

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

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. Appeal of the Records Access Officer’s FOIL Determination.

**DETERMINATION OF APPEAL OF
TRADE SECRET DETERMINATION**

(Issued July 7, 2016)

INTRODUCTION

This is an appeal from a determination of the Records Access Officer (RAO) of the Department of Public Service (DPS) that certain information submitted by Charter Communications (Charter) and Time Warner Cable (TWC) (jointly the Companies) is exempt from disclosure under the Freedom of Information Law (FOIL), Public Officers Law (POL) Article 6.¹ Peter Henner, Esq. appeals, arguing that the protected information -- estimates of the number of housing units in each municipality that are unserved by the Companies -- have not been shown to be “trade secrets” or likely to cause substantial competitive injury if disclosed. He accordingly claims that the RAO’s determination should be reversed, and the estimates should not be exempted from disclosure under FOIL.

This Determination on Appeal upholds the RAO’s determination exempting the estimates of unserved customers (termed in the Companies’ documents as “not passed” customers) by municipality under FOIL as “trade secrets.” Although it is in the public interest to provide expansive access to governmental records, the Legislature carved out certain exceptions necessary to protect other, superior interests in specific contexts.² One of those exceptions is where an entity has established all the criteria necessary to prove that the information sought is entitled to protection as a trade secret and thus confidentiality is necessary to preserve an earned competitive advantage in a market.³ After careful review, here I have determined that the

¹ 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 (issued May 4, 2016) (RAO Determination).

² See POL §§ 84, 87.

³ Id. § 87(2)(d).

Companies' have met their burden of demonstrating that the particular information identified here is entitled to the "trade secret" exemption under the applicable legal standard.⁴

BACKGROUND AND PROCEDURAL HISTORY

The instant appeal arises from Commission approval of the acquisition of TWC and Charter.⁵ The Commission required the resulting entity to extend its network to serve an additional 145,000 unserved residential housing units and/or businesses within four years.⁶ The Companies were required to complete the expansion to 145,000 unserved premises within four years, with 25% of the expansion to be completed in each year. This expansion was not to be funded through the Broadband Program Office (BPO) of Empire State Development (ESD), but the Companies were permitted to seek such funding for extensions in excess of 145,000 newly served premises.⁷

In furtherance of the Commission's directive, on February 18, 2016, the Companies filed confidential and public copies of their analysis of unserved premises categorized by municipality. Mr. Henner, on March 28, 2016, sought access to the confidential/unredacted version of the information. On April 1, 2016, the DPS Records Access Officer requested the Companies to resubmit the documents to minimize redactions. The documents, as refiled on April 5, 2016, contained listings by county, town and franchise and only blacked out the "homes not passed," or unserved premises.⁸ Mr. Henner renewed his request for access to the number of unserved homes on April 6, 2016 and, on the same day, the RAO gave the Companies ten business days to submit a written statement of necessity for an exemption

⁴ See Matter of Verizon v New York State Pub. Serv. Commn., 137 AD3d 66, 72-73 (3d Dept. 2016) (Verizon).

⁵ Case 15-M-0388, *supra*, Order Granting Joint Petition Subject to Conditions, issued January 8, 2016 (Transfer Order).

⁶ Transfer Order at 52-53, Appendix A at 1-3.

⁷ Transfer Order at 53, Appendix A at 1-3. The Companies' Franchise Agreements provide for service to all homes within primary service areas. Such areas must have a minimum of 35 premises per area mile, but may, by agreement, contain fewer premises per area mile. The Companies have also extended service to premises that may be located in areas with lesser minimum densities than required, based on business considerations. The remaining areas in the Companies' franchise territories contain the unserved customers that the Companies have an obligation to serve pursuant to the Transfer Order.

⁸ The Companies filed a confidential copy of the information with the RAO and the BPO on April 8, 2016.

from disclosure. On April 20, 2016, the Companies filed their Statement of Necessity for nondisclosure including supporting declarations of Noel Dempsey (TWC) and James Gregory Mott (Charter) asserting that the estimates of unserved homes is entitled to protection from disclosure as both a trade secret and as commercial information that “if disclosed would cause substantial injury to the competitive position of the subject enterprise.”⁹ By letter dated April 22, 2016, Mr. Henner opposed the Statement of Necessity.

The RAO Determination

On May 4, 2016, the RAO issued a determination finding that estimates of unserved lines by municipalities had been shown to be both trade secret and confidential commercial information that if disclosed would cause a likelihood of substantial competitive injury. With respect to the trade secret exemption, the RAO found that the estimates were a compilation of information used in the Companies’ business that could be used to gain a competitive advantage and that the Companies had met each of the six Restatement factors to be considered when determining a trade secret.¹⁰

The RAO further decided that the Companies demonstrated that disclosure of the information would likely cause substantial competitive injury. According to the RAO determination, the Dempsey Declaration established the existence of competition in the telecommunications industry, and constituted the necessary causal link. The RAO also gave credence to the Company’s claim that the information was developed from Company databases would be extremely costly, complex and time consuming to duplicate. The RAO observed the Companies have maintained that unserved homes is an important tool to define short and long term business strategies and prioritize their investment plans, were committed to building out in these areas over several years and that a competitor’s ability to have information regarding where there are higher concentrations of unserved customers would allow such competitors to build out in those areas prior to the newly merged company doing so.

⁹ POL §87(2)(d).

¹⁰ See Ashland Management Inc. v Janien, 82 NY2d 395, 407 (1993); Restatement of Torts § 757, comment b.

The Appeal

By letter dated May 10, 2016, Mr. Henner appealed the RAO's denial of access. The Companies filed in opposition to the Henner appeal on May 19, 2016. By letter from the Secretary dated May 24, 2016, observing that the Companies' opposition, and particularly the supporting declarations, seemed to be more addressed to whether the Charter companies had shown a "likelihood of substantial competitive injury" and not to the factors relevant to determining trade secrets,¹¹ the Companies were granted an additional 10 business days to correct any misapprehension or apply the correct legal standard.

On June 8, 2016, the Companies filed a response clarifying the Company's handling of the request for trade secret status. They attached revised declarations, organized to show the support for each specific prong of the trade secret analysis. The Companies also reported that the ESD Records Appeal Officer had denied Mr. Henner's appeal from a determination of the ESD Records Access Officer that the estimates of unserved homes by municipality were exempt from disclosure. The ESD Records Appeal Officer also concluded that the Companies showed that it met the trade secret factors and supported the substantial competitive harm analyses.¹² By letter dated June 20, 2016, Mr. Henner replied to the Companies supplemental filing.

ARGUMENTS ON APPEAL

Mr. Henner argues on appeal that the estimates of unserved homes are not entitled to exemption from disclosure as either a trade secret or under the substantial competitive injury test.¹³ With respect the trade secret exception, he acknowledges that the methodology and internal data sources and analyses employed by the Companies to produce the estimate numbers of unserved customers are arguably entitled to trade secret protection.¹⁴ He contends, however, that the resulting number of unserved units, without the underlying analysis, should not be considered a trade secret as it is not a "wide array of information" that could meet the

¹¹ Verizon, supra, at 72-73. The full text of the two-prong trade secret inquiry is quoted infra, pp. 10-11.

¹² Letter from ESD Records Access Appeals Officer Julene E. Beckford to Mr. Henner dated May 31, 2016.

¹³ See Verizon, supra, at 74.

¹⁴ Letter from Peter Henner Appealing RAO Determination, dated May 10, 2016, p. 3.

“compilation of information” component in the definition of a trade secret. He further asserts that if the numbers are a compilation of information, then the Companies have offered no explanation of how they can be used to develop marketing strategies and determine investments, arguing that the Companies do not claim that they intend to market in uneconomical areas. Mr. Henner also suggests that the number of unserved units in a particular municipality can be surmised from a review of franchise agreements requiring extension of service, which are public documents.

With respect to the six trade secret Restatement factors, Mr. Henner concedes that the estimates of unserved homes is not readily available and/or could only be duplicated with difficulty (factor six) and admits no knowledge of whether the information is known outside the business (factor one) or to the Companies’ employees (factor two) and the Companies’ measures to shield the information (factor three). He argues, however, that the critical factor is the competitive value of the information (factor four) and the Companies have made no showing that the numbers of unserved units by municipality has any particular competitive value, either as part of the Companies’ marketing strategy and to a competitor. He also asserts that the Companies have not established the true cost of developing the information (factor five), but have instead conflated the cost of developing its databases with the competitive value of information derived from those databases. He claims that the costs of the databases are a general business expense, incurred apart from the expenses of generating the number of unserved houses by municipality. Mr. Henner asserts that the cost of generating information on unserved homes in particular municipalities is different from the cost of the underlying databases and further that the cost of such generation of information is separate from the value of the information.

On the separate ground of substantial competitive injury, Mr. Henner argues there is has no causal link shown between competitive injury and the existence of competition. He contends that the Companies have not shown how they would be injured and offered no evidence to indicate that they would be injured by disclosure of unserved units. Mr. Henner claims that there is no proof or examples as to how unserved units might be used by a competitor. He further asserts that customers will not want to sign up for a competitor’s service because they know that the companies are required to build out the service over four years.

In their response to Mr. Henner’s arguments, the Companies assert that they have met both prongs of the trade secret analysis. First, they assert that the number of unserved

homes by municipality constitutes a “compilation of information” because a wide array of information has been combined to produce the estimates. The Companies observe that the estimates are based on field walks, desktop and field surveys and special algorithms. Specifically, the estimates were compiled with mapping of Census Bureau housing units and NTA broadband provider service level data blocks against each company’s proprietary database and other data inputs to derive the number of unserved housing units.¹⁵ The estimates, according to the Companies, are used in its business to develop short and long-term business and marketing strategies, as well as plans for facility development and are therefore relevant to the Companies’ business. They further contends that the information gives the Companies an option of obtaining an advantage over competitors who do not know or use it. The Companies assert that the estimates are derived from internal databases and provide the companies an insight into which homes would be prime candidates for deployment of services, marketing and overall decisions to extend service. The information thereby allows the Companies to plan for future deployment and facilities investments, given their constant competition with other providers.¹⁶

The Companies then argue that it has shown that the Restatement factors support the trade secret status of the estimates of unserved homes. They state that the material is not publicly available and is not disclosed to the investment community, while granular data may be provided only after the conclusion of construction (factor one). With regard to the second Restatement factor, the Companies state that only upper management outside management and limited TWC and Charter employees have access to the estimates of homes not served. It then describes the extent of the measures taken by the company in regard to secrecy (factor three).¹⁷

The Companies further claim that the estimates of unserved homes by municipalities are valuable to its competitors (factor four). The Companies assert that competitors will be able to use the estimates to identify markets that present opportunities. They claim that the competitors can engage in cherry picking and build their own networks only in the most lucrative and low-risk markets. Such information would enable incumbent providers to

¹⁵ Companies’ Supplement at 9, citing Dempsey Declaration ¶¶5-6, Mott Declaration ¶¶6-7.

¹⁶ Companies’ Supplement at 10, citing Dempsey Declaration ¶¶5, 8-10, Mott Declaration ¶¶6, 8-11.

¹⁷ Charter cites the Dempsey and Mott declarations as stating that employees only have access on a need to know basis and Charter’s vendors have limited access to materials. Companies’ Supplement at 10-11, citing Dempsey Declarations ¶¶11-13, Mott Declaration ¶¶12-14.

better prevent competitive injury as it would inform them where TWC and Charter are actively looking to expand their footprint.¹⁸ The Companies also state that significant financial resources were required to develop the estimates of unserved homes (factor five). They rely on the Dempsey Declaration to state that TWC has updated its plant records into a single GIS system at a cost of \$128 million. Charter has expended millions of dollars and considerable man hours to develop and maintain the data relied upon.¹⁹ Finally, in regard to the difficulty of obtaining the information (factor six), the Companies assert that it would be costly, complex and time consuming for others to duplicate the information. It cites the Dempsey and Mott Declarations for the proposition that only rough estimates of the information could be obtained by conducting a visual assessment of every mile of outside plant.²⁰

With respect to substantial competitive injury, the Companies claim that they face competition from voice, video and data providers. They assert that if these competitors were allowed access to the estimates of unserved homes they would receive a tangible financial benefit, by being spared the cost of independently collecting information about facility deployment. They also argue that competitors would receive valuable insight into the Companies' strategic decision making and could attempt to build in unserved areas prior to the Companies.²¹

The Companies respond to Mr. Henner's argument that it is not clear how competitors would use data on unserved homes by citing the Dempsey and Mott declarations as providing multiple specific examples or explanations of how the competitor would use the estimates of unserved homes. They cite the Declarations as showing competitors can "cherry pick," by building networks in the most lucrative and low risk markets. It is asserted that the data at issue would allow competitors to target, or refrain from targeting, certain areas based on their assessment of the Companies' competitive strength. Further, the Dempsey declaration

¹⁸ Companies' Supplement at 12, citing Dempsey Declarations ¶¶10, 14-15, Mott Declaration ¶¶8,10-11, 15.

¹⁹ Companies' Supplement at 12-13, citing Dempsey Declarations ¶¶5-6, 14-15, Mott Declaration ¶¶6-7, 15-16.

²⁰ Companies' Supplement at 12, citing Dempsey Declarations ¶¶5-6, 16, Mott Declaration ¶¶6-7, 17.

²¹ Thus, competitors could, it is asserted, be able to offer special offers for service to unserved homes, while at the same time they may refrain from serving certain areas where the companies are competitively strong. TWC/Charter Statement of Necessity at 13-14.

stated that the number of unserved homes would give TWC's competitor a road map to develop strategic business plans for future deployment.²²

The Companies further assert that the RAO properly relied on the showing of competition as the causal link supporting a finding of "likelihood of substantial competitive injury." They argue that a competitor will rely on granular information regarding whether there is a higher concentration of unserved customers when they look to build out those areas prior to the Companies doing so. Given the fierce competition for cable broadband subscribers, competition is asserted as the causal link to show a likelihood of substantial competitive injury.

DISCUSSION

The issue on appeal is whether the Companies' estimates of unserved homes by municipality are entitled to an exemption from disclosure. I conclude that the estimates, at this early stage of the Companies' expansion efforts, are entitled to protection as trade secrets. Accordingly, there is no reason to reach the substantial competitive injury standard.

New York courts have followed the Restatement of Torts definition of trade secret.²³ Thus, the two-prong test for proving "trade secret" under POL §87(2)(d) is as follows:

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. 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 other 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.²⁴

²² TWC/Charter Opposition at 13-14.

²³ See Ashland Management Inc. v Janien, 82 NY2d 395, 407 [1993], citing Restatement of Torts § 757, comment b; Appellate Division Verizon Decision, 137 A.D.3d at 72.

²⁴ Verizon, *supra*, 137 A.D.3d at 72-73 (internal quotations and citations omitted).

In meeting this test “[t]he person requesting an exemption from disclosure pursuant [to POL §89(5)] shall in all proceedings have the burden of proving entitlement to the exemption.” POL §89(5)(e).

A. The Number of Unserved Homes Should Is a Compilation of Information that Provides an Opportunity for Competitive Advantage

I agree with the RAO that the first component of the test is met here because the numbers sought constitute a compilation of information which is used in the Companies’ business, and which gives them an opportunity to obtain an advantage over competitors who do not know or use it. In the Verizon decision, the Appellate Division clarified the differences in the tests for meeting the “trade secret” and “substantial competitive injury” exceptions and, in so doing, emphasized that the material sought to be protected as trade secrets had “to be ‘truly secret’ information worthy of protection from disclosure without a showing of substantial competitive injury.”²⁵ In particular, the Court stated the list of auto insurance policies in Matter of Markowitz v. Serio, 11 NY3d 43 (2008), and the fall semester booklist in Encore College Bookstore v. Auxiliary Services Corp., 87 NY2d at 419-421 were not “truly secret.”²⁶ Also, in citing Matter of Troy Sand & Gravel Co. v New York State Dept. of Transp.,²⁷ the Court found that similar information in that case “likely would not constitute bona fide trade secret material under the Ashland Mgt. standard.”²⁸ Here, however, the estimates of passed houses by municipalities do not constitute the sort of listings in Encore and Markowitz that would be deemed unworthy of trade secret protection.²⁹ The estimates summarize a wide array of information, based on a variety of sources, including Charter and Time Warner databases and other information and, as such, should be considered a “compilation.” The Appellate Division in

²⁵ Verizon, supra, 137 AD3d at 73.

²⁶ Id.

²⁷ 277 AD2d 782, 784-786 (3d Dept. 2000).

²⁸ Verizon, 137 AD3d at 73. The Court also pointed to pricing information and a computer methodology which were not deemed to be “trade secret” in, respectively, Marietta Corporation v. Fairhurst, 301 AD2d 734, 738 (2003), and Ashland Management v. Janien, 82 NY2d at 407-408. (Id.)

²⁹ The booklist in Encore was eventually deemed worthy of protection as confidential commercial material likely to give rise to substantial competitive injury if disclosed.

Verizon, supra, held that the aggregate cost information for a particular locality was a “trade secret.”³⁰ Similar treatment can be accorded to the Companies’ analyses of unserved homes.

Moreover, Mr. Henner’s observation that the materials at issue are based on proprietary databases that are trade secret seems fatal to his argument that the estimates should not be considered compilations. The Companies’ protected databases listing its specific customer information and plant are protected by the FCC from disclosure.³¹ Without the protected data and analysis, the information sought by Mr. Henner cannot be easily reproduced. Accordingly, protection should be extended to the information derived from those databases as well.³²

Further, the estimates provide an opportunity to obtain an advantage over competitors who do not know or use it. Mr. Henner argues that numbers of unserved homes by their nature cannot be considered a competitive document. However, the Companies seek to convert unserved homes to served homes in order to maximize revenue growth and prevent competitive inroads into its franchise areas. The Companies face a variety of competitive alternatives to their provision of service and must make decisions as to how best to expand their system. Estimates of unserved homes by municipality gives them an opportunity for advantage in determining where to build out the system and when. That the Companies previously made decisions that it was uneconomic to serve these customers does not mean the estimates of unserved by municipality are not now of competitive value.

In this regard, Mr. Henner does not properly take account of the condition in the Transfer Order that the Companies expand to unserved homes. That the Companies are required to serve an additional 145,000 homes under the Transfer Order makes the estimates more, not less competitively valuable. The estimates of unserved homes by municipality allows the Companies to make decisions about the locations of which additional homes it serves and when

³⁰ Appellate Division Verizon Decision, 137 A.D.2d at 74.

³¹ CC Docket No. 99-301, In the Matter of Local Competition and Broadband Reporting. Report and Order Released March 30, 2000, ¶¶ 91-94.

³² Given that the databases involved are proprietary, and the information in them not easily reproducible, Matter of Sunset Energy Fleet v. New York State Department of Environmental Conservation, 285 A.D.2d 865 (2001) is distinguishable. In that case the Appellate Division observed that “[s]ignificantly, the compiled information in the worksheets for which petitioner seeks trade secret protection reflects publicly available data and the fact that petitioner had to compile, verify and analyze the data does not make the compiled information exempt.” 285 A.D.2d at 867.

it serves such homes pursuant to the Transfer Order. It is important to note, however, that the Transfer Order specifically contemplated that the Companies would coordinate its required build-out efforts with BPO, with the objective of identifying areas where investments will provide the greatest value and to identify those areas that will not be the focus of the Companies' expansion but which should, therefore, be incorporated into BPO's funding opportunities.³³ Accordingly, it is expected that the Companies would continue to submit information to and coordinate with both the Department and BPO, asserting confidentiality only where justifiable to protect its demonstrable business interests, to meet its obligations under the Transfer Order. Likewise, as the Companies expansion efforts materialize, it is possible that trade secret status may change.³⁴

B. The Companies Have Demonstrated the Six Restatement Factors

In analyzing the Restatement factors, no single factor is controlling; there is, accordingly, a balancing of the six Restatement factors.³⁵ Any trade secret factor that is not established would be deemed to weigh against a finding that the information constitutes a trade secret. Here, I find that here the Companies have made an adequate showing under all of the six factors set forth in the Restatement.³⁶ With regard to Restatement factor one, the extent to which the information is known outside of the business, the Dempsey and Mott Declarations explain that the estimates of unserved homes are not available outside the business. Those estimates were, indeed, prepared using proprietary databases of the Companies, as Mr. Henner recognizes. Mr. Henner argues that unserved areas in a franchise can be determined by looking at the

³³ Transfer Order, at 54.

³⁴ I do not decide whether more highly aggregated information, by county or even larger areas might not be lacking in competitive value. Since the Companies will be making decisions about how to meet the Commission's 145,000 premises requirement based on particular franchising municipalities, information with respect to service in those municipalities may be deemed to have competitive value, though more disaggregated information (such as unserved areas within a municipality) could have even more competitive information. This determination, however, only directly applies to the information requested by Mr. Henner. To the extent that the Companies are required to file additional information in compliance with the Transfer, any claims as to the confidentiality of that information must be stated with particularity as to that information.

³⁵ Ashland Management v Janien, 82 NY2d 395, 407 (1993) ("The Restatement suggests that in deciding a trade secret claim several factors should be considered") (emphasis added).

³⁶ Appellate Division's Verizon Decision, 137 A.D.3d at 74.

franchise agreement.³⁷ Public knowledge of unserved areas into which the Companies' facilities do not reach does not, however, readily translate into estimates of customers that are not unserved. And, the bare knowledge that a portion of a municipality may not be served is not as competitively significant as knowing how many total unserved customers are located in that municipality.³⁸

The Companies have further definitely explained that the information at issue is only known by employees whose functions require access to that information (factor two). Moreover, both Charter and Time Warner have taken steps to prevent disclosure of these non-public financial information by its employees (factor three).

The Companies have demonstrated the value of the information to it (factor four) in their analysis of the first part of the trade secret test, explaining that the data would provide important input for its strategic decisions. The estimates of unserved homes by municipality has particular value to the Companies, given that the Transfer Order obliges them to serve approximately 145,000 homes before it is able to seek reimbursement from the BPO for any new connections. The Companies estimates of unserved homes by municipality is a unique device for deciding how best to meet its obligation with respect to serving those 145,000 currently unserved homes. If competitors have access to the Companies' estimates of unserved homes, then they will have insights into their possible plans for expansion based on the number of unserved customers.

The Companies have also apparently made at least the required case on whether the estimates of unserved homes are valuable to its competitors (also part of factor four) based on the insight the information gives competitors into the Companies' planning. If the competitors have the Companies' estimates of unserved customers by municipality, then they can make judgments about where Charter is likely to build facilities to serve premises in order to meet the target of 145,000 homes required by the Transfer Order. It is less clear, however, to what extent competitors can benefit from the availability of the Companies' estimates, given that the

³⁷ In addition, whether a particular area is not served is, of course, known to unserved homeowners generally, and it is possible to guess whether Time Warner or Charter facilities pass a particular location by checking for the presence of their facilities on a utility pole.

³⁸ Of course, as Mr. Henner argues, it is even of more competitive significance to know the concentration of unserved customers and where those customers might be located, but even information that provides hints of such information would have competitive value.

underlying data is needed to determine the location of unserved homes. The estimates may, however, be commercially valuable to facilities-based providers as a starting point for analysis of potential clusters of unserved homes. Were those competitors to have the Companies' estimates of unserved customers by municipality in hand, they can then look to see which municipalities have the largest numbers of unserved customers and begin making judgments about which franchise agreements should be reviewed and which ground searches might be performed.³⁹

The Companies have also demonstrated that substantial amounts of effort and money were expended in developing the estimates of unserved homes (factor five). As an initial matter, Mr. Henner misunderstands how the information was compiled in this case. Time Warner did not simply run a report from an existing database, but used a new process to compile information from a variety of sources, creating a new database. TWC thus met the evidentiary showing for Restatement factor five, as did Charter, which hired a consultant.⁴⁰

The Companies have, moreover, shown that the estimates could only be duplicated with great difficulty by competitors (factor six). They explain that, without disclosure of the estimates by municipalities, competitors could only develop estimates of the Company's actual unserved customers and any such attempt to create such estimates would be extremely expensive. In order to develop estimates of unserved homes for every municipality in Charter's territory it would be necessary to review every franchise agreement, identify unserved areas and then begin to do field surveys to look for the absence of Time Warner facilities and the presence of houses. Indeed, Mr. Henner concedes as much.

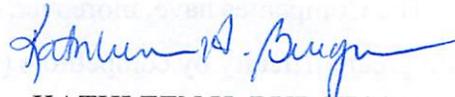
³⁹ In contrast to the build-out information at issue in Case 14-M-0138, cited by Mr. Henner, the estimates of unserved homes have not been disclosed and/or the Companies have made the necessary case for protection of that material. Case 14-M-0183, Joint Petition of Time Warner Cable Inc. and Comcast Corporation for Approval of a Holding Company Level of Control, Appeal of an Administrative Law Judge's FOIL Determination, Determination of Appeal (issued January 9, 2015), at 9-11 (finding that build-out information sought to be protected had either been publicly disclosed or was not shown to have competitive value). Although some competitors might well be dissuaded from constructing or otherwise competing where the Companies have facilities, others, particularly wireless competitors, might be interested in forestalling the Companies by competing in areas where they plan to build.

⁴⁰ Although not decisional on this appeal, I decline to accept Mr. Henner's claim that only the incremental costs of developing information from existing databases should be considered in evaluating whether Restatement factor five is met. Use of incremental costs only understates the costs of compiling information.

When considering the Companies' showing with respect to the "trade secret" definition and the six Restatement factors, the Companies have met their burden of proving an entitlement to an exemption from disclosure of the cost information as trade secrets. The Companies have produced a case on all six Restatement factors. Given this determination, there is no need to proceed to analyze the information under the substantial competitive injury standard.⁴¹

CONCLUSION

For the reasons stated herein, Mr. Henner's appeal of the RAO's December 18, 2015 Determination is denied. The Companies estimates of unserved homes are entitled to an exception from disclosure under POL §87(2)(d) as trade secret material.



(SIGNED)

KATHLEEN H. BURGESS
Secretary

⁴¹ Verizon, supra, at 74.