

STATE OF NEW YORK
DEPARTMENT OF PUBLIC SERVICE

Joint Petition of)	
)	
TIME WARNER CABLE INC.)	
)	
and)	
)	Case 14-M-0183
COMCAST CORPORATION)	
)	
For Approval of a Holding Company Level)	
Transfer of Control)	
)	

**TIME WARNER CABLE INC. AND COMCAST CORPORATION APPEAL
TO SECRETARY KATHLEEN H. BURGESS TO PREVENT PUBLIC DISCLOSURE
OF TRADE SECRET MATERIAL**

Pursuant to Section 89(5)(c)(1) of the N.Y. Public Officer’s Law (“POL”) and Title 16, Section 6-1.3(g) of the N.Y. Code of Rules and Regulations, Comcast Corporation (“Comcast”) and Time Warner Cable Inc. (“Time Warner Cable” or “TWC”) hereby appeal to the Secretary of the New York Public Service Commission (“Commission”) two select findings in Administrative Law Judge David L. Prestemon’s July 22, 2014 determination (the “Determination”) to prevent the disclosure of confidential trade secret information that is entitled to exception from disclosure under New York law.

I. Introduction and Background

This appeal stems from Gerald Norlander's FOIL request for disclosure of "a copy of all the Department of Public Service interrogatories sent to Comcast or Time Warner in Case 14-M-0183 to date" and "the responses of Comcast and Time Warner to each staff interrogatory, to date."¹ As of the date of Mr. Norlander's request, Comcast and TWC had submitted responses to three sets of discovery propounded by Staff of the Department of Public Service ("Staff"). Comcast and TWC produced a large volume of information in response to the Staff requests, providing Staff not only written responses to each of the 52 separate discovery requests but also dozens of exhibits. Because the information and documents produced include highly sensitive and confidential trade secret information, the responses and exhibits were transmitted under a request for exception from public disclosure under the POL and the Commission's Rules.²

After being notified of Mr. Norlander's request, Comcast and TWC provided redacted versions of the discovery responses, thus publicly disclosing a majority of the information in them. Comcast and TWC, however, continued to seek trade secret protection of the redacted information, as well as specified exhibits.³

In the Determination, Judge Prestemon made findings regarding each piece of redacted information and each exhibit at issue. The Determination granted in part and denied in part the requests to except the subject information from public disclosure. Moreover, the Determination

¹ See Email from Gerald Norlander to Donna Giliberto, Records Access Officer (dated June 17, 2014).

² Trade secret information is protected from public disclosure under the POL and the Commission's Rules. See N.Y. POL § 87(2)(d); 16 N.Y.C.R.R. § 6-1.3.

³ Statement of Comcast Corporation and Time Warner Cable Inc. in Further Support of Trade Secret Designations (filed July 10, 2014). Notably, Comcast and TWC did not seek exception from disclosure for many other exhibits.

expressly stated that review of the Determination may be sought by filing a written appeal with the Secretary to the Commission by August 1, 2014.⁴

After carefully considering the Determination, Comcast and TWC seek review of a few select findings in the Determination; no review is sought as to the great majority of ALJ Prestemon's ruling. The limited information subject to this appeal constitutes highly sensitive and confidential trade secret that must be protected from public disclosure under New York law and that would not have been produced absent an expectation that the information would not be publicly disclosed. Comcast and TWC therefore respectfully request that the Secretary reverse and vacate the ALJ's findings regarding the specific information identified below and determine that such information is excepted from public disclosure.

II. Legal Standard

The POL requires the Commission to deny public access to records that are "trade secrets or are submitted to an agency by a commercial enterprise ... and which if disclosed would cause substantial injury to the competitive position of the subject enterprise."⁵ As discussed in the Determination, the Court of Appeals held that the Commission has "not only the power but also the *affirmative responsibility* to provide for the protection of trade secrets."⁶

In accordance with the POL's statutory mandate, the Commission has promulgated regulations to define the scope of "trade secret" information protected from public disclosure. The Commission's Rules provide expansively that "a trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which

⁴ Determination, at 17.

⁵ N.Y. POL § 87(2)(d).

⁶ Determination, at 2, citing *Matter of New York Telephone Co. v. Public Service Commission*, 56 N.Y.2d 213, 219-20 (1982) (*emphasis added*).

provides an opportunity to obtain an advantage over competitors who do not know or use it.”⁷

The Commission’s Rules also set forth a list of factors to be considered in determining whether particular information constitutes a “trade secret” protected from disclosure; these factors 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

The Determination duly recognizes that the industries in which Comcast and Time Warner Cable compete are highly competitive.⁹ As such, the Commission is required to protect Comcast’s and Time Warner Cable’s qualifying trade secret information from public disclosure.

⁷ 16 NYCRR § 6-1.3(a).

⁸ 16 NYCRR § 6-1.3(b)(2).

⁹ Determination, at 6. Indeed, the existence of competition in the communications industries within which Comcast and Time Warner Cable operate has been well-established in prior Commission proceedings. *See, e.g.*, Case 03-C-1220, Report: Competitive Analysis of Telecommunications in NY; and Case 05-C-0616, Proceeding on the Motion of the Commission to Examine Issues Related to the Transition to Intermodal Competition in the Provision of Telecommunications Services, Statement of Policy on Further Steps Toward Competition in the Intermodal Telecommunications Market and Order Allowing Rate Filings (issued April 11, 2006) and DPS Staff White Paper, “Telecommunications in New York: Competition and Consumer Protection,” (issued September 21, 2005); Case 03-C-0971, Proceeding on Motion of the Commission to Consider the Adequacy of Verizon New York Inc.’s Retail Service Quality Improvement Processes and Programs, Ruling on Protective Order and Access by Competitors to Allegedly Confidential Information (February 23, 2007); Matter 09-01904, 2010 Customer Service Annual Report for All Time Warner Cable New York Cable Systems, Determination of Appeal of Trade Secret Determination (issued August 26, 2011); Department of Public Service Staff, Report on Verizon Service Quality – Second Quarter 2013 (filed Session of August 15, 2013).

III. Statement in Support of Appeal

As set forth in detail below, Comcast and TWC seek review and correction of just two findings in the Determination. Notably, in both instances, ALJ Prestemon presumed that the requisite demonstration could in fact be made.

A. Response to DPS-26, and Exhibits 24 and 26.

The Determination acknowledges that “Exhibits 24 and 26 present detailed facility-by-facility location, hours, staffing, and call handling information for the Companies’ call centers.”¹⁰ It further acknowledges that the response to DPS-26 also provides Comcast’s “call interflow parameters that direct calls to sister call centers.”¹¹ While recognizing that “*the redacted data clearly seems to be of a type that businesses would not normally disclose publicly or share with competitors*,”¹² the Determination nonetheless declines to except this detailed, competitively-sensitive data from public disclosure – not because there is no nexus between disclosure and substantial competitive injury, but rather the because the Companies “should be able to explain [the nexus], but they have not.”¹³

Comcast and TWC welcome the opportunity to further that demonstration in order to protect this trade secret information from public disclosure.¹⁴ By way of background, Exhibits 24 and 26 identify not only the number of employees at each Comcast call center in the Northeast and each Time Warner Cable call center in New York, but also detailed facility-by-

¹⁰ Determination, at 10.

¹¹ *Id.*

¹² *Id.* (*emphasis added*).

¹³ Determination, at 10.

¹⁴ *See also*, Declarations of Don A. Laub and Terrence Rafferty, submitted herewith.

facility hours, staffing and operational information. The exhibits specifically delineate how many employees at each call center are dedicated to each function, and during which hours.

The public disclosure of this information would result in substantial competitive harm to Comcast and Time Warner Cable because it would give competitors of all types (e.g., wireline, wireless, satellite) unfair insight into the manner in which Comcast and TWC manage their operations centers. Competitors could unfairly exploit this detailed, proprietary information – which reveals trade secret aspects of the operational expertise developed by Comcast and TWC – to serve their own competitive and corporate interests. Less efficient competitors could, for example, attempt to mimic Comcast and TWC staffing levels, shift management strategies, call handling patterns, or call interflow parameters. In addition, competitors could attempt to exploit this granular information in their marketing efforts – e.g., by misusing it in sales, retention, or win-back campaigns trumpeting purportedly higher staffing levels in a given geographic area, while Comcast and TWC would be deprived of any opportunity for comparative analysis or response.

Comcast and TWC appreciate the opportunity to further demonstrate the substantial competitive harm that would flow from publicly disclosing this information, and, in light of the foregoing, respectfully request that the Secretary hold accordingly and except this information from public disclosure under the POL.

B. Exhibit 46.

As stated in the Declaration of Terence Rafferty, public disclosure of the information in DPS-46 and Exhibit 46, concerning broadband development projects, would unfairly advantage Time Warner Cable's competitors and cause substantial competitive harm. As noted above, access to Time Warner Cable's call center information would assist competitors, including less-

efficient competitors, in the development of similar methods and procedures required to offer competitive products and services, and would give them detailed knowledge as to the expected costs and operational functions that would be required to compete in given geographic markets. Disclosure of Time Warner Cable's broadband strategy would reveal where and when Time Warner Cable plans to deploy fiber and other facilities to upgrade and/or expand its network. Disclosing the information in DPS-24, Exhibit 24, DPS-46, or Exhibit 46 would reveal aspects of Time Warner Cable's operational expertise, and its broadband build out strategy, which Time Warner Cable developed over a significant period of time and at significant cost, and which is the very essence of competitive information.

IV. Conclusion

Comcast and TWC appeal the two aforementioned, limited aspects of the ALJ Determination in order to prevent the disclosure of confidential trade secret information that is entitled to exception from FOIL disclosure under New York law. In light of the demonstrated substantial competitive harm that would flow from the public disclosure of this information, and satisfaction of the applicable standards for protection of trade secret information from disclosure, Comcast and Time Warner Cable respectfully request that the Secretary except the redacted portions of the response to DPS-26, and Exhibits 24, 26, and 46, from public disclosure under the New York Public Officers Law.

Dated: August 1, 2014

S/

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