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October 3, 2014

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Re: Appeal of Determination concerning request for records submitted by Mr. Norlander on June 17, 2014 (filed in Case 14-M-0183)

Dear Mr. Norlander, Ms. Helmer, Mr. Klein:

By letter dated August 15, 2014, I remanded the August 1, 2014, appeal by Time Warner and Comcast to Administrative Law Judge (ALJ) Prestemon for consideration of whether the material at issue in the appeal should be deemed "trade secret." In his determination of July 22, 2014, ALJ Prestemon decided that the material at issue was not protected because it had not been shown that disclosure would create a "likelihood of substantial competitive injury." I remanded the appeal in light of a July 31, 2014 decision of Albany County Supreme Court, which held that under Public Officers Law (POL) §87(2)(d), "trade secrets" were not subject to the test of a "likelihood of substantial competitive injury."[1] For reasons given in this letter, a further remand of the September 15, 2014 Time Warner/Comcast appeal, is appropriate.

On remand, Comcast and Time Warner did not present a further case on whether the material sought to be protected is "trade secret." The ALJ then reviewed the material provided in the August 1, 2014 appeal and decided in a September 3, 2014 determination that, inasmuch as Time Warner and Comcast had not shown a "likelihood of substantial competitive injury," they had not shown that the material was "trade secret," conferring a competitive advantage. Time Warner and Comcast then appealed the second determination on September 15, 2014, claiming that the considerations that led them to argue in the first appeal for protection of the materials meant that the necessary showing of competitive advantage had been made.

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[1] Matter of Verizon New York Inc. v. New York State Public Service Commission et. al., (Albany County Index No. 6735-13) ("Verizon").

Mr. Gerald Norlander
Ms. Maureen Helmer
Mr. Andrew Klein
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Upon review of the submissions on appeal I conclude that the direction in my August 15, 2014 letter that there be "consideration of whether the information sought to be protected is 'trade secret'" has not been discharged. In this regard, it is telling that Comcast and Time Warner are relying on the same declarations they used in the first appeal. A further remand is appropriate in view of the Commission's "affirmative responsibility to make provision, appropriate to the exercise of its regulatory authority, for the protection of the interest ... in any trade secrets ... made available to participants in the proceeding."[2]

To aid in the consideration of these issues on remand, I am propounding the following questions to be addressed before the ALJ. The parties are, of course, welcome to raise such additional issues and present such additional proof as may be appropriate, but I believe at the very least the following questions should be addressed.

1) Under the Commission's regulations "[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." 16 NYCRR 6-1.3(a). Please specify how the information at issue on the appeals is a "formula, pattern, device or compilation of information . . . ."

2) The definition of "trade secret" in the regulation further states that, to be a trade secret, a formula, pattern, device or compilation of information must provide "an opportunity to obtain an advantage over competitors who do not know or use it." 16 NYCRR 6-1.3(a). Please specify how the information at issue on the appeals provides "an opportunity to obtain an advantage over competitors . . . ." and how such an opportunity is to be proven.

3) The second prong of the Encore test is stated in terms of probabilities – "a likelihood of substantial competitive injury."[3] Is "the opportunity to obtain an advantage over competitors" similarly, a probabilistic test? If so, what is the probability? Is there some more explicit quantum of information, beyond a probability, that must be shown to prove that "any formula, pattern, device or compilation of information" is a trade secret? Please explain how your answer to this question supports (undermines) your view on whether the information at issue should be protected.

4) The ALJ applied Markowitz v. Serio, 11 N.Y.3d 43 (2008), as precluding speculation in concluding that the material has not been shown to be "trade secret."

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[2] New York Telephone Co. v. Public Service Commission, 56 N.Y.2d 213, 220 (1982).

[3] See Encore College Bookstore v. Auxiliary Service Corp. of State University of New York, 87 NY2d 410, 421 (1995).

Markowitz seems to pertain to application of POL §87(2)(d) generally, 11 NY2d at 50, so after Verizon shouldn't it still apply to "trade secrets," even though the Court observed in that case that "[t]rade secrets were not at issue in [Markowitz]", Verizon, slip opinion at 21, note 16? Please explain your answer and how that answer means the information at issue in this case should be protected (disclosed).

5) The ALJ stated, correctly it seems, POL §89(5)(e), that the burden of proving "trade secret" is on the proponent of exemption from disclosure. What burden must be met by an entity seeking to exempt a "trade secret" from disclosure? How has that burden been met (or failed) with respect to the information at issue?

Thank you for your attention to the questions in this letter and consideration of them on a further remand.

Sincerely,

Kathleen H. Burgess
Secretary

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