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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