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via e-mail (secretary@dps.ny.gov) and certified mail return receipt requested

May 10, 2016

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

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

Dear Secretary Burgess:

Please consider this letter as a formal appeal, on behalf of my clients, Alliance for Environmental Renewal, New Scotland Town Supervisor Douglas LaGrange, Nancy Lawson, Douglas Bullock, Jim and Lynn Cable, Priscilla and Robert Hannan, pursuant to the provisions of §89 (5) (c) of the Public Officers Law (“POL”), from the May 4, 2016 Determination 16-02 of the RAO Donna M. Giliberto. Ms. Giliberto determined that the records that my clients sought in a Freedom of Information Law (“FOIL”) request were excepted from disclosure on the grounds that they constituted trade secrets or confidential commercial information pursuant to POL §87 (2) (d) and 16 NYCCR §6-1.3.

**PROCEDURAL BACKGROUND**

On February 18, 2016, Time Warner Cable and Charter Communications (“the Companies”) filed a list of municipalities where they held franchise agreements, and the number of unpassed homes in each municipality in Case No. 15-M-0388. However, all information, including the County, municipality type, and the name of the municipality where the franchise was applicable, was redacted. The Companies maintained that this information was “confidential.” On March 28, 2016, I filed a FOIL request, seeking access to an unredacted version of this document.

After the RAO contacted the Companies, they submitted a revised redacted version of the document on April 5, 2016, providing all of the information except for the number of unpassed homes in each municipality. In response, I reiterated my request for access to the full unredacted

version of this document. The Companies submitted a “Statement of Necessity” for the nondisclosure of this information, and I responded to this statement.

The RAO determined that the redacted information met the definition of a “trade secret” and that the Companies had met their burden of establishing that disclosure of this information would result in a “competitive injury.”

### **DESCRIPTION OF INFORMATION SOUGHT**

The redacted information consists only of the numbers of unpassed housing units in each municipality where the Companies have negotiated a franchise agreement with the municipality. According to the Companies, these numbers are compiled as a result of an extensive process that includes the review of multiple data sources and relies on both internal data and data from publicly available sources.

While the methodology, internal data sources, and internal analyses of the Companies are arguably entitled to trade secret protection, that is not what is at issue in this FOIL request. The only information which was submitted in the pending proceeding and to which access is sought is the actual number of homes unpassed in each municipality.

The Companies’ franchise agreements are heavily regulated by Article 11 of the Public Service Law. In particular, § 215 gives the Commission the authority to prescribe minimum standards for a cable television provider. These standards have been incorporated in regulations, particularly 16 NYCRR § 895.5, which requires cable television companies to provide service wherever there is a density of 35 housing units per linear mile. Many franchise agreements impose stricter requirements, such as requiring that the franchisee offer to extend service without cost wherever there are at least 20 housing units per linear mile. All franchise agreements are public records and are available on the PSC website.

The Companies can, of course, agree to offer service to residences that do not meet the minimum requirements for free extension of service, and frequently do so. Such service is offered at fairly expensive rates, and many people are not willing or able to pay the costs, sometimes in the tens of thousands of dollars for an extension of service.

As discussed below, the companies have not filed any information as to the costs of providing service, their marketing strategies, if any, to provide service, or how their competitors would use the information. The only information at issue is the sum total of housing units in particular municipalities that are not served.

### **DECISION OF RECORDS ACCESS OFFICER**

According to the RAO: “Through the use of... 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 as well in the Commission regulations and the Verizon case.” (p.8). However, while her two-page discussion of the “Applicable Law” characterizes the declarations

filed by the Companies as supplying detailed information that would be extremely costly and difficult for others to duplicate, it does not specify which details she relied upon to reach her conclusion. Nor does her determination analyze the six specific factors set forth in the regulations.

Instead, the RAO merely relies upon the conclusory statements made by the Companies in the documents that they submitted, and uncritically accepts their conclusions.

### **TRADE SECRET STATUS**

The Companies maintain that the information at issue is a “trade secret” because it allegedly “consists of a wide array of information that has been combined to give insight into the Companies’ existing broadband deployment and future plans.” (Statement of Necessity, p.6). This is simply absurd. The simple number of unserved housing units in a particular municipality is not a “wide array of information” nor does disclosure of such a number give any insight into the question of whether or not the Companies have any intention of providing service to any of those housing units.

Furthermore, it should be remembered that service has not been extended to these housing units because they are presumably in areas of low density, where the Companies are not required to extend service, and the companies have not found it economical to do so. Therefore, it seems very unlikely that the Companies have any plans to extend service to these unserved units, absent a direction from the Commission to do so as a result of the January 8, 2016 Order which directed the extension of service to 145,000 housing units.

While it may be true that confidential information was used to determine how many units are presently unserved, that does not mean that the ultimate conclusion of how many unserved units may exist is or should be confidential.

The Companies do not provide any information, other than a conclusory statement, that competitors will be able to use this specific information to gain a competitive advantage. If a competitor knows that there are X number of housing units in a given municipality (as opposed to say 2X or .5X, it is not clear, and the Companies do not offer any explanation, as to how a competitor can use that information. The information will not provide any guidance as to whether the Companies intend to offer service to those unserved units, whether it is economically feasible for anyone, the competitor or the Companies, to offer such service.

### **THE SIX CRITERIA IN THE REGULATIONS**

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

The Companies do not offer any evidence to indicate that they will be injured by the disclosure of this information. Even if it is to be assumed that they have some marketing plans for the presently unserved housing units, they do not offer any examples of how knowing how many units might be presently unserved could be used by a competitor.

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

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 which were contained in the document filed with the Public Service Commission. Some 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. Municipalities have some idea of how many subscribers a particular franchisee may have in their territory. It is not difficult to figure out whether large parts of a municipality are not serviced by a cable television company, even if the exact number is not known.

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

The value of the information is not the cost of compiling it. Even if we are to accept Time Warner's claim that it cost \$128 million to generate this information (see Dempsey Affidavit, p.4), that is not to say that the information is worth anything like that amount of money. The value of the information is the use to which it can be put. As noted above, the Companies have not offered any explanation, other than a conclusory statement, that knowledge of the number of housing units in a particular municipality has any value to their competitors.

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

It should be noted that the Companies were required to develop this information, in order to comply with the PSC Order approving the merger. The Companies are required to extend service to 145,000 housing units, and they will be required to identify where those units are located. Therefore, even if the Companies did incur costs in developing this information, they are costs that would have been required in any event, regardless of the activities of their competitors.

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

As noted above, approximations of the number of housing units in a particular municipality could be derived, albeit with some difficulty.

6. Other statutes or regulations specifically accepting the information from disclosure.

No such statutes or regulations have been identified.

### **SUBSTANTIAL COMPETITIVE INJURY**

The mere fact that competition exists in the telecommunication area does not, as the RAO included, constitute a "causal link" for a substantial competitive injury. The Companies fail to establish that there is any actual competition within the particular municipalities where they have unserved housing units. Nevertheless, even if we assume such competition does, in fact exist, the Companies have not offered any evidence or even any anecdotal examples, of how they will suffer any competitive injury.

The RAO concludes by noting that the Merger Order will require a build out over several years, and speculates that a competitor may be able to use information regarding the number of housing units to build out before the newly merged company will be required to do so. This seems to suggest that the RAO believes that there is a significant possibility that a competitor will perform such a build out, and attempt to pass the cost on to customers. Such a scenario is unlikely because prospective 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.

### **DETERMINATION OF APPEAL**

Pursuant to the provisions of §89(5) (c) (2) of the Public Officers Law, this appeal is to be decided within 10 business days of its receipt. I have sent a copy of it to counsel for the Companies, but I understand that it will be posted on the PSC website for Case No, 15-M-0388 as well. Please note that I have taken the liberty of sending a copy of this appeal to the New York State Committee on Open Government. As you know, §89(4) requires you to send a copy of your response to this appeal directly to the Committee.

Very truly yours,

s/Peter Henner

Peter Henner

c: Ekin Senlet, Esq. (via e-mail only)  
Maureen Helmer, Esq (via e-mail only)  
Robert Freeman, Esq.  
Clients