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Partner

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VIA ELECTRONIC MAIL

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

RE: Joint Petition of Charter Communications, Inc. and Time Warner Cable Inc. for Approval of a Transfer of Control of Subsidiaries and Franchises; for Approval of a Pro Forma Reorganization; and for Approval of Certain Financing Arrangements Case 15-M-0388

Request for Confidential Treatment of Portions of the Network Expansion Implementation Plan

Dear Ms. Giliberto:

Pursuant to Public Officers Law (“POL”) §§ 87(2), 89(5) and Part 6-1.3 of the Commission’s Regulations (16 N.Y.C.R.R. § 6-1.3), Charter Communications (“Charter”) respectfully requests confidential treatment for portions of the attached information, which includes the Charter Network Expansion Implementation Plan and Appendices (the “Plan”). Confidential treatment is sought for the redacted portions of the Charter Network Expansion Plan and for all of the information contained in the Appendices (together, the “Confidential Data”).

The data and information contained in the Plan was compiled to meet Condition B.1¹ of the Commission’s Order approving the merger of Charter and Time Warner Cable, Inc., which required Charter to notify the Commission where it will seek to complete network expansion to an additional 145,000 unserved and underserved homes or businesses in the next four years on a

¹ Certain subjects discussed in this filing and the Plan pertain to non-jurisdictional products and services. Discussion of non-jurisdictional products and services are not intended as a waiver or concession of the Commission’s jurisdiction beyond the scope of Charter’s regulated telecommunications and cable video services. Charter respectfully reserves all rights relating to the inclusion of or reference to such information, including without limitation Charter’s legal and equitable rights relating to jurisdiction, compliance, filing, disclosure, relevancy, due process, review, and appeal. The inclusion of or reference to non-jurisdictional information or to the ordering clauses or other requirements of the Order as obligations or commitments to provide non-jurisdictional services shall not be construed as a waiver of any rights or objections otherwise available to Charter in this or any other proceeding, and may not be deemed an admission of relevancy, materiality, or admissibility generally.

census block and street level basis.² As such, the Plan contains granular information regarding the number and locations of potential network extensions, the planned tranches of expansion over the next four years, and the methodologies used to compile the information. Charter respectfully requests that the Commission grant protection from disclosure for the Confidential Data because it contains trade secrets as well as confidential commercial information relative to Charter's operations on a detailed level, and because disclosure of the Confidential Data would provide an advantage to Charter's competitors to the detriment of Charter. Moreover, this information and initial identification of served and unserved locations was a unique exercise that required a significant amount of intellectual and proprietary capital, to Charter's knowledge, has not been performed. A redacted version will be filed with the Secretary to the Commission.

It should be noted that confidential protection was granted for a less granular form of this information on May 4, 2016 in your Determination 16-02.³ That determination was found to be consistent with the POL by the New York State Department of State, Committee on Open Government.⁴ In addition, the Empire State Development ("ESD") Records Access Officer granted trade secret protection to the less granular form of this information,⁵ a finding that was upheld by the ESD's Records Access Appeals Officer upon appeal.⁶

Discussion:

The Confidential Data presents the number of unserved and unpassed homes within a particular locality, the specific addresses Charter will target for build-out of services, the methodology used to develop the information, and plans to implement the network expansion over the next four years, including the number and locations of each tranche. To generate the information, Charter compiled parcel data by county for its Upstate NY franchise footprint, both from publicly available sources and from individual counties, most of the latter of which required payment. That information was compared against Charter's internal proprietary databases to yield address level data for the unserved/underserved locations. The address level data was then used to develop the build-out plans, as presented in the Plan.

The Plan will be the basis for Charter's future deployment and business plans, which includes targeted marketing strategies for new customers as well as allocation and planning of

² Case 15-M-0388 - Joint Petition of Charter Communications Time Warner Cable for Approval of a Transfer Control of Subsidiaries and Franchises, Pro Forma Reorganization, and Certain Financing Arrangements, Order Granting Joint Petition Subject to Conditions, (Issued and Effective: January 8, 2016). ("Merger Order")

³ Case 15-M-0388, *Joint Petition of Charter Communications and Time Warner Cable for Approval of a Transfer of Control of Subsidiaries and Franchises, Pro Forma Reorganization, and Certain Financing Arrangements*, Determination of the Records Access Officer 16-02 (May 4, 2016) ("Determination 16-02").

⁴ Letter from Kristin O'Neill, Assistant Director, Committee on Open Government, New York Department of State, to Peter Henner (May 23, 2016).

⁵ Letter from Lesley Hall, Assistant Counsel & Records Access Officer, Empire State Development, to Maureen O. Helmer, Barclay Damon, regarding ESD FOIL request #1927 (May 10, 2016).

⁶ Letter from Julene Beckford, Associate Counsel and Records Access Appeals Officer, Empire State Development, to Peter Henner, regarding ESD FOIL Request #1927 – Appeal (May 31, 2016).

company resources such as staff and materials. As discussed below, the confidential information contained in the Plan is a trade secret, which mandates exception from disclosure. In addition, the information in the Confidential Data qualifies as confidential commercial information which, if publicly disclosed, would cause substantial injury to the competitive position of Charter.

Trade Secret and Confidential Commercial Information Tests:

POL § 87(2)(d) states in relevant part that agencies must deny access to records that “are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise.”⁷ The New York State Appellate Division, Third Department, recently upheld the New York State Supreme Court’s ruling in *Verizon v. New York State Public Service Commission* which found that trade secret records submitted to an agency are exempt from public disclosure under New York’s Freedom of Information Law (“FOIL”) and do not require an additional showing of substantial competitive injury.⁸ In its decision, the Third Department affirmed that the “trade secret” and “substantial competitive injury” tests are two alternate standards, such that information satisfying either test must be exempted from public disclosure under FOIL.⁹ Charter respectfully submits that the confidential information in the Plan satisfies each of these alternate standards and must, therefore, be exempted from disclosure.

1. Trade Secret

Relying on the Restatement of Torts definition of a trade secret, the Third Department’s *Verizon* decision laid out a “two-prong” approach to determine the existence of a trade secret. “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.’”¹⁰ This definition is also found in the Commission’s Regulations under 16 NYCRR § 6-1.3(a). For the second prong, *Verizon* laid out the factors enumerated in the Restatement:

Second, if the information fits [the] 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 others involved in the business;
- (3) the extent of measures taken by the business to guard the secrecy of the information;

⁷ POL § 87(2)(d).

⁸ *Verizon New York, Inc. v. New York State Public Service Commission*, 137 A.D.3d 66 (3d Dep’t 2016).

⁹ *Verizon*, 137 A.D.3d at 73.

¹⁰ *Verizon*, 137 A.D.3d at 72.

- (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.¹¹

The six factors are non-exclusive, and not all factors must be established to prove that a trade secret exists.¹² It should be noted that many of these same factors are also used in the analysis for whether disclosure would result in substantial competitive injury, discussed below.

The information in the Confidential Data complies with the general definition of a trade secret. Assembled from a variety of sources including internal databases and public information, the Confidential Data is “compilation of information.” It is used in Charter’s business to develop strategies and plan resources for future network expansion. It gives Charter an advantage over competitors who do not know or use the information because the Confidential Data is used as the basis for deployment of services to unserved and underserved areas as well as the basis to organize and launch marketing initiatives before competitors have the chance to deploy their own services in a particular area. The Confidential Data, therefore, meets the first prong of the trade secret analysis.

As to the second prong, the information in the Confidential Data is, indeed, a secret. The Confidential Data is not publicly available, is not readily disclosed in this granular form to the investment community, and is closely guarded internally. Only upper management, limited outside consultants who developed the datasets, and necessary Charter employees that have prepared and compiled the Confidential Data have access to it such that internal access is given only on a need-to-know basis for implementation of the marketing plans or to allocate time and materials for the physical deployment. While some granular data may be released under certain circumstances, it is only after the conclusion of construction. Therefore, the information in the Confidential Data meets factors one, two and three of the secrecy analysis portion of the trade secret test.

The Confidential Data includes detailed information relative to Charter’s operations and business plans that, if disclosed, could be used by competitors to obtain a highly disaggregated level of information that implicitly sets forth important aspects of Charter’s network facility locations and operations. It is very valuable tool used by Charter to determine where, when, and if Charter should expand its network and develop marketing strategies. If disclosed, the Confidential Data would be valuable to competitors because it would provide insight into the most lucrative and low-risk markets and provide specific information of where Charter is actively looking to expand its footprint, thus enabling incumbent providers to better prevent

¹¹ *Verizon*, 137 A.D.3d at 72-73.

¹² The Commission has followed this approach in its recent FOIL Determination in Case 14-C-0370, *In the Matter of a Study on the State of Telecommunications in New York State*, Determination of Appeal of Trade Secret Determination, 17 (issued March 23, 2016) (“Thus, in compliance with the Appellate Division’s decision, the entity resisting disclosure ‘must make a sufficient showing with respect to each of the six factors,’ any trade secret factor that is not established would be deemed to weigh against a finding that the information constitutes a trade secret”).

competitive entry. Charter has expended a significant amount of time, money, and effort to compile the information and Plan. If disclosed, competitors would unfairly obtain this information at “quite a bargain” without the same investment as Charter, and would be spared the cost of independently collecting market data and information about facilities deployment. Thus, factors four and five are met.

The Confidential Data does not constitute the type of information that competitors make available to each other in the normal course of business and could not be easily replicated without consent from Charter. The information in the Confidential Data could be used to support detailed analyses, on a very granular level, of Charter’s cost of doing business. Such information could not be developed independently by competitors, and any estimates developed through publicly available sources or from third-party sources, if possible at all, would be expensive and burdensome to assemble, and less accurate than the data provided in the Confidential Data. As such, the Confidential Data meets the sixth and final trade secret factor to show that the Confidential Data is, and should remain, a secret.

2. *Substantial Competitive Injury*

The “substantial competitive injury” test evaluates whether disclosure of the confidential information “would be likely to cause substantial injury to the competitive position of the subject commercial enterprise.”¹³ Determination 16-02 noted that the Department of Public Service Staff continues to rely on the New York Court of Appeals decision in *Encore College Bookstore v. Auxiliary Service Corporation of the State University of New York at Farmingdale* to evaluate whether substantial competitive injury would result from disclosure of confidential information.¹⁴ In *Encore*, the Court of Appeals found that whether substantial competitive harm exists turns on the commercial value of the requested information to competitors and the cost of acquiring it through other means.¹⁵ *Encore* remarked that “where [] disclosure is the sole means by which competitors can obtain the requested information, the inquiry ends [there].”¹⁶ It should be noted that much of the trade secret analysis and factors also support the substantial competitive injury test.

As presented above in the analysis of trade secret factors four and five, the Confidential Data has tangible value to Charter that would be severely diminished if the Confidential Data was disclosed. If given free, unfettered access to this information, competitors could tailor their own networks, marketing strategies, and budgets, and build-out in these areas prior to Charter. As presented for trade secret factor six, the only way competitors could access the information in its compiled and granular form as presented in the Confidential Data would be through disclosure or by expending a significant amount of time and money to develop mere estimates of the information contained in the Confidential Data. Therefore, the Confidential Data has significant commercial value to Charter and its competitors, such that if it were disclosed, Charter would suffer substantial financial and competitive injury.

¹³ Determination 16-02 at 8; 16 NYCRR § 6-1.3(b)(2).

¹⁴ Determination 16-02 at 8, citing *Encore College Bookstores v. Auxiliary Serv. Corp.*, 87 N.Y.2d 410 (1995).

¹⁵ *Encore*, 87 N.Y.2d at 420-21.

¹⁶ *Id.* at 420.

Conclusion:

Accordingly, Charter respectfully requests that the Confidential Data be protected from disclosure as it satisfies both the “trade secret” and the “substantial competitive injury” tests under the POL. To protect the confidentiality of this information, the Confidential Information must be maintained in the Department of Public Service’s confidential files and must be provided only to interested members of the Commission and DPS Staff, and not otherwise be disclosed or made available, either through FOIL or otherwise.

Respectfully submitted,

/s/ Maureen O. Helmer

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