STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

Case 13-C-0197 – Tariff filing by Verizon New York Inc. (Trade Secret 13-05)

DETERMINATION OF APPEAL OF TRADE SECRET DETERMINATION

(Issued December 2, 2013)

This is an appeal of a Determination issued in the above captioned proceeding on November 4, 2013.[1] In that Determination, the Records Access Officer (RAO) concluded that certain records submitted by Verizon New York Inc. (Verizon) were not entitled to an exemption from disclosure as trade secrets or confidential commercial information. Verizon provided the records in response to various interrogatories and document production requests (IRs) issued by Department of Public Service Staff (Staff) in connection with a tariff filing by Verizon. This Determination on Appeal upholds the RAO's Determination.

INTRODUCTION AND BACKGROUND

In May 2013, Staff propounded a series of IRs in connection with Verizon's submission of Proposed Amendments to its Tariff. The amendments consisted of revisions to allow the Company to discontinue its current wireline service offerings in the western portion of Fire Island and, instead, offer a wireless service as its sole service offering in the area.[2] Thereafter, Verizon submitted written replies and documents in response to Staff's requests through the RAO. It sought protection from disclosure of such records as trade secret and confidential commercial information, pursuant to POL § 87(2)(d) and 16 NYCRR § 6-1.3.[3]

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[1] Pursuant to § 89(5)(c)(1) of the Public Officers Law (POL) and 16 NYCRR § 6-1.3(g), the "Secretary of the Commission shall hear appeals from such negative determinations" and issue a "written final determination . . . which determination specifically states the reason or reasons for such final determination."

[2] The records were submitted in Case 13-C-0197, Tariff Filing by Verizon New York Inc. to Introduce Language Under Which Verizon Could Discontinue its Current Wireline Service Offerings in a Specified Area and Instead Offer a Wireless Service as its Sole Service Offering in the Area.

[3] See Case 13-C-0197, Response to Staff Requests for Information. (June 17, 2013; July 22, 2013; July 24, 2013; August 15; 2013; and September 3, 2013).

On September 13, 2013, a request was made by Richard Brodsky, Esq. on behalf of Common Cause New York, Communication Workers of America, Region I, Consumers Union, and Fire Island Association (the Brodsky Group). The request sought documents containing seven general categories of information that corresponded to Verizon's responses to certain IRs. On September 23, 2013, the RAO advised Verizon of the Brodsky Group's request and of her intention to determine the entitlement of such records to an exemption from public disclosure. Since Verizon had not submitted redacted versions of its responses to Staff IRs, the RAO also directed Verizon to comply with this filing requirement as soon as practicable.

In response to the RAO's letter, Verizon filed redacted versions of certain IR responses on October 4, 2013, and a Statement of Necessity for its claimed trade secret exemption from FOIL on October 7, 2013. On October 9, 2013, the RAO sent a letter to the Brodsky Group and Verizon, wherein she requested that Mr. Brodsky review the redacted submissions and provide a written acknowledgment stating whether or not the requested records "as is" fulfilled his Freedom of Information Law (FOIL) request. The RAO further stated that, if the Brodsky Group did not believe that the records fulfilled its request, a Determination would be made on November 4, 2013, as to the entitlement of an exception from public disclosure pursuant to POL § 89(5).

On October 11, 2013, Mr. Brodsky submitted additional comments and an initial response to the Statement of Necessity filed by Verizon on October 7, 2013, and an initial response to the October 9, 2013 letter issued by the RAO. Thereafter, on October 21, 2013, the RAO, again, directed Verizon to comply with the Secretary's filing guidelines and file redacted copies of responses to all Staff IRs as soon as practicable. The Company agreed to do so expeditiously. On October 24, 2013, Mr. Brodsky sent an email message to the RAO wherein he contended that the redacted documents submitted to the Secretary by Verizon were insufficient and not in fulfillment of his FOIL request. Specifically, the Brodsky Group request averred that Verizon's responses and other exhibits were redacted to the extent that they denied the public the ability to adequately comment on the ongoing proceedings.

Verizon's Statement of Necessity

Verizon argued in its October 7, 2013 Statement of Necessity that the RAO must deny the FOIL request because the documents at issue contain non-public, competitively-sensitive

information. According to Verizon, the protected material included information related to Verizon's network costs and its proprietary processes and procedures for marketing and administering a competitive product offering. The Company argued that creating such a windfall through the disclosure of trade-secret information would undermine not only the State's policies favoring economic development, but also the pro-competitive policies of this Commission. Verizon cited Commission precedent, case and statutory law to support its argument that limiting competitor access to proprietary material is an important policy.[4]

Verizon further argued that the Brodsky Group had not provided any legitimate justification for the documents identified in its FOIL request. It contended that the request was moot in light of the Company's decision not to make Voice Link its sole offering in western Fire Island, and instead to build out a wireline Fiber to the Premises (FTTP) network in that area.

In its Statement, Verizon addressed four subject areas that coincide with the Brodsky Group's request: (1) cost and network information, (2) information on Voice Link installations outside of western Fire Island, (3) information on Verizon's methods and procedures and (4) insurance coverage information. With regard to 2) the information on Voice Link installations outside of western Fire Island, and 4) insurance coverage information, Verizon initially argued that both categories were entitled to trade secret protection.[5]

With regard to the cost and network information, Verizon argued that such costs are all relevant to its provision of highly competitive retail services. Verizon contended that it offers a wide range of services throughout the State over DLC and FTTP networks – as well as over other types of network architecture – in a fiercely competitive environment. Verizon asserted that the competitive environment has resulted in the loss of some 70 percent of the Company's access lines since 2000, with a corresponding impact on its finances. It argued that information on the costs of offering services over telecommunications networks has great value in this highly

[4] See, e.g., Case 99-C-0529, "Ruling Concerning Proprietary Material" (issued December 13, 1999), p. 2.

[5] Following issuance of the RAO's Determination, the Company released these documents. Thus, this Determination will not discuss Verizon's arguments addressing those categories in its Statement of Necessity. See Case 13-C-0197, Appeal of Verizon New York Inc. from the Determination of the Records Access Officer (filed November 15, 2013) ("Verizon Appeal"), p. 1, n. 1.

competitive environment and provides valuable input to the competitors' own pricing decisions. The Company further contended that such information would not be available to competitors, other than through the regulatory process. According to Verizon, any cost information obtained by competing entities outside the regulatory process would be estimates based upon the competitors' construction and development of their own models. Thus, the results would assertedly not be as detailed and accurate as Verizon's own data.

As for the methods and procedures (M&Ps) information – the 13 documents offered in response to IR Number 4 – Verizon asserted that such documents were created in order to inform, instruct and advise its employees on various aspects of the Company's interaction with its customers concerning Voice Link. Verizon noted that it does not publicly disclose these M&Ps and argued that they would be of significant value to competitors who seek to develop similar M&Ps for their own comparable service offerings. Verizon further argued that such documents embody a great deal of thought and experience, which was acquired by Verizon at great expense and over a considerable period of time, and, thus, the documents are, in effect, intellectual property created by Verizon. The Company reasoned that competitors should not be enabled to piggy-back on its knowledge and experience for free, simply by obtaining Verizon's M&P documents through FOIL requests.[6]

The RAO's Determination

The RAO cited the applicable statutory and regulatory authority,[7] as well as the relevant case law,[8] in her analysis of trade secret and confidential commercial information. In applying the first part of the two-prong test enunciated in Encore College Bookstores[9] (the Encore test) – which requires a showing of actual competition – the RAO noted that the existence of competition in the telecommunications industry in New York State has generally been

[6] Verizon also noted that, although none of the members of the Brodsky Group are competitors, the release of information under FOIL is tantamount to making it publicly available.

[7] POL §§ 87(2)(d) and 89(5)(b)(3), and 16 NYCRR § 6-1.3(b)(2).

[8] Matter of Markowitz v Serio, 11 NY3d 43 (2008); Matter of Encore Coll. Bookstores v Auxiliary Serv. Corp. of State Univ. of N.Y. at Farmingdale, 87 NY2d 410 (1995); Ashland Mgt. v Janien, 82 NY2d 395 (1993); Matter of Capital Newspapers Div. of Hearst Corp. v Burns, 67 NY2d 562 (1986); Matter of New York Tel. Co. v Public Serv. Commn., 56 NY2d 213 (1982).

[9] Supra.

established.[10] The RAO further noted that Verizon had also demonstrated the existence of competition in the telecommunications field.[11]

Accordingly, the RAO posited that whether the information at issue is entitled to an exception from disclosure as trade secrets or confidential commercial information would turn on the second prong of the Encore test – whether disclosure would be likely to cause substantial injury to the competitive position of the subject enterprise. To that end, the RAO determined that, with respect to the information in Request 1 and a limited amount of the information in Request 3, Verizon made a valid case that the information provided in response to the Group's requests fits within the definition of trade secret.[12]

Specifically, the information submitted in response to Request 1 consisted of sensitive cost analysis for each type of network construction done by the Company. The information submitted in response to Request 3 consisted of 13 documents – 330 pages – with blanket redactions except for the page headings and page numbers, including Verizon's M&Ps. Of the 13 documents, the RAO determined that only documents (1), (2) and (10) of the filing appeared to fit within the definition of trade secret.

The RAO explained that, while the Company made a valid case for the portion of the response to Request 3 that consists of its M&Ps, it did not address the remainder of the blanket-

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[10] See 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, 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).

[11] See, e.g., Verizon's Annual Reports to the Commission for calendar years 2000 and 2012, Schedule 61; Annual Report for 2012, Schedules 12 and 13; Case 05-C-0616, Statement of Policy on Further Steps Toward Competition in the Intermodal Telecommunications Market and Order Allowing Rate Filings (issued April 11, 2006), p. 35; Id., p. 26, 54-55; Department of Public Service Staff, Report on Verizon Service Quality – Second Quarter 2013 (filed Session of August 15, 2013), p. 1.

[12] 16 NYCRR § 6-1.3(a).

redacted documents provided in response to the request. Therefore, she determined that Verizon had failed to make a valid case that the remaining 10 documents in that response were trade secret material. The RAO also determined that Verizon had failed to make a valid case that the information provided in response to the Brodsky Group's Requests 2 and 4, information on Voice Link installations outside of western Fire Island and procedures and insurance coverage information, respectively, were trade secret material.

Although the RAO decided that Verizon satisfied the first prong of the Encore test with regard to cost information in Request 1 and M&Ps in Request 3, the RAO concluded that Verizon offered no factual support to sustain a finding that disclosure of these documents would cause substantial injury to the competitive position of a commercial enterprise. Rather, the RAO found that Verizon merely argued that the windfall resulting from disclosure alone was enough to demonstrate competitive injury. Inasmuch as Verizon failed to demonstrate a particularized and specific justification for denying access, the RAO determined that it failed to meet its burden of proof pursuant to POL § 89(5)(e).

The RAO suggested that, with more compelling facts (perhaps submitted in an affidavit by an economist or other expert)[13] and stronger arguments, Verizon might be able to meet the burden of proof it bears pursuant to POL § 89(5)(e). However, since the Company failed to supply such facts and arguments, the RAO decided that Verizon did not show how disclosure would be likely to cause substantial injury to the competitive position of a commercial enterprise. The RAO stated that mere conclusory allegations, without factual support, are insufficient to sustain non-disclosure.[14] Further, she noted that, since the Encore test is reflected in the Commission's regulations, it must be met before an exception from disclosure may be granted.

Verizon's Appeal

Verizon appealed the RAO's FOIL determination on November 15, 2013. It cited POL § 87(2)(d), in claiming that the RAO denied its "request for confidential treatment of certain

[13] Matter of Markowitz v Serio, 11 NY3d 43 (2008); Matter of Saratoga Harness Racing, Inc. v Task Force on the Future of Off-Track Betting, 2010 N.Y. Misc. LEXIS 2531 (Sup. Ct. Albany Co.).

[14] Church of Scientology of N.Y. v State of New York, 46 N.Y.2d 906 (1979).

documents related to the company's network costs and to the methods and procedures used by Verizon in connection with its Voice Link service."[15] The only portion of the RAO's determination that Verizon seeks to appeal are those relating to the disclosure of its network costs and M&Ps.[16] Verizon submitted three declarations, by Thomas MacNabb, a Director of Operations in National Operations, Robert Wheatley II, an Executive Director of Financial Planning and Analysis, and Dr. William E. Taylor, an expert economist, in support of its position.

Verizon cites to Encore College Bookstores, supra, as the controlling precedent on the scope of the trade secret exemption and asserts that the RAO's Determination misapplied the Encore test. Indeed, Verizon maintains that, in relying upon Matter of Markowitz v Serio, "the Determination set too stringent a standard for establishing such injury"[17] required under the second prong of the Encore test. Verizon largely relies upon its position as a regulated telecommunications corporation as a ground for a blanket exemption from disclosure under the second prong of the Encore test. Specifically, Verizon maintains that its obligation to regularly submit detailed information to the Staff and the Commission gives other unregulated entities, which do not have such requirements, a competitive advantage. Verizon maintains that such "[a]symmetric access to competitively important information is itself a form of 'substantial competitive injury.'"[18]

Verizon further argues that, pursuant to the Encore test, the network cost information and M&Ps are entitled to protection under POL § 87(2)(d). Verizon asserts that a company can meet its burden under FOIL by providing a cogent and persuasive explanation of how a competitor could use the relevant information, and why such use is likely to lead to competitive harm. Verizon contends that its original Statement of Necessity provides such an explanation and, when supplemented by the declarations, satisfies the second prong of the Encore test. The Company further asserts that "the principle that [its] costs are exempt from disclosure under POL

[15] Verizon Appeal, p. 1.

[16] See footnote 5.

[17] Verizon Appeal, p. 6.

[18] Verizon Appeal, p. 10.

§ 87(2)(d) has been established by numerous rulings issued in Commission proceedings."[19] Similarly, Verizon contends that methods and procedures documents have been found to be entitled to trade secret protection in Commission proceedings and, as such, the M&Ps at issue here should also be protected.[20]

Lastly, Verizon takes issue with the RAO's conclusion that rulings of Department Administrative Law Judges (ALJ) on trade secret matters in the context of administrative proceedings were inapposite to the instant matter. While the Company agrees with the Determination's description of the RAO's role, it asserts that the Determination failed to establish any material difference in the nature of the decision-making process carried out by the RAO and that used by the ALJs. Verizon contends that the law applied by an ALJ within the context of an administrative proceeding is "precisely the same" as that applied by the RAO in a FOIL determination.[21] Thus, Verizon argues that the RAO failed to provide an adequate reason for disregarding the cited precedent.

Brodsky Group Response

On November 22, 2013, the Brodsky Group submitted a letter to the Secretary in support of the RAO's Determination.[22] The Brodsky Group asserts that the appropriate standard to be applied in this appeal is whether the Determination is arbitrary and capricious, that the burden of establishing this standard is borne by Verizon and that the record upon which this appeal is to be decided is the one before the RAO.

The Brodsky Group fully supports the RAO's Determination, stating that, contrary to Verizon's arguments, the Determination illuminates and explores the applicable legal standards and does not expand or alter them. The Brodsky Group avers that the instant dispute centers around Verizon's desire to exempt itself from policies favoring disclosure. The Brodsky Group

[19] Verizon Appeal, p. 17.

[20] Verizon Appeal, p. 21.

[21] Verizon Appeal, p. 13.

[22] While POL § 89(5)(c) does not authorize responses to appeals, it does not prohibit them, and the uniform practice of the Secretary for many years has been to consider such pleadings, if submitted on a timely basis. I will accordingly consider the opposition of the Brodsky Group to the Verizon appeal.

further contends that Verizon has offered no factual support to sustain a finding that disclosure would cause substantial injury to the competitive position of the subject enterprise, in that Verizon did not provide the necessary causal link between the disclosure of the information and the conclusion that such disclosure will cause substantial competitive injury.

As an initial matter, the Brodsky Group objects to the submission of supplemental material (i.e. the declarations) to the Secretary for review on this appeal. It maintains that the use of such material is improper under the law and rules. In any event, the Brodsky Group contends that the declarations proffered by Verizon do not contain material upon which an exemption from disclosure can be based. To that end, the Group argues that Verizon's appeal merely reiterates its earlier argument with similarly broad and conclusory language and, thus, that what was legally insufficient in the initial submission remains legally insufficient in the instant appeal. Accordingly, the Brodsky Group contends that nothing in the record before the RAO, or in any supplemental declarations submitted by Verizon, justifies the overturning of the Determination.

With regard to the declaration of Dr. William E. Taylor, the Brodsky Group asserts that his broad statements of opinion on economic policy and the use of "cost information" contain little or no analysis of the specific cost data sought and, thus, fails to demonstrate how the disclosure of the specific cost data will lead to a competitive injury. The Brodsky Group also argues that the standard suggested by Dr. Taylor would provide for an exemption from disclosure for any cost data.

The Brodsky Group contends that the declaration of Robert Wheatley is similarly broad and conclusory. With regard to Mr. Wheatley's opinions on "general costs" and use of similar "technologies," the Group maintains that such statements are logically distant from the required FOIL showing of a specific causal link to a specific injury. Similarly, the Brodsky Group maintains that Thomas McNabb's speculation about what could be a consequence falls significantly short of the legal standard set forth in the cases and the Determination. The Brodsky Group argues that, taken together, the three declarations do not substantially change the evidence upon which the Determination was based, and, thus, Verizon has not provided the evidence it needs to meet the standard.

Lastly, the Brodsky Group opines that Verizon's complaint relies largely on what the Company characterizes as "asymmetric regulatory treatment." The Brodsky Group does not

concede that Verizon is subject to such asymmetric treatment, but contends that the need to show competitive injury when seeking an exclusion from disclosure applies to both regulated and unregulated entities. The Brodsky Group argues that, inasmuch as Verizon has failed to produce coherent, specific and persuasive evidence of its entitlement to a statutory exemption, the RAO's Determination should be upheld.

DISCUSSION

The issue on appeal is whether certain filings made by Verizon related to its network costs and the methods and procedures utilized by the Company in connection with its Voice Link service are entitled to an exception from disclosure as trade secrets or confidential commercial information. Verizon argues that public disclosure of the information in these documents would cause it substantial competitive harm. Specifically, the Company asserts that the network cost information, if released, would cause such harm by providing important input into competitors' pricing decisions. Verizon further maintains that it would be harmed by the release of the M&P documents, inasmuch as competitors would have free access to commercially valuable information and, absent such access, its competitors would be forced to endure the effort and substantial cost of developing their own similar data.

In Encore College Bookstores, supra, the Court of Appeals established a two-prong test for determining whether records or portions thereof may be excepted from public disclosure pursuant to POL § 87(2)(d). In applying the first prong of the Encore test, in which the Court implicitly assumed the non-public nature of the information in question, the existence of competition must be established. Thereafter, the second prong is met if the party seeking the exemption demonstrates that disclosure of the information would be likely to cause substantial competitive injury.[23] In order to meet its burden, the party seeking the exemption must present specific, persuasive evidence that disclosure will likely cause it, or another affected enterprise, to suffer a competitive injury.[24] Indeed, speculative conclusions that disclosure might potentially cause harm, without factual support, are insufficient to demonstrate that the disclosure of the

[23] 87 NY2d at 421.

[24] 11 NY3d at 51.

information would be likely to cause substantial competitive injury, such that the information should be exempted as trade secret material.[25]

As an initial matter, I do not agree with Verizon that asymmetric access to information, standing alone, creates competitive injury.[26] The Encore Court took account of the possibility of windfalls and protected against such windfalls when it designed the test for showing competitive harm.[27] Further, I reject Verizon's position that, in relying upon Matter of Markowitz v Serio, the RAO's Determination "set too stringent a standard for establishing" the requisite substantial competitive injury.[28] In the 1995 Encore decision, the Court of Appeals established its two-prong test for determining whether records, or portions thereof, could be excepted from public disclosure as trade secret material. Verizon apparently believes that it is possible to meet the burden of protecting information under FOIL by providing a cogent and persuasive explanation of how a competitor could use the information and why it is likely to lead to harm.[29] The case law does suggest that some information could be deemed protected without an evidentiary showing, particularly information bearing directly on pricing.[30] However, it appears that such cases are the exception rather than the rule; record facts are required to prove a likelihood of competitive harm.[31] Indeed, the hypothetical situation Verizon offers, where competitive harm

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[25] 87 NY2d at 421.

[26] Verizon Appeal, p. 10.

[27] 87 NY2d at 420-21.

[28] Verizon Appeal, p. 6.

[29] Verizon Appeal, pp. 6-8.

[30] Matter of New York State Elec. & Gas Corp. v New York State Energy Planning Bd., 221 AD2d 121 (3d Dep't 1996); Matter of Catapult Learning, LLC v New York City Dept. of Educ. (N.Y. County Index No. 109158/11);Verizon Appeal Exhibit 1.

[31] Verizon attempts to argue that Encore was just such a case where the Court was able to infer competitive harm without an evidentiary record, Verizon Appeal, p. 4. Its argument is undercut, however, by its observation, Appeal, p. 10, n. 25, that in Encore, the bookstore seeking an exemption was able to show a business decline after disclosure of the specific kind of information (a list of course textbooks) sought to be protected.

could be inferred from the date of a product launch, would require proof of the advantage such information would provide to competitors.[32]

Thus, in the 2008 Markowitz decision, the Court of Appeals stated that "the party seeking exemption must present specific, persuasive evidence that disclosure will cause it to suffer a competitive injury; it cannot merely rest on a speculative conclusion that disclosure might potentially cause harm."[33] While the Markowitz Court did not change the Encore standard or undercut the test contained therein, the RAO correctly decided that the language used in the Markowitz opinion appears to have "raised the bar" as to what evidence is necessary to sustain the burden of proof required to exempt information from public disclosure as trade secret material. Indeed, in Markowitz, the Court of Appeals stated: "To meet its burden, the party seeking exemption must present specific, persuasive evidence that disclosure will cause it to suffer a competitive injury."[34] The Court did not overrule the Encore test; rather, the Markowitz decision appears to have clarified Encore with respect to the quality of evidence generally necessary to satisfy the second prong of the test established in the Encore decision and, thus, is binding upon this Commission's proceedings. Verizon attempts to distinguish Markowitz by relying on an unreported New York County case, affirmed by the Appellate Division.[35] That case affirms, however, the fundamental principle that "each case presents a unique set of facts and the ultimate determination of competitive injury is fact specific."

At least one lower court case since Markowitz has exemplified the quality of evidence required to sustain a finding of competitive injury. In Matter of Saratoga Harness Racing, Inc. v Task Force on the Future of Off-Track Betting,[36] petitioners, who sought exemption from the disclosure of information contained in their 2004-2008 year-end financial statements, submitted affidavits of corporate executives and of experts in gaming market analysis and labor

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[32] Verizon Appeal, p. 11.

[33] See Matter of Markowitz v Serio, 11 NY3d at 51.

[34] 11 NY3d at 51 (emphasis added).

[35] Matter of Aurelius Capital Mgt., LP v. Dinallo, 2009 NY Misc. Lexis 276, aff'd, 70 AD3d 467 (1st Dep't 2010), quoted by Verizon Appeal, p. 8.

[36] 2010 NY Misc LEXIS 2531 (Sup. Ct. Albany Co. 2010).

negotiations. Such affidavits explained, in great detail, the competitive pressures faced by Saratoga Harness Racing, Inc. (Saratoga) and a detailed account of the injury that it would suffer by the disclosure of the disputed information. Specifically, the court found that Saratoga had demonstrated "specific, persuasive evidence" that the dissemination of its financial data falls "squarely within a FOIL exemption."[37] As enunciated in Markowitz and exemplified in Saratoga, the party seeking exemption must produce specific and sophisticated evidence to sustain a finding of competitive injury. Accordingly, I find that the RAO's reliance on the Markowitz opinion, despite Verizon's arguments to the contrary, was appropriate.

Verizon makes, however, a valid case that certain granular information provided, relating to network costs, might fit within the definition of trade secret.[38] To that end, Verizon has submitted two declarations in support of its position that present more compelling facts and stronger arguments that Verizon has met the burden of proof it bears pursuant to POL § 89(5)(e).[39] While this new evidentiary support strengthens Verizon's argument that it would likely experience competitive injury if specific network cost information was disclosed (i.e. the brands and model types of equipment and the quantities thereof), it has failed to offer sufficient support as to how the release of aggregate costs alone would result in competitive injury. In other words, but for Verizon's failure to submit documents with fewer redactions, as directed by the RAO, it might have satisfied its burden of proof. Accordingly, I must conclude that Verizon has failed to demonstrate that all of the cost information, both aggregate and specific, contained

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[37] Id.

[38] 16 NYCRR § 6-1.3(a).

[39] The Brodsky Group's objection to Verizon's presentation of additional declarations on appeal reflects an erroneous view of the legal standard in these FOIL appeals. The issue on appeal is not whether the RAO's decision was arbitrary and capricious. Rather, the issue is whether Verizon has met its burden of proving that records or portions thereof should be excepted from public disclosure under FOIL. Inasmuch as Verizon has the burden of proof, it is proper for it to submit, and for the Secretary to consider, further arguments and evidence not submitted to the RAO in support of a claimed exception. There is no unfairness to a challenger of the exception, since, in any review proceeding, not only does Verizon still have the burden of showing an exception from disclosure under POL § 89(5)(e), but the agency assumes the burden of proving that a record to which access has been denied is exempt from public disclosure, as specified in POL § 89(5)(f). It would, of course, have been better for these declarations to have been submitted to the RAO in the first instance.

within the documents would result in substantial competitive injury if disclosed through the instant FOIL request.

In support of its argument, Verizon submitted the declarations of Robert Wheatley II, an Executive Director of Financial Planning and Analysis, and Dr. William E. Taylor, a seasoned economist. The declarations purport to prove the competitive injury that Verizon would endure if the documents containing network cost information were released. The Brodsky Group argues that both declarations are broad and conclusory. I conclude, however, that, if Verizon had conformed its redactions to the proof presented in these declarations, then it might well have been able to support the redaction of information, such as specific quantities, that provided granular cost (and thus pricing) information. Neither declaration offers, however, any reasoning as to how aggregate cost information, which cannot be dissected and deciphered in a manner that would be harmful to the Company, could result in competitive injury if disclosed.

For example, Dr. Taylor notes that the disclosure of cost information concerning the prices Verizon pays for its inputs, such as cable and equipment, could impact the future prices that the Company is able to negotiate from suppliers. He fails, however, to demonstrate that the release of aggregate equipment costs, without including specific information relating to the brand and model of the equipment and the quantity of units, would cause competitive harm. In the absence of such specific information, competitors would be unable to ascertain the price per unit paid by Verizon, and thus would be deprived of the precise information the Company alleges will cause competitive injury.[40]

Similarly, Mr. Wheatley's declaration indicates that the real competitive harm would lie in the fact that knowledge of Verizon's unique cost structure "can help a competitor understand the extent to which Verizon can sustain long-run reductions in prices to particular levels, and thus can help it predict how Verizon will respond to pricing initiatives (such as promotional discounts) by its competitors."[41] Mr. Wheatley, however, also fails to explain how the disclosure of broad aggregate cost information could cause competitive harm, such that an exemption is warranted.

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[40] Case 13-C-0197, Declaration of William E. Taylor (filed November 15, 2013), p. 8.

[41] Case 13-C-0197, Declaration of Robert Wheatley II (filed November 15, 2013), p. 2.

Although Verizon provided a more particularized and specific justification for denying access to the specific cost information, it failed to meet its burden of proving that the network cost information, in total, should be excepted from disclosure. I observe that the Company might well have satisfied its burden of proof had it made an effort to provide unredacted portions of some of the network cost information (i.e. the aggregate cost information, which does not contain potentially damaging information). For instance, it would seemingly not have been a particularly time-consuming task to remove granular identifying information (such as numbers of units and manufacturers) from the spreadsheets showing aggregate costs. The resulting provision of unredacted aggregate costs, while shielding granular cost information, would have been particularly appropriate, given that blanket exemptions are not favored by New York State courts.[42] Thus, the Court of Appeals has stated that "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government."[43]

I also reject Verizon's argument that the 13 remaining documents, produced in response to IR Number 4, consisting of 330 pages of blanket redactions, described collectively by Verizon as M&Ps, are entitled to sweeping protection as trade secret material. Although Verizon maintains that all 13 documents consist of M&Ps, as noted by the RAO, only documents (1), (2) and (10) of the filing appear to meet that description. Specifically, two documents consist of email correspondence to Verizon staff and the Company has failed to demonstrate how these documents "embody processes that the company developed at considerable expense and effort."[44]

Verizon offered the declaration of Thomas MacNabb in support of its argument, but the assertions contained therein, and others made by Verizon in the instant appeal, do not constitute the type of specific and sophisticated evidence necessary to sustain a finding of competitive

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[42] See Matter of Gould v New York City Police Dept., 89 NY2d 267, 275 (1996); Matter of Capital Newspapers Div. of Hearst Corp. v Burns, 67 NY2d 562, 569 (1986); Matter of DJL Rest. Corp. v Department of Bldgs. of City of N.Y., 273 AD2d 167, 168 (1st Dep't 2000); Brown v Town of Amherst, 195 AD2d 979, 980 (4th Dep't 1993).

[43] Gould, 89 NY2d at 275

[44] See Verizon Appeal, p. 20.

injury. Rather, these statements, as the Brodsky Group argues, offer only conclusory allegations that lack factual support.

As an initial matter, the Company has not parsed out each of the 13 documents and demonstrated how each, if disclosed, would competitively injure it. Instead, Verizon is attempting to obtain a blanket exemption for all 13 documents by summarily stating that disclosure would enable competitors to obtain, for free, information on processes that the Company developed at considerable expense and effort.[45] Verizon has, however, failed to demonstrate, in adequate detail, how the complete disclosure of all 13 documents would result in substantial competitive injury.

In his declaration, Mr. MacNabb states that the release of the M&Ps "could assist [competitors] in the development of parallel methods and procedures for similar products of their own. The documents could provide guidance on issues that they will need to consider in their own product development process, and could be a source of ideas on competitive strategies."[46] This statement lacks the specific and particularized facts necessary to support a finding of competitive injury. It also rests largely on speculative claims as to what competitors "could" do with the information.

Verizon also contends that, here, as was the case in Encore, disclosure of the M&Ps would result in an "economic windfall." It asserts that competitors would gain, essentially without cost, information of commercial value that could assist them in the development of parallel methods and procedures for similar products of their own and provide guidance on how to compete against the Company more effectively.[47] Such an argument is theoretical at best. Verizon has failed to offer any evidentiary support to demonstrate the likelihood of this "economic windfall." Thus, Verizon's argument that there is a potential for injury does not provide sufficient justification to entitle it to the exemption. Further, the Company fails to articulate how any potential injury would be substantial enough to fall squarely within the exemption under POL § 87(2)(d).

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[45] Verizon Appeal, p. 22.

[46] Case 13-C-0197, Declaration of Thomas MacNabb (filed November 15, 2013), p. 5.

[47] Verizon Appeal, p. 22.

While it is clear that Verizon has spent a considerable amount of time developing its methods and procedures, the Company has failed to proffer any specific evidence that the disclosure of these 13 documents will – or would be likely to – cause it competitive injury. As such, I find that Verizon has failed to meet its burden of justifying the exemption of all 13 documents as trade secret materials.

I observe, however, that, again, Verizon might have satisfied its burden, at least with respect to a portion of its all-inclusive request for exemption, if it had separated out the documents it describes generically as "methods and procedures" and assessed each individually for information that might actually be eligible for exception from disclosure and explained, in detail, how disclosure would cause competitive injury. All of the documents and materials in Verizon's filing may well contain some proprietary information for which the Company could attempt to satisfy its burden, under POL § 89(5)(e), of proving entitlement to an exception from disclosure. Rather than separate materials and attempt to make an evidentiary showing on each, Verizon has comingled internally published M&Ps with other documents and presentations, or excerpts thereof, produced for similar purpose (i.e. to provide training or to describe a proposed or actual internal operation or process), but not specifically identified as an "M&P." Both types of materials, the M&Ps and other documents and presentations, include information that clearly does not fit within the definition of "trade secret" (e.g., a publicly available Voice Link User Guide).[48]

The Commission recognizes that limiting competitor access to proprietary material is an important policy. Exemptions are to be narrowly construed, however. The entity resisting disclosure bears the burden of proof and, therefore, must demonstrate a particularized and specific justification for denying access to the subject documents.[49] Absent such a showing of competitive injury covering each document that comprises the response, the speculative concerns articulated by Verizon are not enough to sustain the Company's burden of proving that the information should remain protected as trade secret materials.

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[48] 16 NYCRR § 6-1.3(b)(2); Kewanee Oil Co. v Bicron Corp., 416 US 740, 474-475 (1973)

[49] See, e.g., Case 99-C-0529, "Ruling Concerning Proprietary Material" (issued December 13, 1999), at 2; Ashland Mgt. v Janien, 82 NY2d 395, 407 (1993); Matter of Capital Newspapers Div. of Hearst Corp. v Burns, 67 NY2d at 566-567.

Lastly, I reject Verizon's argument that the RAO's Determination improperly "overruled" Department precedent concerning the trade secret exemption inasmuch as the RAO failed to distinguish ALJ Rulings that allegedly concluded that Verizon's network costs were "proprietary."[50] Verizon apparently agrees with the RAO's statement of the contrasting roles of the RAO and the ALJs. As the RAO concluded, the ALJ's role is narrower inasmuch as he, or she, is limited to deciding questions regarding discovery by parties in an administrative proceeding that is finite in duration.[51] In contrast, the RAO is tasked with coordinating the agency's responses to FOIL requests[52] and, as such, is statutorily obligated to review all agency records sought, in their entirety, and to determine which portions, if any, might properly be withheld or deleted prior to disclosing the remainder.[53]

Verizon asserts, however, that both the RAO and the ALJs must determine whether a document filed with the Department of Public Service is entitled to protection from disclosure, under the same substantive regulation, 16 NYCRR § 6-1.3, and that agencies must be consistent in the policies they adopt. Verizon's substantive contentions are essentially correct; however, the same substantive standard does not imply that the applicable procedures or burdens are identical.[54] Moreover, any need for agency consistency does not require the RAO to carefully parse every ALJ Ruling that allegedly supports a person's position in the context of FOIL. The Secretary is the definitive agency decision-maker on FOIL matters, inasmuch as RAO Determinations and ALJ Rulings are appealed to the Secretary, as Verizon acknowledges. [55]

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[50] Verizon Appeal, p. 12-16.

[51] 16 NYCRR § 6-1.4

[52] N.Y. State Comm Open Govt. AO 11641.

[53] N.Y. State Comm Open Govt. AO 11765.

[54] The procedures followed by the RAO under POL § 89(5)(b), as implemented by 16 NYCRR § 6-1.3, and those employed by ALJs under, 16 NYCRR § 6-1.4, differ. Also, the burdens in the context of discovery are not the same as those under FOIL. See, e.g., 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, Determination on Appeal of Ruling on Access by Competitors to Allegedly Confidential Information (issued March 20, 2007).

[55] Verizon Appeal, p. 14.

Verizon ignores, however, that each FOIL case must be decided in a specific evidentiary context. The ALJ rulings cited by Verizon are limited to evidentiary records in the context of a particular trial-type proceeding. That different agency employees, with different roles, have reached allegedly different decisions based upon different records creates no basis for claiming that the agency has been inconsistent.[56]

In deciding questions in the context of litigated cases, moreover, the ALJs have the benefit of experience with an evidentiary record, developed in a particular trial-type administrative proceeding, which largely focuses on particular litigated issues, notably pricing. In contrast, those submitting documents and pleadings to the RAO must develop the record by filing affidavits and relying, as appropriate, on legal and policy arguments. While such person is, of course, free to cite an ALJ's ruling to the RAO and the Secretary in support of protecting information, mere citation of such a ruling does not satisfy its burden. The person must be prepared to explain why an ALJ's protection of certain information on a particular record justifies protection of that information on a different record before the RAO.[57]

In support of its appeal, Verizon cites an ALJ's ruling opining that disclosure of competitively sensitive information will lead to market distortions.[58] In applying FOIL, however, the Department must respect the balance struck by the Legislature between protecting confidential information and ensuring transparency in government. Notably, contrary to Verizon's claims, the asymmetric access to information enjoyed by its competitors to

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[56] Similarly, any Verizon claim that the ALJ rulings support a blanket exemption for network cost information is without merit. The ALJs have protected specific cost information based on a particular showing based on individual records. There has been no finding that all network cost information, particularly aggregate cost information, needs to be protected to ensure competitive neutrality.

[57] For instance, Verizon relies upon an ALJ's ruling granting the Company trade secret protection for methods and procedures, "based on Verizon's representation that they have value for which it would be entitled to compensation." Verizon Appeal, p. 21, n. 52, citing Case 02-C-1425, Ruling on Confidential Trade Secret Status of Testimony and Exhibits (issued October 8, 2004), p. 11. Verizon's representations that its M&Ps have value are, however, now under challenge. The Company needs to build an evidentiary record that disclosure would create a "windfall" for competitors, particularly when material it seeks to except from disclosure contains public information.

[58] Verizon Appeal, p. 2.

information does not, as the Brodsky Group argues, justify a change in the showing that must be made to demonstrate a likelihood of substantial competitive injury. Under FOIL case law, the burden is on Verizon to demonstrate a particularized and specific justification, supported by evidence, for denying access to the documents at issue and, inasmuch as Verizon has failed to meet its burden, I uphold the RAO's November 4, 2013 Determination.

CONCLUSION

As explained above, Verizon has failed to carry the burden of proving that the information submitted in response to various IRs in connection with its tariff filing is entitled to the exception from public disclosure provided in POL § 87(2)(d). For the reasons discussed above, Verizon's appeal of the RAO's November 4, 2013 Determination is denied. Pursuant to POL § 89(5)(a)(3), information required to be disclosed as a result of this Determination "shall be excepted from disclosure and be maintained apart by the agency from all other records until fifteen days after the entitlement to such exception has been finally determined or such further time as ordered by a court of competent jurisdiction."

Kathleen H. Burgess

Digitally Signed by Secretary
New York Public Service Commission

Kathleen H. Burgess
Secretary