Verizon New York, Inc. v. New York State Public Service Commission*, 137 A.D.3d 66 (3d Dep’t 2016).

Determination in Case 14-C-0370 (“Verizon Determination of Appeal”).⁵ As is discussed further and as found by the RAO, the Companies’ Deployment Data meets both the trade secret test and the substantial injury test.

A. Trade Secret

The *Verizon* decision reemphasized that the Restatement of Torts’ definition of a trade secret should be used to analyze whether a trade secret exists. In the subsequent Verizon Determination of Appeal, the Secretary to the Commission recognized that the Restatement of Torts is the proper analysis to determine whether a trade secret exists.⁶ Pursuant to the Restatement of Torts, the Third Department’s *Verizon* decision, the March 23, 2016 Verizon Determination of Appeal, and as defined in the Commission’s regulations at 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.”⁷ If the information fits this general definition, then an additional factual determination is made concerning whether the information truly is a trade secret by consideration of the six trade secret factors outline in the Restatement of Torts:

- (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;

⁵ 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 (Issued March 23, 2016) (“Verizon Determination of Appeal”).

⁶ See Verizon Determination of Appeal at 17.

⁷ 16 NYCRR § 6-1.3; see also *Verizon*, 137 A.D.3d at 72; Verizon Determination of Appeal at 17; Restatement of Torts § 757, comment b.

(6) the ease or difficulty with which the information could be properly acquired or duplicated by others.⁸

These trade secret factors are not to be confused with the six factors outlined in the Commission's regulations at 16 NYCRR §§ 6-1.3(b)(2)(i)-(vi), which are used to determine the second test for whether "substantial competitive injury" would result.⁹ Although the factors for each separate test are similar and contain some overlap, contrary to the implications of Mr. Henner's appeal, the RAO's Determination is not incomplete or in error because it did not analyze the "six specific factors set forth in the regulations,"¹⁰ which are not wholly applicable to the trade secret test. Moreover, the trade secret factors are non-exclusive, and not all factors must be established to prove that a trade secret exists.¹¹

B. Substantial Competitive Injury

As noted in the RAO's Determination, the second test, 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."¹² The

⁸ *Verizon*, 137 A.D.3d at 72-73; *Verizon Determination of Appeal* at 17; Restatement of Torts § 757, comment b.

⁹ The factors outlined in 16 NYCRR § 6-1.3(b)(2) used to evaluate whether substantial competitive injury would result from disclosure 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.

¹⁰ *Henner Appeal* at 3.

¹¹ The Commission followed this approach in the *Verizon Determination of Appeal* noting that "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."

¹² 16 NYCRR § 6-1.3(b)(2).

RAO also noted that the Department of Public Service Staff continues to rely on the New York Court of Appeals decision in *Encore College Bookstore v. Auxiliary Service Corporation of the State University of New York at Farmingdale*¹³ to evaluate whether substantial competitive injury would result from disclosure of the confidential information.¹⁴

In *Encore*, the Court of Appeals noted 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” and that a showing of actual competitive harm was not required but “[r]ather, actual competition and the likelihood of substantial competitive injury is all that need be shown.”¹⁵ The *Encore* court also noted that “where [] disclosure is the sole means by which competitors can obtain the requested information, the inquiry ends [there].” The court found that the likelihood of harm to the party seeking protection was “enhanced by the economic windfall conferred upon [the competitor] were it to receive the [information] at the mere cost of FOIL fees” and that “[d]isclosure through FOIL, however, would enable [it] to obtain the requisite information without expending its resources, thereby reducing its cost of business and placing [the party seeking protection] at a competitive disadvantage.”¹⁶

Under 16 NYCRR Section 6-1.3(b)(2), the Commission delineated factors to determine whether confidential commercial information “would be likely to cause substantial injury to the competitive position of the subject commercial enterprise.”¹⁷ As discussed above, Mr. Henner cites these “six criteria in the regulations” in his appeal and includes a blanket assertion that “Nor does her [the RAO’s] determination analyze the six specific factors set forth in the

¹³ *Encore College Bookstores v. Auxiliary Serv. Corp.*, 87 N.Y.2d 410 (1995).

¹⁴ Determination 16-02 at 8.

¹⁵ *Encore*, 87 N.Y.2d at 421 (internal quotes omitted).

¹⁶ *Id.*

¹⁷ 16 NYCRR § 6-1.3(b)(2).

regulations.”¹⁸ It is not clear if Mr. Henner is alleging that that the factors outlined in Section 6-1.3(b)(2) must be independently met outside of the trade secret or substantial competitive injury tests, or as part of either analysis.¹⁹ However, the factors outlined in Section 6-1.3(b)(2) are applicable only to support an analysis of whether the substantial competitive injury test is met, as further exemplified by the *Encore* decision.²⁰ An additional discussion of the “six factors in the regulations” is included here, after analysis of each of the proper tests.

III. OPPOSITION TO THE APPEAL

A. The RAO Correctly Determined that the Deployment Data was a Trade Secret

To meet its burden of proof, the Companies provided detailed declarations to support their Statement of Necessity to explain that the Deployment Data was a trade secret. The RAO appropriately applied the general definition of trade secret discussed above, and found that the Deployment Data met the general trade secret definition.²¹ The RAO then analyzed the proper underlying trade secret factors, as cited in the Restatement of Torts, and concluded that there was specific, detailed evidence in the declarations to support the proposition that the confidential Deployment Data was, indeed, a trade secret.²² The RAO noted that “[t]hrough use of these comprehensive declarations and well-reasoned legal and factual arguments, [the Companies] demonstrate in detail compliance with the Restatement definition of a ‘trade secret’ as well as the six factors which supplement the ‘trade secret’ definition as outlined in the Commission

¹⁸ Henner Appeal at 3.

¹⁹ The organization of Mr. Henner’s appeal such that “Trade Secret Status” is presented first, followed by “The Six Criteria in the Regulations” and then “Substantial Competitive Injury” appears to indicate that Mr. Henner is asserting that the factors outlined in Section 6-1.3(b)(2) apply to the trade secret analysis, or are an independent test.

²⁰ While the *Encore* decision does not outline or cite the factors enunciated in Section 6-1.3(b)(2), its analysis generally discusses these factors.

²¹ Determination 16-02 at 8.

²² Determination 16-02 at 8.

regulations and the Verizon case.”²³ The RAO, therefore, found that “TWC and Charter [met] each factor of the initial two-part trade secret test established in the Verizon case with significant statements, arguments, and facts that establish the existence of a trade secret.”²⁴

Mr. Henner’s overarching argument appears to be that while the underlying data sources, methodology, and internal analysis “are arguably entitled to trade secret protection,” that the information derived from those confidential sources would not be entitled to trade secret protection.²⁵ In support of his argument, Mr. Henner states that some of the Deployment Data could be developed by a third party or “guessed” at based on a review of franchise agreements. However, Mr. Henner fails to recognize that even if the information was derived from *public* sources, it could qualify as a trade secret because it is the unique way the information is *combined* or *compiled* that determines whether it is a trade secret,²⁶ with the operative inquiry being whether the information for which protection is sought (i.e. the compilation of information) meets the trade secret test. Here, the Deployment Data clearly meets the trade secret test.

Next, Mr. Henner argues that the number of unserved homes in a particular municipality is not a “wide array of information.”²⁷ However, again, Mr. Henner misunderstands and misconstrues the definition of a trade secret. A trade secret can consist of a wide array of information that has been combined or compiled in a particular way. Here, the “wide array of

²³ Determination 16-02 at 8.

²⁴ Determination 16-02 at 8.

²⁵ Henner Appeal at 2, 3.

²⁶ *sit-up Ltd. v. IAC/Interactive Corp.*, 2008 U.S. Dist. LEXIS 12017, *27 (S.D.N.Y. Feb. 20, 2008) (finding that “Under New York law, 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.”).

²⁷ Henner Appeal at 3.

information” is the *underlying* data used to derive the Deployment Data in its final, compiled form. The Companies have never asserted that the Deployment Data is a “wide array of information.” Instead, the Companies have shown that a wide array of information from a number of sources, including internal TWC and Charter databases and National Telecommunications & Information Administration databases,²⁸ were used to compile the Deployment Data such that it meets the first part of the general definition of a trade secret in that is a “compilation” of information.

Mr. Henner then asserts that “it seems very unlikely that the Companies have any plans to extend service to these unserved units, absent a direction from the Commission” However, what a company plans to do with its trade secret information is not part of the analysis as to whether a trade secret exists. Moreover, as specified in the declarations supporting the Statement of Necessity, the Deployment Data is, in fact, used to determine future deployment and the sequencing of deployment of new broadband service.²⁹ Furthermore, beyond the conditions in the Merger Order requiring deployment of broadband to 145,000 homes and businesses, in recent years, TWC has deployed new service to many previously unpassed or unserved units across its rural upstate New York footprint, demonstrating its continued commitment to the expansion of its services in New York.

Next, Mr. Henner argues that “it is not clear” how competitors will be able to use the Deployment Data to gain a competitive advantage because the Companies do not provide any

²⁸ Dempsey Declaration at ¶ 5.

²⁹ “The Deployment Data . . . is an important tool that [TWC] may use to define its short and long term business strategy and prioritize its plans for facilities investment.” Dempsey Declaration at ¶ 6. “TWC also uses the Deployment Data to develop strategic business plans for future deployment, including sequencing of deployment for the most efficient use of manpower, resources, and money and to target specific geographic areas for marketing strategies.” Dempsey Declaration at ¶ 9. “The Deployment Data . . . is an important tool that [Charter] will use to define its short and long term business strategy and prioritize its plans for facilities investment in the near future.” Dempsey Declaration at ¶ 6.

examples or information.³⁰ However, the declarations of Mr. Dempsey and Mr. Mott provide multiple, specific examples and explanations of how a competitor would use the Deployment Data, if disclosed:

If given access to these data, TWC's competitors would gain a significant unfair advantage, not only because they would gain free information that TWC compiled at its own cost and effort, but also because they could use that information to identify markets that present significant opportunities with little or no competition. Armed with this cost and effort-free information, TWC's 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. Additionally, 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 lock in their customers to long term contracts to discourage TWC from entering their service areas. This could materially change the penetration rate assumptions on the Company's build plan if the potential customers were all locked into contracts.

Dempsey Declaration at ¶ 8.

If competitors were to obtain TWC's Deployment Data, they could identify and target their resources to invest and market in areas where TWC is competitively vulnerable or conversely, refrain from targeting certain areas where TWC is competitively strong. In the long term, this will 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. Moreover, TWC's competitors could use the Deployment Data to gauge the success of TWC's market penetration such that competitors would use that information to develop competitive strategies or in negative marketing campaigns.

Dempsey Declaration at ¶ 9.

If allowed access to the data, Charter's competitors would receive a tangible financial benefit, gaining insight into where Charter does and does not currently offer broadband service. The Deployment Data, if made public, would give Charter's competitors a road map to develop strategic business plans for future deployment, including sequencing of construction for the most efficient use of manpower, resources, and money, and to target specific geographic areas for marketing strategies. Competitors could — and given the opportunity would —

³⁰ Henner Appeal at 3.

identify and target their resources to invest and market in areas where Charter is competitively vulnerable or conversely, refrain from targeting certain areas where Charter is competitively strong.

Mott Declaration at ¶ 9.

Charter's competitors would also benefit by avoiding the significant cost of independently collecting data and information about Charter's deployment of facilities. Competitors could avoid the cost and risk of independent market analysis and simply focus on the easiest market opportunities.

Mott Declaration at ¶ 10.

As the declarations show, the Companies have, indeed, provided clear and sufficient evidence and explanations of how a competitor would use the Deployment Data to its own advantage at the expense of and to the disadvantage of the Company. As noted in the RAO's Determination, if the Deployment Data were disclosed, competitors would use that information to "market in the areas the Companies are currently not serving by promoting rate decreases, implementing new services, and proposing new contracts leveraging new products."³¹ The RAO also noted that "[c]onversely, competitors will refrain from targeting certain areas where the Companies are competitively strong."³²

B. The RAO Correctly Determined that Disclosure of the Deployment Data Would Result in Substantial Competitive Injury

The RAO stated that in order to prove that substantial competitive injury would result from public disclosure of confidential commercial information, there must be a causal link between the disclosure and the injury.³³ Here, the RAO found that the declaration of Mr. Dempsey set the foundation and was that causal link because it established the existence of

³¹ Determination 16-02 at 5.

³² Determination 16-02 at 5.

³³ Determination 16-02 at 5.

competition in the telecommunications industry in the geographic areas which were the subject of Mr. Henner's FOIL.³⁴ The RAO noted that because the confidential information has "tangible financial and strategic value to their competitors" that "[i]f allowed access to the data, competitors in these franchise areas would receive a tangible financial benefit, in terms of being spared the cost of independently collecting market data and information about facilities deployment."³⁵ The RAO, therefore, concluded that, here, "[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 [those] areas prior to the newly-merged Company doing so" and found that the Deployment Data met the substantial competitive injury test.³⁶

Mr. Henner asserts that the existence of competition does not constitute a causal link to show substantial competitive injury, that the Companies failed to show actual competition exists in the particular municipalities where they have unserved units, and that no examples were offered to show how the Companies will suffer injury.

As noted in *Encore*, actual competitive harm does not need to be established, "[r]ather, actual competition and the likelihood of substantial competitive injury is all that need be shown."³⁷ As here, where there is fierce competition for cable and broadband subscribers and near ubiquitous options for alternate service, the retention of existing customers, prevention of migration to other providers, and the need for new subscribers is paramount to the viability of a provider and its success such that the likelihood for substantial competitive injury increases.

³⁴ Determination 16-02 at 8-9.

³⁵ Determination 16-02 at 9.

³⁶ Determination 16-02 at 9.

³⁷ *Encore*, 87 N.Y.2d at 421.

Therefore, the existence of competition is indeed the causal link to show a likelihood of substantial competitive injury.

The RAO's Determination noted that Mr. Henner's letter made a "bald statement that there are no competitors for the business of connecting these unserved homes."³⁸ Mr. Henner provides no evidence in his appeal to controvert the RAO's recognition and the Companies' experience that vibrant competition exists in these franchise areas.³⁹ Exhibit 1, attached to the declaration of Mr. Dempsey, lists 59 competitors to TWC outside of the City of New York, which covers the areas and municipalities included in the Deployment Data. It should be noted that Exhibit 1 does not include *other* competitors such as satellite (Dish and DirecTV), wireless (AT&T, T-Mobile, and Sprint), and incumbent carriers; competitors that generally cover the majority of New York and the municipalities listed in the Deployment Data. As such, it is clear that the Companies are in constant competition with numerous other providers across all of their lines of service,⁴⁰ and clear that the RAO was correct in finding the same.

Multiple examples and detailed explanations of how competitors would use the Deployment Data to the detriment of the Companies is discussed above and included in the declarations. For example, if the Deployment Data were disclosed, competitors would engage in competitive or negative marketing campaigns against the Companies.⁴¹ Incumbent carriers could initiate marketing campaigns and otherwise lock-in customers to long-term contracts to discourage the Companies from entering the service area, which would materially change the penetration rate assumptions used for the Companies' build plans.⁴² These and additional

³⁸ Determination 16-02 at 5, n.18.

³⁹ See Determination 16-02 at 5, n.18.

⁴⁰ See Mott Declaration at ¶ 8.

⁴¹ Dempsey Declaration at ¶ 9.

⁴² See Dempsey Declaration at ¶ 8.

examples are provided in the declarations as well as further discussed in the Statement of Necessity.

Mr. Henner alleges that it would be unlikely that a competitor would perform a build-out where the Companies would plan to deploy new service because “prospective [customers] know that they will benefit from the build out of the Companies’ service that will be required under the Merger Order, and will not want to pay for a competitor’s service when they know that will get service from one of the Companies.”⁴³ Such a leap in logic is not germane to the overall analysis of whether the Deployment Data should be disclosed. Moreover, that prediction is exactly why the Deployment Data should not be released as it can have the counter-effect to New York’s goals of increasing access to broadband and promoting competition; by Mr. Henner’s logic, competitors would be hesitant to perform their own build-outs in areas that may be the target of the Companies’ new deployment.

C. **“The Six Criteria in the Regulations”**

As previously noted, it is not clear if Mr. Henner’s appeal asserts that the factors outlined in 16 NYCRR 6-1.3(b)(2) should have been the basis for the trade secret test, the substantial competitive injury test, or a stand-alone test. And as previously discussed, the factors enumerated in the Commission’s regulation are to be used to determine whether information meets the *substantial competitive injury test*. In an effort to respond to each of Mr. Henner’s claims, a response to each of the factors he takes issue with is included below.

1. *The extent to which the disclosure would cause unfair economic or competitive damage.*

Mr. Henner argues that the Companies did not offer any evidence to indicate that they would be injured by disclosure of the information or examples of how the information would be

⁴³ Henner Appeal at 5.

used by competitors. Examples of competitor use and explanations of the injury that would result to the Companies if the information is disclosed are discussed above and shown in the various examples provided in the declarations.

2. *The extent to which the information is known by others and can involve similar activities.*

Mr. Henner, again, asserts that because “[s]ome information as to the extent of the number of unserved units in a particular municipality can be guessed from a review of the franchise agreement,” that “it is not difficult to figure out whether large parts of a municipality are not serviced by a cable television company,” and, therefore, the information should not qualify as a trade secret or confidential commercial information that should be protected.⁴⁴ While some parts of the information could be “guessed” based on the franchise agreements or other sources, the Deployment Data (1) is not readily available in its compiled form; and (2) would certainly not be as complete or accurate as the information compiled by the comprehensive GIS databases used by both Companies, as detailed in the declarations.⁴⁵

3. *The worth or value of the information to the person and the person’s competitors*

Mr. Henner alleges that the value of the information does not equate to the cost to compile it, and that the Companies have not provided any explanation as to the value the information has to competitors. As noted in *Encore*, the inquiry “turns on the commercial value of the requested information to competitors and *the cost of acquiring it through other means.*”⁴⁶ As such, the Companies’ costs in compiling the information is relevant to estimate the cost of acquiring the same information through other means. As noted in the Dempsey Declaration, “[i]f

⁴⁴ Henner Appeal at 4.

⁴⁵ Dempsey Declaration at ¶ 5; Mott Declaration at ¶ 6.

⁴⁶ *Encore*, 87 N.Y.2d at 420.

allowed access to the data, TWC's competitors would receive a tangible financial benefit, in terms of being spared the cost of independently collecting market data and information about facilities deployment."⁴⁷

4. *The degree of difficulty and cost of developing the information.*

Mr. Henner suggest that the degree of difficulty and cost of developing the information should not be relevant to the inquiry of whether the information should be exempted from disclosure because the information would have been required as part of the Companies' commitment to the Commission.⁴⁸ While it is true that the information was compiled at the request of the Commission, this does not mean that it should be provided free of charge to the public at large or to the Companies' competitors. Moreover, if disclosure was predicated upon whether information was compiled to meet a regulatory burden or agency request, the exception from disclosure under POL §§ 87 and 89 would be superfluous, as most of the information that is the subject of FOIL is information that is submitted to an agency pursuant to its request or regulations and would, therefore, be ineligible for trade secret treatment.

5. *The ease or difficulty associated with obtaining or duplicating the information by others without the person's consent.*

Mr. Henner admits that duplicating the information without the consent of the Companies would be at "some difficulty."⁴⁹ As noted in the Dempsey Declaration, "[a]t best, anyone attempting to replicate the Deployment Data would only be able to achieve rough estimates without expending a tremendous amount of time and money by, for instance, going door-to-door

⁴⁷ Dempsey Declaration at ¶ 7.

⁴⁸ Henner Appeal at 4.

⁴⁹ Henner Appeal at 4.

to query individual homes.”⁵⁰ The tremendous effort that would be needed to replicate the Deployment Data was echoed in the declaration of Mr. Mott who stated “[e]ven to replicate rough estimates of the Deployment Data, a third party would have to expend a tremendous amount of time and money by, for instance, performing a complete visual assessment of every mile of outside plant deployed in the Plattsburgh System.”⁵¹ “The third party would then have to develop a methodology for matching Charter's defined franchise areas to U.S. Census data and then calculating the number of unserved homes based on all of this information.”⁵²

6. *Other statutes or regulations specifically accepting (sic; should be “excepting”) the information from disclosure.*

Mr. Henner noted that no statutes or regulations were cited by the Companies, which is because there are no additional statutes or regulations that specifically exempt the Deployment Data from disclosure.

IV. CONCLUSION

The RAO’s aptly reasoned Determination should not be disturbed. The RAO carefully described the issues and facts presented by both parties, and evaluated those issues and facts against the proper legal standards. In so doing, the RAO correctly determined that the Deployment Data qualified as a trade secret as the information at issue was a compilation of information, thus meeting the general definition of trade secret. The RAO also properly determined that the Deployment Data met each of the trade secret factors. Because the Deployment Data was considered to be a trade secret, the inquiry is complete and the

⁵⁰ Dempsey Declaration at ¶ 13.

⁵¹ Mott Declaration at ¶ 13.

⁵² Mott Declaration at ¶ 13.

information is protected from public disclosure. However, the RAO's determination also found that the Deployment Data met the alternate test such that substantial competitive injury would result if the Deployment Data were disclosed. Both standards and tests being met, the Deployment Data should not be disclosed, and Mr. Henner's appeal should be denied.

Dated: May 19, 2016

S/

Maureen O. Helmer
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Counsel for Charter Communications, Inc.

**BEFORE THE
NEW YORK PUBLIC SERVICE COMMISSION**

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)	
)	

DECLARATION OF JAMES GREGORY MOTT

1. My name is James Gregory Mott, and I am the Vice President of Field Operations Engineering for Charter Communications, Inc. (“Charter”). My business address is 6399 South Fiddlers Green Circle, Greenwood Village, Colorado 80111. I am responsible for design, construction, and maintenance of Charter’s approximately 210,000 miles of plant, including Charter’s New York State systems. I have held this position since November 30, 2015. I hold a B.A. in geology from The Colorado College, and a Master of Science in Engineering from the University of Michigan, Ann Arbor.

2. I have more than 18 years of experience in the cable industry, and prior to my current position I was Vice President of Field Engineering for Charter’s Northeast Region and had responsibility for approximately 35,000 miles of plant in that region. Prior to joining Charter, I was Senior Vice President of ISP, Construction, and Critical Systems at Cablevision Systems Corporation in Bethpage, New York, where I was also responsible for plant design and construction. Previously I served as Area Director of Technical Operation and Engineering at

Comcast Cable Communications, Inc. in Millersville, Maryland, where I was responsible for all technical operations.

3. I submit this Declaration in connection with the Statement of Necessity submitted in the above-referenced proceeding with regards to the request for confidential treatment of the broadband deployment information (“Deployment Data”) submitted on behalf of Charter and Time Warner Cable Inc. (“TWC”). This declaration addresses the Deployment Data for Charter only.

4. The Charter Deployment Data contains an estimate of the number of homes not served, or not “passed,” by Charter’s broadband-enabled network in each municipality in New York served by Charter’s Plattsburgh System. I have been advised that, on February 18, 2016, the Deployment Data was submitted to the New York Public Service Commission (“Commission”) and the Broadband Program Office with much of the information redacted. Subsequently, on April 8, 2016, Charter and TWC submitted the Deployment Data in a manner that made public all of the information in the document with the exception of the detailed number of homes not passed, the information at issue here.

5. The purpose of this Declaration is to explain how the Charter Deployment Data is of substantial competitive value, and how public disclosure of the information would give unfair advantage to competitors to the detriment of Charter. The Charter Deployment Data was compiled at Charter’s direction with the assistance of a vendor, Frontier GeoTek, Inc. (“Frontier”), and incorporates information from multiple data sources and geographic information systems (“GIS”).

6. I am informed and believe that in preparing the Charter Deployment Data, Frontier drew from data sources including (i) Charter’s internal resources, such as its GIS

database; and (ii) public resources, such as the United States Census Bureau housing unit data and data obtained from the National Telecommunications & Information Administration. Preparation of the Deployment Data required both effort and expense, as Frontier had to evaluate the boundaries of Charter's franchise areas as compared to its deployed network plant, mapping Census Bureau data blocks, and evaluating other data inputs necessary to ultimately derive the estimated number of unserved housing units in Charter's current Plattsburgh System franchise footprint. Charter also incurs expense associated with developing and maintaining the underlying non-public data upon which Frontier relied. 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.

7. The Deployment Data results from Charter's detailed analysis of its existing and potential service territories and is an important tool that Charter will use to define its short and long term business strategy and prioritize its plans for facilities investment in the near future. As such, the Deployment Data has tangible value, in terms of the financial and operational investment Charter has made to create the data and the competitive and strategic insight that the data provides to Charter.

8. Perhaps even more importantly, the Deployment Data has tangible financial and strategic value to Charter's competitors. There are a number of other providers in Charter's Plattsburgh service area that compete with Charter for voice, broadband, and video customers. The two major satellite video providers (Dish and DirecTV) provide near ubiquitous service throughout the area. The four major wireless carriers (Verizon, AT&T, T-Mobile, and Sprint), and resellers operating on their networks, also offer competitive voice and broadband services throughout most of the area. Incumbent local exchange carriers (and, in the enterprise market,

competitive local exchange carriers) compete with Charter for wireline and broadband customers. This means that Charter is in constant competition with numerous other providers across all of its lines of service.

9. If allowed access to the data, Charter's competitors would receive a tangible financial benefit, gaining insight into where Charter does and does not currently offer broadband service. The Deployment Data, if made public, would give Charter's competitors a road map to develop strategic business plans for future deployment, including sequencing of construction for the most efficient use of manpower, resources, and money, and to target specific geographic areas for marketing strategies. Competitors could—and given the opportunity would—identify and target their resources to invest and market in areas where Charter is competitively vulnerable or conversely, refrain from targeting certain areas where Charter is competitively strong.

10. Charter's competitors would also benefit by avoiding the significant cost of independently collecting data and information about Charter's deployment of facilities. Competitors could avoid the cost and risk of independent market analysis and simply focus on the easiest market opportunities.

11. The Deployment Data is also not publicly available and it is not disclosed to the investment community. While Charter does provide investors high-level data concerning the aggregate number of homes passed by its network, that data is not specific to a particular system or municipality, and reflects the number of new residential passings and new commercial buildings only after the conclusion of construction.

12. Charter ensures that the Deployment Data is made available within the company only to those who need to access the data to perform their job functions. Only Charter management who are involved in the strategic planning and high-level business decisions have

access to the Deployment Data. To the extent Charter relies on an outside vendor (Frontier) to assist with preparing the Deployment Data, I am informed that Charter's contract with Frontier contains comprehensive terms ensuring that Charter's confidential, proprietary, and trade secret information is handled properly and not disclosed to third parties.

13. Because preparation of the Deployment Data requires access to information available only to Charter or Frontier, it would be costly, complex, time-consuming, and extraordinarily difficult for others to duplicate the Deployment Data. Even to replicate rough estimates of the Deployment Data, a third party would have to expend a tremendous amount of time and money by, for instance, performing a complete visual assessment of every mile of outside plant deployed in the Plattsburgh System. The third party would then have to develop a methodology for matching Charter's defined franchise areas to U.S. Census data and then calculating the number of unserved homes based on all of this information.

14. Disclosure of the Deployment Data will harm Charter if it is made public because (a) it will allow competitors to benefit from Charter's own costly efforts to develop data, thus reducing the competitors' costs as compared with Charter's; and (b) it will provide a road map on how to compete against Charter more effectively. In either case, the result will be competitive harm to Charter in terms of lost customers, lost revenues, lost investments, and lost future business opportunity.

I declare under penalty of perjury that the foregoing is true and correct to the best of my information and belief.



James Gregory Mott

April 20, 2016

**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)	
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DECLARATION OF NOEL DEMPSEY

1. My name is Noel Dempsey, and I am the Group Vice President in the Department of Network Expansion and Outside Plant Design at Time Warner Cable Inc. (“TWC” or the “Company”). I have held this position since April 2013, and my responsibilities include outside plant expansion, construction, activation and design for residential and commercial services. I have more than twenty years of experience in the cable industry and I have held positions in the Regional Engineering Operations and Regional Network Engineering departments at TWC prior to my recent position.

2. I submit this Declaration in connection with the Statement of Necessity submitted in the above referenced proceeding with regards to the request for confidential treatment of the broadband deployment information (“Deployment Data”), as submitted on behalf of TWC and Charter Communications (“Charter”). My declarations are limited to the Deployment Data for TWC only.

3. I have been advised that, on February 18, 2016, the Deployment Data was previously submitted to the Commission and the Broadband Program Office with much of the information redacted, and that the subsequent April 8, 2016 submission released all information with the exception of the detailed number of homes not passed, the information at issue here. The TWC Deployment Data contains the number of homes not served, or not “passed,” by TWC in each municipality in New York by franchise.

4. The purpose of this Declaration is to explain how the TWC Deployment Data is of substantial competitive value to TWC, and how public disclosure of the information would give unfair advantage TWC’s competitors to the detriment of TWC.

5. The TWC Deployment Data was compiled by TWC through a process that incorporates information from multiple data sources and geographic information systems (“GIS”). Pursuant to this process, TWC combines internal data and data from publicly available sources to create a proprietary data resource that it uses to analyze potential opportunities, such as potential residential and commercial passings, and to evaluate and plan strategic and speculative builds that may correspond to a significant residential, commercial or combined revenue opportunity. Data sources include information drawn from (i) TWC’s internal resources, such as TWC’s 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 (“NTIA”) that TWC acquires, combines and analyzes at its own expense for its own purposes. TWC has invested significant financial and employee resources to procure this data and continues to incur costs to maintain these data assets. The creation of TWC’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. The Deployment Data that was sent to the

Commission includes the output of an analysis conducted by a team of GIS engineers and TWC's internal and consulting data analysts. This effort required mapping of the Census Bureau housing units data blocks, NTIA broadband provider service level data blocks to TWC's proprietary GIS service area environment and other data inputs necessary to ultimately derive the number of unserved housing units in TWC's current franchise footprint outside of New York City.

6. The Deployment Data results from TWC's detailed analysis of existing and potential service territories and is an important tool that the Company may use to define its short and long term business strategy and prioritize its plans for facilities investment. As such, the Deployment Data has tangible value, in terms of the financial and operational investment TWC has made to create the data and the competitive and strategic insight that the data provides to TWC.

7. While the Deployment Data represents homes that are not yet served by TWC, there are other providers in these areas with which TWC faces fierce competition.¹ With the near ubiquitous availability of Satellite, wireless providers, competitive service providers and incumbent carriers, TWC is in constant competition with numerous other providers. As such, the data has tangible financial and strategic value to TWC's competitors. If allowed access to the data, TWC's competitors would receive a tangible financial benefit, in terms of being spared the cost of independently collecting market data and information about facilities deployment. TWC's competitors would also receive competitively valuable insight into TWC's basis for strategic decision-making involving the Company's future investments, facilities construction

¹ For a complete list of the TWC's competitors in the franchise areas outside of New York City, please refer to Dempsey Declaration, Exhibit 1.

and marketing plans. Clearly, if the situation were reversed, TWC's competitors would be loath to release such information to TWC and other competitors.

8. For the past 10 years, TWC has been investing in updating its plant records to ensure that they are spatially accurate and consolidated into a single 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. If given access to these data, TWC's competitors would gain a significant unfair advantage, not only because they would gain free information that TWC compiled at its own cost and effort, but also because they could use that information to identify markets that present significant opportunities with little or no competition. Armed with this cost and effort-free information, TWC's 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. Additionally, 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 lock in their customers to long term contracts to discourage TWC from entering their service areas. This could materially change the penetration rate assumptions on the Company's build plan if the potential customers were all locked into contracts.

9. TWC also uses the Deployment Data to develop strategic business plans for future deployment, including sequencing of deployment for the most efficient use of manpower, resources, and money, and to target specific geographic areas for marketing strategies. If competitors were to obtain TWC's Deployment Data, they could identify and target their resources to invest and market in areas where TWC is competitively vulnerable or conversely,

refrain from targeting certain areas where TWC is competitively strong. In the long term, this will 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. Moreover, TWC's competitors could use the Deployment Data to gauge the success of TWC's market penetration such that competitors would use that information to develop competitive strategies or in negative marketing campaigns.

10. The Deployment Data is also not publicly available, and is not disclosed to the investment community. TWC's passings data and deployment plans are provided to the investment community only after the conclusion of construction.

11. Within TWC, only TWC employees and vendors who have prepared and compiled the information and only TWC management who are involved in strategic planning and high-level business decisions have access to the Deployment Data. In fact, these data sets in their uncompiled formats are available only to certain teams within TWC. These data sets in their compiled forms are available only to market development and network expansion designers. Otherwise, data sets are compiled only for specific reasons, for example, in this instance, to respond to a Commission request. Compilation of the information was a costly and complex endeavor. As mentioned above, a number of database and information resources are used to develop the information, not to mention the combined efforts of a variety of TWC organizations and outside contractors.

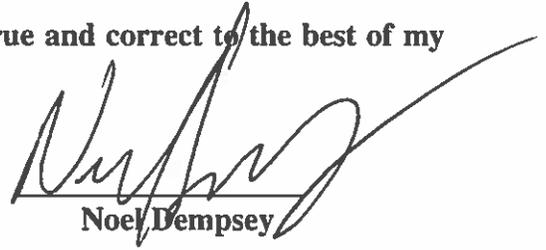
12. After compilation of the information, employees only have access on a need-to-know basis for strategic, facilities and network planning and development and implementation of marketing plans. TWC takes the protection of the Deployment Data very seriously and, in fact, employs a variety of measures to restrict access to sensitive and confidential information,

including the use of password-protected shared document libraries, restring access to information by job description and category also by requiring all employees to participate in annual training to ensure compliance with data protection practices.

13. Because much of the information was developed from TWC databases, it would be extremely costly, complex, time-consuming and extraordinarily difficult for others to duplicate the information. At best, anyone attempting to replicate the Deployment Data would only be able to achieve rough estimates without expending a tremendous amount of time and money by, for instance, going door-to-door to query individual homes.

14. In sum, in my judgment, disclosure of the Deployment Data will harm TWC as (a) it will allow competitors to benefit from TWC's own costly efforts to develop data, thus reducing the competitors' costs as compared with TWC's; and (b) it will provide guidance on how to compete against TWC more effectively. In either case, the result will be competitive harm to TWC in terms of lost customers, lost revenues, and lost investments.

I declare under penalty of perjury that the foregoing is true and correct to the best of my information and belief.



Noel Dempsey

April 20, 2016

DEMPSEY DECLARATION - EXHIBIT 1

ALTERNATIVE PROVIDERS IN TWC FRANCHISE AREAS OUTSIDE OF NYC

Adams CATV Inc.
Deposit Telephone Company, Inc.
Alteva Hometown, Inc.
Frontier Communications Corporation
Armstrong Telephone Co of New York
Atlantic Broadband (Penn), LLC
Berkshire Cable Corp.
Berkshire Telephone Company
Cablevision Lightpath, Inc.
Cogent Communications Group
Level 3 Communications, LLC
Light Tower Fiber LLC
Verizon New York Inc.
Cassadaga Telephone Corporation
Castle Cable TV, Inc.
Champlain Telephone Company
Charter Communications Inc.
Chautauqua & Erie Telephone Corporation
Chazy & Westport Telephone Corporation
Citizens Telephone Company of Hammond, NY
Comcast of New York, LLC
Crown Point Network Technologies, Inc.
CSC Holdings, Inc.
Delhi Telephone Company
MTC Cable
Delhi Telephone Company
DFT Local Service Corporation
Dunkirk and Fredonia Telephone Company
Edwards Telephone Company, Inc.
Empire Long Distance Corporation
Empire Telephone Corp.
Fiber Technologies Networks, L.L.C.
Finger Lakes Technologies Group
Haefele TV Inc.
Keene Valley Video, Inc.
Mid-Hudson Cablevision, Inc.
Margaretville Telephone Co Inc
MegaPath Corporation
MTC Cable
Newport Telephone Company, Inc.
Nicholville Telephone Company, Inc.

Slic Network Solutions, Inc.
Northland Networks
Oneida County Rural Telephone Co.
Ontario Telephone Company Inc.
Oriskany Falls Telephone Corp
Pattersonville Telephone Company
Port Byron Telephone Company
Primelink, Inc.
Slic Network Solutions, Inc.
Southern Cayuga County Cablevision, LLC
State Telephone Company, Inc.
Taconic Telephone Corporation
The Middleburgh Telephone Co
Township Telephone Company, Inc.
Trumansburg Telephone Company, Inc.
Westelcom Network
Vernon Telephone Company, Inc.
Windstream Corporation

APPENDIX B

- **Empire State Development, Records Access Appeals Officer Appeal Response, dated May 31, 2016**
- **Determination of the ESD Records Access Officer, dated May 10, 2016**
- **April 20, 2016 Letter to ESD RAO sending a Copy of the April 20, 2016 Statement of Necessity**

May 31, 2016

Peter Henner
Attorney and Counselor at Law
P.O. Box 326
Clarksville, NY 12041-0326

Re: ESD FOIL Request #1927 - Appeal

Dear Mr. Henner:

Empire State Development (“ESD”) has received your appeal dated May 16, 2016, concerning your March 28, 2016 request for records made pursuant to the Freedom of Information Law (“FOIL”).¹

Background

On March 28, 2016, you submitted a FOIL request to ESD “seeking access to the unredacted broadband franchise information that was filed by Time Warner Cable and Charter Communications (“the Companies”) in PSC Case number 15-M-0388 on February 18 or 19, 2016.”²

In a letter dated April 6, 2016, Lesley Hall, ESD’s Records Access Officer (“RAO”), notified the Companies about your FOIL request and informed them of “ESD’s intention to determine whether the records provided, or portions thereof, warrant trade secret protection, and are, therefore, exempt from public disclosure.”³ The RAO instructed the Companies to review the requested document and only redact “portions of the documents containing information that is not otherwise available and, if released, would cause...a competitive disadvantage.” Pursuant to Section 89(5)(b)(2) of the Public Officers Law, ESD provided the Companies 10 business days to submit a written justification for trade secret protection.

¹ Public Officers Law, §84, *et seq.*

² The Companies previously filed Broadband Deployment Data with ESD’s Broadband Program Office on February 18, 2016.

³ Letter from Lesley Hall, ESD Records Access Officer, to Maureen O. Helmer, Esq., Barclay & Damon (Apr. 6, 2016).

The Companies subsequently provided ESD with a revised redacted document and a Statement of Necessity detailing the “justification for confidential treatment of the Broadband Deployment Data.”⁴ The Companies requested that the number of unserved homes be exempt from disclosure “because it includes trade secret and confidential commercial information relative to [the Companies’] broadband deployment.”⁵

On May 10, 2016, ESD’s RAO provided you with a copy of his determination in favor of redacting the number of unserved homes in the Broadband Deployment Data. Upon review of the Companies’ Statement of Necessity and accompanying employee Declarations, ESD’s RAO determined that the Companies demonstrated “that the information at issue meets the definition of ‘trade secret,’ and that the release of this information would cause substantial injury to their competitive position.”⁶ To be sure, the RAO determined that the information both met the definition of trade secret and would cause substantial injury to the Companies’ competitive position. Accordingly, the RAO concluded that the information at issue was “entitled to an exception from disclosure as trade secrets or confidential information under FOIL.”⁷

On May 16, 2016, you appealed the RAO’s determination “that certain information contained in a document submitted by [the Companies] was entitled to an exception from disclosure as trade secrets or confidential commercial information under the Freedom of Information Law.”⁸ In your appeal, you questioned both the RAO’s determination and his analysis.

On May 25, 2016, the Companies submitted a letter in opposition to your appeal.

Applicable Law

Although there is a presumption of access under FOIL, a specific exemption exists in Section 87(2)(d) of the Public Officers Law permitting an agency to withhold records or portions thereof 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...”

⁴ Letter from Maureen O. Helmer, Esq., Barclay Damon to ESD (Apr. 20, 2016).

⁵ *Id.*

⁶ Letter from Lesley Hall, ESD Records Access Officer, to Maureen O. Helmer, Esq., Barclay & Damon (May 10, 2016).

⁷ *Id.*

⁸ Appeal Letter from Peter Henner, Attorney and Counselor at Law, to ESD (May 16, 2016).

The purpose of this exception is “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 York.”⁹ If a business is required to submit records to a state agency, Section 89(5) of the Public Officers Law allows it to request that records or portions thereof be kept confidential under the exemption found in Section 87(2)(d) of the Public Officers Law.¹⁰ A state agency must rely on the information provided by a commercial enterprise in order to conduct this analysis.¹¹

In order to determine if “substantial competitive harm” exists, “the commercial value of the requested information to the competitors and the cost of acquiring it through other means” must be assessed.¹² The RAO must determine how valuable the information would be to competing businesses and any potential damage to the business enterprise that is submitting the information.¹³ The inquiry will end if the only way that competitors can access the information at issue is through a disclosure pursuant to FOIL.¹⁴ If, however, the information is available at little or no cost, the release of the information is unlikely to cause competitive damage to the business enterprise.¹⁵

When determining whether company information is a trade secret, the Court of Appeals established a six-part analysis in *Ashland Mgt. v. Janien*, 82 N.Y. 2d 395 (N.Y. 1993): “(1) the extent it is known outside the entity; (2) the extent to which it is known by employees and others involved in the business; (3) the extent of measures taken by the entity to guard said 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; and (6) the ease or difficulty with which the information could be properly acquired.”¹⁶

Discussion

You contend that, contrary to the RAO’s determination, the information at issue does not meet any prong of the six-part trade secret analysis set forth in *Ashland*.

⁹ *Matter of Encore Coll. Bookstores v Auxiliary Ser. Corp. of State Univ. of N.Y. at Farmingdale*, 87 N.Y.2d 410, 420 (N.Y. 1995).

¹⁰ Committee on Open Government Opinion No. 11740 (Oct. 14, 1999).

¹¹ The Committee on Open Government has opined that “the nature of the record, the area of commerce in which a commercial entity is involved and the presence of the conditions...that must be found to characterize records as trade secrets would be the factors used to determine the extent to which disclosure would ‘cause substantial injury to the competitive position’ of a commercial enterprise.” COOG Opinion No. 11740.

¹² *Encore*, 87 N.Y.2d 420.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Ashland Mgt. v. Janien*, 82 N.Y. 2d 395, 407 (N.Y. 1993).

The first prong of the *Ashland* test examines the extent to which the information is known outside the entity. After reviewing the Companies' Statement of Necessity, the RAO determined that the information at issue is not publicly available, not disclosed to the investment community, and closely guarded internally.¹⁷ You argue in your appeal that "[a] distinction should be drawn between the information which the Companies used to generate their numbers of unpassed housing units, much of which is not known, and the final numbers" found in the document submitted to ESD.¹⁸ You assert that much of this information "can be guessed by a review of the franchise agreement." Assuming arguendo that these numbers can be guessed, the Companies' used a certain internal methodology to produce those specific numbers. Based on my review of the Companies' Statement of Necessity, I am compelled to agree with the RAO's determination that the information at issue is not known outside of the entity.

The second and third prongs of the trade secret test require an evaluation of the measures taken by the entity to guard said information. In making his determination, ESD's RAO recognized that "[o]nly the upper management, outside consultants who developed these datasets and limited TWC and Charter employees that have prepared and compiled the Development Data have access to the information at issue."¹⁹ ESD's RAO concluded that once the information was compiled, the Companies' employees only had access to it on a need-to-know basis.²⁰ Your only objection to this determination is that the Companies did not explain why the information at issue is "so guarded." Notwithstanding, the test does not require an evaluation as to why measures were taken to guard the information; rather, it requires only that efforts were made to guard the information. Accordingly, I concur with the RAO's determination that the information at issue is not disclosed to the investment community, and is closely guarded internally.

The fourth prong requires an assessment of the value of the information to the business and its competitors. In your appeal, you state that "[t]he value of the information is the use to which it can be put." You further assert that "the Companies have not offered any explanation, other than a conclusory statement, that the knowledge of the number of housing units in a particular municipality has any value to their competitors." Upon review of the Companies' submissions, it is my determination that the Dempsey and Mott Declarations support the conclusion that the Companies would be competitively harmed by the release of this information. For example, the release of the Deployment Data would give competitors insight into where broadband services are currently unavailable allowing them to "build their own networks only in the most lucrative and low-risk markets" and "would enable incumbent providers to better prevent competitive entry, as it would inform them of areas where [the Companies are] actively looking to expand [their] footprint."²¹

¹⁷ ESD Letter (May 10, 2016).

¹⁸ Henner Appeal Letter at 4.

¹⁹ ESD Letter (May 10, 2016).

²⁰ *Id.*

²¹ Dempsey Declaration at ¶8.

Further, it could allow competitors to “identify and target their resources to invest and market in areas where [the Companies are] competitively vulnerable or conversely, refrain from targeting certain areas where [the Companies are] competitively strong.”²² ESD’s RAO determined that the information at issue is an important tool for the Companies “to define their short and long term business strategies and prioritize their plans for facilities investment.”²³ Accordingly, I find that this prong of the *Ashland* test has also been met.

The fifth prong of the trade secret test requires an evaluation of the amount of effort, or money, expended by the business in developing the information. ESD’s RAO notes that much of the information at issue was “developed from the [C]ompanies’ databases, and it would be extremely costly, complex and time-consuming, and extraordinarily difficult for others to duplicate.” According to the Companies’ submissions, the financial investment exceeds \$128 million.²⁴ In your appeal, you acknowledge that the Companies may have incurred significant costs in compiling this information but state that they were required to do so by the Public Service Commission as a condition of their merger. Regardless of the reason that the Companies incurred this cost, it is clear that the Companies expended significant effort and money in developing the information. Accordingly, I concur with the RAO’s determination that the Companies have met this prong of the *Ashland* test.

Lastly, the sixth prong of the test looks at the ease or difficulty with which the information at issue could be properly acquired. In your Appeal, you concede that others could identify the information at issue, “albeit with some difficulty.” I agree with the RAO’s determination that the requirements of this prong have been met since this information is not otherwise publicly available and the Companies incurred considerable effort and cost to acquire and protect it.

Incidentally, many of the *Ashland* factors also support the substantial competitive harm analysis. As stated earlier, if the release of information through FOIL is the only way that competitors can access the information at issue, the competitive injury analysis ends. Since the only way the Companies’ competitors can access this information would be through the release of this information pursuant to FOIL, then the substantial competitive harm test has been met. Nevertheless, an assessment of “the commercial value of the requested information to the competitors and the cost of acquiring it through other means” reveals that the Companies spent \$128 million generating the information at issue, and that were this information to be released, the Companies’ competitors could engage in actions that would cause the Companies substantial injury, as discussed extensively in the Dempsey and Mott Declarations.

²² Mott Declaration at ¶9.

²³ Henner Appeal Letter at 4.

²⁴ Charter Communications, Inc. and Time Warner Cable Inc.’s Statement of Necessity Pursuant to Public Officers Law §89(5)(b)(2) at 10.

Conclusion

In making his determination, ESD's RAO appropriately relied on the Companies' Statement of Necessity and the accompanying Declarations when analyzing whether the information at issue warrants trade secret protection under FOIL.²⁵ ESD's RAO conducted a thorough analysis of the information provided by the Companies, and correctly determined that the information at issue meets the definition of trade secret, and that the release of this information would cause substantial injury to the Companies' competitive position. I agree with the analysis and conclusion set forth in the Determination, and I reach the same conclusion.

Therefore, your appeal is denied.

I am directing ESD's RAO to provide the responsive document to you within five business days.

Sincerely,



Julene E. Beckford
Associate Counsel and
Records Access Appeals Officer

cc: Robert J. Freeman, Executive Director, NYS Committee on Open Government
Maureen O. Helmer, Esq., Barclay & Damon
Ekin Senlet, Esq., Barclay & Damon
Lesley Hall, Records Access Officer, Empire State Development

²⁵ See ESD Letter (May 10, 2016).



May 10, 2016

VIA EMAIL

Maureen O. Helmer, Esq.
Ekin Senlet, Esq.
Barclay & Damon
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mhelmer@barclaydamon.com
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RE: ESD FOIL request # 1927

Dear Ms. Helmer:

Pursuant to Public Officers Law (POL) §89(5)(b)(3), the Empire State Development (ESD) Records Access Officer (RAO) determines that certain information for which Charter Communications (Charter) and Time Warner Cable (TWC) have requested confidential treatment under POL §87(2)(d) is entitled to an exception from disclosure as trade secrets or confidential commercial information under the Freedom of Information Law (FOIL).

DETERMINATION

Charter and TWC submitted to ESD a Statement of Necessity dated April 20, 2016, along with two Declarations by Noel Dempsey and Greg Mott. (These documents are incorporated by Reference to this Determination). The Statement of Necessity and the accompanying Declarations make a compelling case for trade secret protection and competitive injury protection for the information at issue.

According to Charter and TWC, the information at issue contains non-public, competitively-sensitive information and trade secrets with respect to their broadband deployment, including information regarding the number of unserved homes in certain municipalities in which TWC and Charter provide service – also known as “not passed homes” or Deployment Data. They contend that disclosure of the Deployment Data would provide an advantage to the companies’ competitors to the detriment of TWC and Charter, and subject them to significant economic and competitive harm.

Public Officers Law § 87(2)(d) protects from FOIL disclosure “all 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.” The Restatement of Torts definition of trade secret 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 obtain an advantage over competitors who do not know or use it.” In *Ashland Mgt. v Janien*, 82 N.Y. 2d 395, 407 (N.Y. 1993), the N.Y. Court of Appeals determined the extent to which information is a trade secret by (1) the extent it is known outside the entity; (2) the extent to which it is known by employees and others involved in the business; (3) the extent of measures taken by the entity to guard said 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; and, (6) the ease or difficulty with which the information could be properly acquired .



TWC and Charter have demonstrated in detail that the information at issue meets the definition of “trade secret,” and that the release of this information would cause substantial injury to their competitive position. They present persuasive historical factual data and data from a wide variety of sources to establish that the “homes not passed” category was compiled with internal expertise.

As both Declarations discuss in detail, much of the information was developed from the companies’ databases, and it would be extremely costly, complex and time-consuming, and extraordinarily difficult for others to duplicate the information. 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 at issue. 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, is not disclosed to the investment community, and is closely guarded internally. Further, the companies maintain that the Deployment Data is an important tool that they use to define their short and long term business strategies and prioritize their plans for facilities investment. Both TWC and Charter aver that the data has tangible financial and strategic value to their competitors. If allowed access to the data, competitors in these franchise areas would receive a tangible financial benefit, by being spared the cost of independently collecting market data and information about facilities deployment.

In light of the forgoing, the information claimed to be trade secrets or confidential commercial information warrants an exception from disclosure and the request for continued protection from disclosure is granted.

Review of my Determination may be sought, pursuant to POL §89(5)(c)(1), by filing a written appeal within seven business days of receipt of this Determination with Antovk Pidedjian, Senior Counsel of New York State Urban Development Corporation d/b/a Empire State Development, 633 Third Avenue, 37th Floor, New York, NY 10017. Any requests for an extension of time in which to file a written appeal of this Determination should be directed to Mr. Pidedjian.

Sincerely,

Lesley Hall
Assistant Counsel &
Records Access Officer

cc:

Peter Henner
Attorney and Counselor at Law
P.O. Box 326
Clarksville, New York 12041-0326
peter@peterhenner.com

Committee on Open Government

Maureen O. Helmer
Partner

April 20, 2016

VIA ELECTRONIC MAIL

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RE: FOIL No. 1927 - Statement of Necessity

Dear Mr. Ortiz and the Empire State Development Records Access Officer:

In response to your letter dated April 6, 2016 regarding FOIL No. 1927, attached please find a copy of the Statement of Necessity detailing justification for confidential treatment of the Broadband Deployment Data filed on behalf of Time Warner Cable, Inc (“TWC”) and Charter Communications, Inc. (“Charter”) (collectively the “Companies”).

The Companies originally filed the Broadband Deployment Data with the Broadband Program Office (“BPO”) and the Public Service Commission’s Records Access Officer (“the PSC RAO”) on February 18, 2016. On March 28, 2016, Mr. Henner requested an unredacted copy of this filing. On April 1, 2016, the PSC 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 only the approximate number of homes not passed in each franchise. (Also attached here). On April 6, 2016, Mr. Henner responded stating that his office still sought full disclosure of the Broadband Deployment Data. On April 6, 2016, both the PSC RAO and the BPO sent letters to the Companies and offered an opportunity to the Companies to submit a Statement of Necessity for non-disclosure of the Broadband Deployment Data by April 20, 2016.

Accordingly, the attached the Statement of Necessity 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. A copy of the same has been filed with

Empire State Development Records Access Officer

April 20, 2016

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the Public Service Commission.

Respectfully submitted,

/s/ Maureen O. Helmer

Maureen O. Helmer

*Counsel for Time Warner Cable, Inc. and
Charter Communications, Inc.*

Cc:

Peter Henner, Esq. (via electronic mail)

Public Service Commission Records Access Officer (via electronic mail)