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Via e-mail recordsaccess@dps.ny.gov and regular mail

April 6, 2016

Donna M. Giliberto
Assistant Counsel and Records Access Officer
New York State Department of Public Service
Three Empire State Plaza
Albany, New York 12223-1350

Re: FOIL Request: Time Warner Cable – Charter Communications broadband franchise information

Dear Ms. Giliberto:

Your "Two-fold letter" of April 1, 2016 directed counsel for Time Warner Cable and Charter Communications ("the Companies") to submit "redacted documents with only those redactions necessary to support their request for confidential treatment" and justification for those redactions. You also stated that if I found the submission of the Companies "unresponsive to [my] March 28, 2016 request," you would proceed to make a "Determination of the Records Access Officer in accordance with POL § 89 (5)."

On April 4, 2015, the Companies, by email from Ekin Senlet, submitted "revised Redacted Documents", which provided, for the first time, a list of the municipalities and counties where the Companies hold franchise agreements, but reiterated their request for confidential treatment for "granular information regarding the number of unpassed homes." As I stated in my March 28 request: "The crucial information in the document that has been filed is the number of unserved housing units in each municipality." **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.**

Since the Freedom of Information Law is predicated on a presumption of access, the Companies have the burden of establishing that they are entitled to the claimed exemption. They have not submitted any new arguments, and appear to rely on their original February 18, 2016 letter, where they claim that the requested information can be withheld on the grounds that it is either a "trade secret" or that disclosure will result in "substantial competitive injury."

The Companies may be correct in claiming that the information, the number of unpassed homes in each municipality is not known by anyone else, and they may have incurred some costs in developing this information. Nevertheless, they have not met the other more important standards with respect to establishing a “trade secret” exemption.

Initially, it should be noted that the gathering of this information was required by the Public Service Commission in its Order of January 8, 2016. The Companies were ordered to connect 145,000 unpassed housing units in its franchise areas, even though it appears, from the Order, that no one is quite sure how many unpassed housing units actually exist. The Companies must gather this information in order to comply with the Order.

If this information is not made publicly available, it will be impossible to ascertain whether the Companies are complying with the Order. There will be no way to know if the extension of service to a specific number of housing units actually represents an extension of service to all of the housing units that may lack it.

More importantly, knowledge of the number of unpassed units no longer provides the Companies with a competitive advantage. The Companies have been ordered to connect these units at their own expense. There are no competitors for the business of connecting these units. These units are located within existing franchise areas, and there is no reason to believe that any competitor would be in a position to offer service to these units in any event.

It appears that the information that is being withheld consists merely of a single number of units within each municipality. Therefore, it is not “detailed information regarding unserved and underserved homes, as opposed to aggregated data,” as the Companies claim. Furthermore, the Companies’ statement that the withheld information “could be used by competitors to obtain a highly disaggregated level of information that implicitly sets forth important aspects of the Companies’ deployment, improvement and investment plans” is only conclusory speculation. The Companies do not explain how this information “implicitly” states anything, nor do they explain how this information might be used by competitors. For that matter, the companies do not explain who are their “competitors,” if, in fact, they have any.

Similarly, the Companies have not established that the disclosure of the information will “cause substantial injury to the competitive position of the subject enterprise by exposing their market position.” Again, the Companies have been ordered to connect the unpassed units at their own expense, so it is not clear what is meant by a “market position.” Nor do the Companies explain how anyone is or could be competing with them or how such “competitors” could “tailor their marketing strategies and budgets” to obtain a competitive advantage.

As I stated in my original request, the information that is sought is critical to determine whether the January 8 Order to the Companies to connect 145,000 housing units will be sufficient to ensure that all unpassed units within the Companies current franchise areas will be connected. If there are more than 145,000 units, the excess may be entitled to have their connections funded through the monies allocated to the Governor’s Broadband Program Office.

This means that it is essential for the public to know whether the total number of unpassed units exceeds 145,000.

Furthermore, individual municipalities should be able to know the extent of their problems with respect to unpassed units within their borders. This information is essential for the municipalities to plan for broadband expansion and to administer existing franchise agreements and to negotiate with Time Warner for extensions and renewals.

The Companies have not established their entitlement to exempt the number of unpassed housing units within the borders of existing franchise agreements from disclosure. On the other hand, this information is essential, to properly administer and enforce the PSC's Order and for the benefit of the public. Consequently, I respectfully urge you to make a Determination that this information is not subject to the "trade secret" exemption and that access should be granted to the unredacted document that was filed by the Companies.

Very truly yours,



Peter Henner

c. Ekin Senlet, Esq.

via e-mail only Maureen Helmer, Esq.