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May 19, 2016

**VIA ELECTRONIC MAIL**

Hon. Kathleen H. Burgess  
Secretary to the Commission  
New York State Public Service Commission  
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**

Dear Secretary Burgess:

On behalf of Charter Communications, Inc. ("Charter"), attached is the Charter Response in Opposition to Mr. Henner's Appeal of the Record Access Officer's Determination 16-02, issued on May 4, 2016.

Respectfully submitted,

/s/ Maureen O. Helmer

Maureen O. Helmer  
*Counsel for Charter Communications, Inc.*

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**BEFORE THE  
NEW YORK PUBLIC SERVICE COMMISSION**

Joint Petition of	)	
	)	
CHARTER COMMUNICATIONS, INC.	)	
	)	
and	)	Case 15-M-0388
	)	
TIME WARNER CABLE INC.	)	
	)	
For Approval of a Transfer of Control of	)	
Subsidiaries and Franchises; for Approval of	)	
a Pro Forma Reorganization; for Approval of	)	
Assignment of 16 Franchises; and for Approval	)	
of Certain Financing Arrangements	)	
	)	

**Charter Communications, Inc.’s Opposition to Mr. Henner’s  
Appeal from the Records Access Officer Determination 16-02**

May 19, 2016

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**BEFORE THE  
NEW YORK PUBLIC SERVICE COMMISSION**

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**Charter Communications, Inc.’s Opposition to Mr. Henner’s  
Appeal from the Records Access Officer Determination 16-02**

Charter Communications, Inc. (“Charter”), and its new affiliate Time Warner Cable Inc. (“TWC”) (collectively, “Charter Companies” or “Companies”)<sup>1</sup> respectfully request that the Secretary to the Commission deny the appeal of Mr. Peter Henner, on behalf of his clients, regarding the Records Access Officer’s Determination 16-02 (“Determination”).<sup>2</sup> The RAO’s Determination found that the Companies’ broadband franchise information (“Deployment Data”) was entitled to an exception from disclosure as it met the trade secrets test and would also be deemed confidential commercial information that would cause substantial competitive injury to the position of the Companies, if disclosed. The RAO’s determination thoroughly evaluated the

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<sup>1</sup> Note that while the documents at issue in this appeal were submitted by the individual Companies, the Companies have officially merged as of May 18, 2016 such that this is filed on behalf of the newly merged company.

<sup>2</sup> 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”).

issues and facts presented by all parties, and carefully considered the underlying declarations in support of the Statement of Necessity submitted in this matter. As such, the RAO's determination should not be disturbed, and Mr. Henner's appeal should be denied.

## **I. BACKGROUND**

On February 18, 2016, the Companies filed Deployment Data with the Commission's Records Access Officer ("RAO"). On March 28, 2016, Mr. Peter Henner, on behalf of his clients, requested an unredacted copy of this filing. On April 1, 2016, the RAO requested that the Companies file a revised redacted version of the data, which the Companies filed on April 4, 2016. In the revised redacted documents, the Companies disclosed the municipality and franchise information, and retained redaction for the approximate number of homes not passed in each franchise. On April 6, 2016, Mr. Henner responded, stating that the latest submission by the Companies was not responsive to his request. On the same day, the RAO advised that the Companies could file a Statement of Necessity in furtherance of the RAO's intention to make a formal determination regarding the Companies' requests for protection from disclosure. On April 20, 2016, the Companies filed their Statement of Necessity along with the supporting declarations of Noel Dempsey of TWC and James Gregory Mott of Charter, both attached again here, for convenience.

On May 4, 2016, the RAO issued Determination 16-02 and found that the Companies' Deployment Data warranted exception from disclosure as both a trade secret and confidential commercial information. In granting the Companies' request for continued protection from disclosure, the RAO found that "the Companies make a compelling case for trade secret

protection for the information limited to the ‘homes not passed’ category.”<sup>3</sup> On May 10, 2016, Mr. Henner filed an appeal of the RAO’s determination.

This filing reiterates the Companies’ position that the number of unserved homes should be granted confidential protection because it includes trade secret and confidential commercial information relative to the Charter Companies’ broadband deployment. Disclosure of the information would provide an advantage to the Companies’ competitors at a competitive loss to the Companies, and subject the Companies to significant economic and competitive harm.

## II. APPLICABLE LAW

Although the Companies’ Statement of Necessity and the RAO’s Determination provide ample discussion and background regarding the legal standard for exemption from disclosure, a brief review is included here to respond to Mr. Henner’s appeal and clarify some points of law that may be misconstrued or confused in his appeal. As noted in the RAO’s Determination, the New York State Appellate Division, Third Department’s, recent decision in *Verizon v. Public Service Commission* found that Public Officers’ Law § 87(2)(d) provides two *alternate* standards, or “tests,” to determine whether information should be excepted from public disclosure.<sup>4</sup> As such, information will be exempted from disclosure if it is *either* (1) a trade secret; or (2) if disclosure would result in a likelihood of substantial competitive injury, referred to as the “substantial injury test.” Therefore, if *either* test is met, the information must be excepted from disclosure.

The Commission recently applied the findings from the Third Department’s *Verizon* decision in a lengthy and detailed March 23, 2016 Determination of Appeal of Trade Secret

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<sup>3</sup> Determination 16-02 at 8.

<sup>4</sup> *Verizon New York, Inc. v. New York State Public Service Commission*, 137 A.D.3d 66 (3d Dep’t 2016).

Determination in Case 14-C-0370 (“Verizon Determination of Appeal”).<sup>5</sup> As is discussed further and as found by the RAO, the Companies’ Deployment Data meets both the trade secret test and the substantial injury test.

**A. Trade Secret**

The *Verizon* decision reemphasized that the Restatement of Torts’ definition of a trade secret should be used to analyze whether a trade secret exists. In the subsequent Verizon Determination of Appeal, the Secretary to the Commission recognized that the Restatement of Torts is the proper analysis to determine whether a trade secret exists.<sup>6</sup> Pursuant to the Restatement of Torts, the Third Department’s *Verizon* decision, the March 23, 2016 Verizon Determination of Appeal, and as defined in the Commission’s regulations at 16 NYCRR § 6-1.3(a), “[a] trade secret may consist of any formula, pattern, device or compilation of information which is used in one’s business, and which provides an opportunity to obtain an advantage over competitors who do not know or use it.”<sup>7</sup> If the information fits this general definition, then an additional factual determination is made concerning whether the information truly is a trade secret by consideration of the six trade secret factors outline in the Restatement of Torts:

- (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;
- (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;

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<sup>5</sup> 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 (Issued March 23, 2016) (“Verizon Determination of Appeal”).

<sup>6</sup> See Verizon Determination of Appeal at 17.

<sup>7</sup> 16 NYCRR § 6-1.3; see also *Verizon*, 137 A.D.3d at 72; Verizon Determination of Appeal at 17; Restatement of Torts § 757, comment b.

(6) the ease or difficulty with which the information could be properly acquired or duplicated by others.<sup>8</sup>

These trade secret factors are not to be confused with the six factors outlined in the Commission's regulations at 16 NYCRR §§ 6-1.3(b)(2)(i)-(vi), which are used to determine the second test for whether "substantial competitive injury" would result.<sup>9</sup> Although the factors for each separate test are similar and contain some overlap, contrary to the implications of Mr. Henner's appeal, the RAO's Determination is not incomplete or in error because it did not analyze the "six specific factors set forth in the regulations,"<sup>10</sup> which are not wholly applicable to the trade secret test. Moreover, the trade secret factors are non-exclusive, and not all factors must be established to prove that a trade secret exists.<sup>11</sup>

## **B. Substantial Competitive Injury**

As noted in the RAO's Determination, the second test, 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."<sup>12</sup> The

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<sup>8</sup> *Verizon*, 137 A.D.3d at 72-73; *Verizon Determination of Appeal* at 17; Restatement of Torts § 757, comment b.

<sup>9</sup> The factors outlined in 16 NYCRR § 6-1.3(b)(2) used to evaluate whether substantial competitive injury would result from disclosure 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.

<sup>10</sup> *Henner Appeal* at 3.

<sup>11</sup> The Commission followed this approach in the *Verizon Determination of Appeal* noting that "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."

<sup>12</sup> 16 NYCRR § 6-1.3(b)(2).

RAO also 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*<sup>13</sup> to evaluate whether substantial competitive injury would result from disclosure of the confidential information.<sup>14</sup>

In *Encore*, the Court of Appeals noted 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” and that a showing of actual competitive harm was not required but “[r]ather, actual competition and the likelihood of substantial competitive injury is all that need be shown.”<sup>15</sup> The *Encore* court also noted that “where [ ] disclosure is the sole means by which competitors can obtain the requested information, the inquiry ends [there].” The court found that the likelihood of harm to the party seeking protection was “enhanced by the economic windfall conferred upon [the competitor] were it to receive the [information] at the mere cost of FOIL fees” and that “[d]isclosure through FOIL, however, would enable [it] to obtain the requisite information without expending its resources, thereby reducing its cost of business and placing [the party seeking protection] at a competitive disadvantage.”<sup>16</sup>

Under 16 NYCRR Section 6-1.3(b)(2), the Commission delineated factors to determine whether confidential commercial information “would be likely to cause substantial injury to the competitive position of the subject commercial enterprise.”<sup>17</sup> As discussed above, Mr. Henner cites these “six criteria in the regulations” in his appeal and includes a blanket assertion that “Nor does her [the RAO’s] determination analyze the six specific factors set forth in the

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<sup>13</sup> *Encore College Bookstores v. Auxiliary Serv. Corp.*, 87 N.Y.2d 410 (1995).

<sup>14</sup> Determination 16-02 at 8.

<sup>15</sup> *Encore*, 87 N.Y.2d at 421 (internal quotes omitted).

<sup>16</sup> *Id.*

<sup>17</sup> 16 NYCRR § 6-1.3(b)(2).

regulations.”<sup>18</sup> It is not clear if Mr. Henner is alleging that that the factors outlined in Section 6-1.3(b)(2) must be independently met outside of the trade secret or substantial competitive injury tests, or as part of either analysis.<sup>19</sup> However, the factors outlined in Section 6-1.3(b)(2) are applicable only to support an analysis of whether the substantial competitive injury test is met, as further exemplified by the *Encore* decision.<sup>20</sup> An additional discussion of the “six factors in the regulations” is included here, after analysis of each of the proper tests.

### III. OPPOSITION TO THE APPEAL

#### A. The RAO Correctly Determined that the Deployment Data was a Trade Secret

To meet its burden of proof, the Companies provided detailed declarations to support their Statement of Necessity to explain that the Deployment Data was a trade secret. The RAO appropriately applied the general definition of trade secret discussed above, and found that the Deployment Data met the general trade secret definition.<sup>21</sup> The RAO then analyzed the proper underlying trade secret factors, as cited in the Restatement of Torts, and concluded that there was specific, detailed evidence in the declarations to support the proposition that the confidential Deployment Data was, indeed, a trade secret.<sup>22</sup> The RAO noted that “[t]hrough use of these comprehensive declarations and well-reasoned legal and factual arguments, [the Companies] demonstrate in detail compliance with the Restatement definition of a ‘trade secret’ as well as the six factors which supplement the ‘trade secret’ definition as outlined in the Commission

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<sup>18</sup> Henner Appeal at 3.

<sup>19</sup> The organization of Mr. Henner’s appeal such that “Trade Secret Status” is presented first, followed by “The Six Criteria in the Regulations” and then “Substantial Competitive Injury” appears to indicate that Mr. Henner is asserting that the factors outlined in Section 6-1.3(b)(2) apply to the trade secret analysis, or are an independent test.

<sup>20</sup> While the *Encore* decision does not outline or cite the factors enunciated in Section 6-1.3(b)(2), its analysis generally discusses these factors.

<sup>21</sup> Determination 16-02 at 8.

<sup>22</sup> Determination 16-02 at 8.

regulations and the Verizon case.”<sup>23</sup> The RAO, therefore, found that “TWC and Charter [met] each factor of the initial two-part trade secret test established in the Verizon case with significant statements, arguments, and facts that establish the existence of a trade secret.”<sup>24</sup>

Mr. Henner’s overarching argument appears to be that while the underlying data sources, methodology, and internal analysis “are arguably entitled to trade secret protection,” that the information derived from those confidential sources would not be entitled to trade secret protection.<sup>25</sup> In support of his argument, Mr. Henner states that some of the Deployment Data could be developed by a third party or “guessed” at based on a review of franchise agreements. However, Mr. Henner fails to recognize that even if the information was derived from *public* sources, it could qualify as a trade secret because it is the unique way the information is *combined* or *compiled* that determines whether it is a trade secret,<sup>26</sup> with the operative inquiry being whether the information for which protection is sought (i.e. the compilation of information) meets the trade secret test. Here, the Deployment Data clearly meets the trade secret test.

Next, Mr. Henner argues that the number of unserved homes in a particular municipality is not a “wide array of information.”<sup>27</sup> However, again, Mr. Henner misunderstands and misconstrues the definition of a trade secret. A trade secret can consist of a wide array of information that has been combined or compiled in a particular way. Here, the “wide array of

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<sup>23</sup> Determination 16-02 at 8.

<sup>24</sup> Determination 16-02 at 8.

<sup>25</sup> Henner Appeal at 2, 3.

<sup>26</sup> *sit-up Ltd. v. IAC/Interactive Corp.*, 2008 U.S. Dist. LEXIS 12017, \*27 (S.D.N.Y. Feb. 20, 2008) (finding that “Under New York law, a trade secret can exist in a combination of characteristics and components, each of which, by itself, is in the public domain, but the unified process, design and operation of which, in unique combination, affords a competitive advantage and is a protectable secret.”).

<sup>27</sup> Henner Appeal at 3.

information” is the *underlying* data used to derive the Deployment Data in its final, compiled form. The Companies have never asserted that the Deployment Data is a “wide array of information.” Instead, the Companies have shown that a wide array of information from a number of sources, including internal TWC and Charter databases and National Telecommunications & Information Administration databases,<sup>28</sup> were used to compile the Deployment Data such that it meets the first part of the general definition of a trade secret in that is a “compilation” of information.

Mr. Henner then asserts that “it seems very unlikely that the Companies have any plans to extend service to these unserved units, absent a direction from the Commission . . . .” However, what a company plans to do with its trade secret information is not part of the analysis as to whether a trade secret exists. Moreover, as specified in the declarations supporting the Statement of Necessity, the Deployment Data is, in fact, used to determine future deployment and the sequencing of deployment of new broadband service.<sup>29</sup> Furthermore, beyond the conditions in the Merger Order requiring deployment of broadband to 145,000 homes and businesses, in recent years, TWC has deployed new service to many previously unpassed or unserved units across its rural upstate New York footprint, demonstrating its continued commitment to the expansion of its services in New York.

Next, Mr. Henner argues that “it is not clear” how competitors will be able to use the Deployment Data to gain a competitive advantage because the Companies do not provide any

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<sup>28</sup> Dempsey Declaration at ¶ 5.

<sup>29</sup> “The Deployment Data . . . is an important tool that [TWC] may use to define its short and long term business strategy and prioritize its plans for facilities investment.” Dempsey Declaration at ¶ 6. “TWC also uses the Deployment Data to develop strategic business plans for future deployment, including sequencing of deployment for the most efficient use of manpower, resources, and money and to target specific geographic areas for marketing strategies.” Dempsey Declaration at ¶ 9. “The Deployment Data . . . is an important tool that [Charter] will use to define its short and long term business strategy and prioritize its plans for facilities investment in the near future.” Dempsey Declaration at ¶ 6.

examples or information.<sup>30</sup> However, the declarations of Mr. Dempsey and Mr. Mott provide multiple, specific examples and explanations of how a competitor would use the Deployment Data, if disclosed:

If given access to these data, TWC's competitors would gain a significant unfair advantage, not only because they would gain free information that TWC compiled at its own cost and effort, but also because they could use that information to identify markets that present significant opportunities with little or no competition. Armed with this cost and effort-free information, TWC's competitors could engage in "red lining" or "cherry-picking" hot spots and build their own networks only in the most lucrative and low-risk markets. Additionally, access to this data would enable incumbent providers to better prevent competitive entry, as it would inform them of areas where TWC is actively looking to expand its footprint. Tipping off incumbent competitors gives them the opportunity to initiate marketing campaigns and otherwise lock in their customers to long term contracts to discourage TWC from entering their service areas. This could materially change the penetration rate assumptions on the Company's build plan if the potential customers were all locked into contracts.

Dempsey Declaration at ¶ 8.

If competitors were to obtain TWC's Deployment Data, they could identify and target their resources to invest and market in areas where TWC is competitively vulnerable or conversely, refrain from targeting certain areas where TWC is competitively strong. In the long term, this will result in market balkanization, as competitors could avoid the cost and risk of independent market analysis and simply pick and choose only the most ripe market opportunities. Moreover, TWC's competitors could use the Deployment Data to gauge the success of TWC's market penetration such that competitors would use that information to develop competitive strategies or in negative marketing campaigns.

Dempsey Declaration at ¶ 9.

If allowed access to the data, Charter's competitors would receive a tangible financial benefit, gaining insight into where Charter does and does not currently offer broadband service. The Deployment Data, if made public, would give Charter's competitors a road map to develop strategic business plans for future deployment, including sequencing of construction for the most efficient use of manpower, resources, and money, and to target specific geographic areas for marketing strategies. Competitors could — and given the opportunity would —

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<sup>30</sup> Henner Appeal at 3.

identify and target their resources to invest and market in areas where Charter is competitively vulnerable or conversely, refrain from targeting certain areas where Charter is competitively strong.

Mott Declaration at ¶ 9.

Charter's competitors would also benefit by avoiding the significant cost of independently collecting data and information about Charter's deployment of facilities. Competitors could avoid the cost and risk of independent market analysis and simply focus on the easiest market opportunities.

Mott Declaration at ¶ 10.

As the declarations show, the Companies have, indeed, provided clear and sufficient evidence and explanations of how a competitor would use the Deployment Data to its own advantage at the expense of and to the disadvantage of the Company. As noted in the RAO's Determination, if the Deployment Data were disclosed, competitors would use that information to "market in the areas the Companies are currently not serving by promoting rate decreases, implementing new services, and proposing new contracts leveraging new products."<sup>31</sup> The RAO also noted that "[c]onversely, competitors will refrain from targeting certain areas where the Companies are competitively strong."<sup>32</sup>

**B. The RAO Correctly Determined that Disclosure of the Deployment Data Would Result in Substantial Competitive Injury**

The RAO stated that in order to prove that substantial competitive injury would result from public disclosure of confidential commercial information, there must be a causal link between the disclosure and the injury.<sup>33</sup> Here, the RAO found that the declaration of Mr. Dempsey set the foundation and was that causal link because it established the existence of

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<sup>31</sup> Determination 16-02 at 5.

<sup>32</sup> Determination 16-02 at 5.

<sup>33</sup> Determination 16-02 at 5.

competition in the telecommunications industry in the geographic areas which were the subject of Mr. Henner's FOIL.<sup>34</sup> The RAO noted that because the confidential information has "tangible financial and strategic value to their competitors" that "[i]f allowed access to the data, competitors in these franchise areas would receive a tangible financial benefit, in terms of being spared the cost of independently collecting market data and information about facilities deployment."<sup>35</sup> The RAO, therefore, concluded that, here, "[a] competitor's ability to have granular information regarding where there are higher concentrations of unserved customers will enable it to attempt to build out [those] areas prior to the newly-merged Company doing so" and found that the Deployment Data met the substantial competitive injury test.<sup>36</sup>

Mr. Henner asserts that the existence of competition does not constitute a causal link to show substantial competitive injury, that the Companies failed to show actual competition exists in the particular municipalities where they have unserved units, and that no examples were offered to show how the Companies will suffer injury.

As noted in *Encore*, actual competitive harm does not need to be established, "[r]ather, actual competition and the likelihood of substantial competitive injury is all that need be shown."<sup>37</sup> As here, where there is fierce competition for cable and broadband subscribers and near ubiquitous options for alternate service, the retention of existing customers, prevention of migration to other providers, and the need for new subscribers is paramount to the viability of a provider and its success such that the likelihood for substantial competitive injury increases.

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<sup>34</sup> Determination 16-02 at 8-9.

<sup>35</sup> Determination 16-02 at 9.

<sup>36</sup> Determination 16-02 at 9.

<sup>37</sup> *Encore*, 87 N.Y.2d at 421.

Therefore, the existence of competition is indeed the causal link to show a likelihood of substantial competitive injury.

The RAO's Determination noted that Mr. Henner's letter made a "bald statement that there are no competitors for the business of connecting these unserved homes."<sup>38</sup> Mr. Henner provides no evidence in his appeal to controvert the RAO's recognition and the Companies' experience that vibrant competition exists in these franchise areas.<sup>39</sup> Exhibit 1, attached to the declaration of Mr. Dempsey, lists 59 competitors to TWC outside of the City of New York, which covers the areas and municipalities included in the Deployment Data. It should be noted that Exhibit 1 does not include *other* competitors such as satellite (Dish and DirecTV), wireless (AT&T, T-Mobile, and Sprint), and incumbent carriers; competitors that generally cover the majority of New York and the municipalities listed in the Deployment Data. As such, it is clear that the Companies are in constant competition with numerous other providers across all of their lines of service,<sup>40</sup> and clear that the RAO was correct in finding the same.

Multiple examples and detailed explanations of how competitors would use the Deployment Data to the detriment of the Companies is discussed above and included in the declarations. For example, if the Deployment Data were disclosed, competitors would engage in competitive or negative marketing campaigns against the Companies.<sup>41</sup> Incumbent carriers could initiate marketing campaigns and otherwise lock-in customers to long-term contracts to discourage the Companies from entering the service area, which would materially change the penetration rate assumptions used for the Companies' build plans.<sup>42</sup> These and additional

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<sup>38</sup> Determination 16-02 at 5, n.18.

<sup>39</sup> See Determination 16-02 at 5, n.18.

<sup>40</sup> See Mott Declaration at ¶ 8.

<sup>41</sup> Dempsey Declaration at ¶ 9.

<sup>42</sup> See Dempsey Declaration at ¶ 8.

examples are provided in the declarations as well as further discussed in the Statement of Necessity.

Mr. Henner alleges that it would be unlikely that a competitor would perform a build-out where the Companies would plan to deploy new service because “prospective [customers] know that they will benefit from the build out of the Companies’ service that will be required under the Merger Order, and will not want to pay for a competitor’s service when they know that will get service from one of the Companies.”<sup>43</sup> Such a leap in logic is not germane to the overall analysis of whether the Deployment Data should be disclosed. Moreover, that prediction is exactly why the Deployment Data should not be released as it can have the counter-effect to New York’s goals of increasing access to broadband and promoting competition; by Mr. Henner’s logic, competitors would be hesitant to perform their own build-outs in areas that may be the target of the Companies’ new deployment.

**C. “The Six Criteria in the Regulations”**

As previously noted, it is not clear if Mr. Henner’s appeal asserts that the factors outlined in 16 NYCRR 6-1.3(b)(2) should have been the basis for the trade secret test, the substantial competitive injury test, or a stand-alone test. And as previously discussed, the factors enumerated in the Commission’s regulation are to be used to determine whether information meets the *substantial competitive injury test*. In an effort to respond to each of Mr. Henner’s claims, a response to each of the factors he takes issue with is included below.

*1. The extent to which the disclosure would cause unfair economic or competitive damage.*

Mr. Henner argues that the Companies did not offer any evidence to indicate that they would be injured by disclosure of the information or examples of how the information would be

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<sup>43</sup> Henner Appeal at 5.

used by competitors. Examples of competitor use and explanations of the injury that would result to the Companies if the information is disclosed are discussed above and shown in the various examples provided in the declarations.

2. *The extent to which the information is known by others and can involve similar activities.*

Mr. Henner, again, asserts that because “[s]ome information as to the extent of the number of unserved units in a particular municipality can be guessed from a review of the franchise agreement,” that “it is not difficult to figure out whether large parts of a municipality are not serviced by a cable television company,” and, therefore, the information should not qualify as a trade secret or confidential commercial information that should be protected.<sup>44</sup> While some parts of the information could be “guessed” based on the franchise agreements or other sources, the Deployment Data (1) is not readily available in its compiled form; and (2) would certainly not be as complete or accurate as the information compiled by the comprehensive GIS databases used by both Companies, as detailed in the declarations.<sup>45</sup>

3. *The worth or value of the information to the person and the person’s competitors*

Mr. Henner alleges that the value of the information does not equate to the cost to compile it, and that the Companies have not provided any explanation as to the value the information has to competitors. As noted in *Encore*, the inquiry “turns on the commercial value of the requested information to competitors and *the cost of acquiring it through other means.*”<sup>46</sup> As such, the Companies’ costs in compiling the information is relevant to estimate the cost of acquiring the same information through other means. As noted in the Dempsey Declaration, “[i]f

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<sup>44</sup> Henner Appeal at 4.

<sup>45</sup> Dempsey Declaration at ¶ 5; Mott Declaration at ¶ 6.

<sup>46</sup> *Encore*, 87 N.Y.2d at 420.

allowed access to the data, TWC's competitors would receive a tangible financial benefit, in terms of being spared the cost of independently collecting market data and information about facilities deployment."<sup>47</sup>

4. *The degree of difficulty and cost of developing the information.*

Mr. Henner suggest that the degree of difficulty and cost of developing the information should not be relevant to the inquiry of whether the information should be exempted from disclosure because the information would have been required as part of the Companies' commitment to the Commission.<sup>48</sup> While it is true that the information was compiled at the request of the Commission, this does not mean that it should be provided free of charge to the public at large or to the Companies' competitors. Moreover, if disclosure was predicated upon whether information was compiled to meet a regulatory burden or agency request, the exception from disclosure under POL §§ 87 and 89 would be superfluous, as most of the information that is the subject of FOIL is information that is submitted to an agency pursuant to its request or regulations and would, therefore, be ineligible for trade secret treatment.

5. *The ease or difficulty associated with obtaining or duplicating the information by others without the person's consent.*

Mr. Henner admits that duplicating the information without the consent of the Companies would be at "some difficulty."<sup>49</sup> As noted in the Dempsey Declaration, "[a]t best, anyone attempting to replicate the Deployment Data would only be able to achieve rough estimates without expending a tremendous amount of time and money by, for instance, going door-to-door

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<sup>47</sup> Dempsey Declaration at ¶ 7.

<sup>48</sup> Henner Appeal at 4.

<sup>49</sup> Henner Appeal at 4.

to query individual homes.”<sup>50</sup> The tremendous effort that would be needed to replicate the Deployment Data was echoed in the declaration of Mr. Mott who stated “[e]ven to replicate rough estimates of the Deployment Data, a third party would have to expend a tremendous amount of time and money by, for instance, performing a complete visual assessment of every mile of outside plant deployed in the Plattsburgh System.”<sup>51</sup> “The third party would then have to develop a methodology for matching Charter's defined franchise areas to U.S. Census data and then calculating the number of unserved homes based on all of this information.”<sup>52</sup>

6. *Other statutes or regulations specifically accepting (sic; should be “excepting”) the information from disclosure.*

Mr. Henner noted that no statutes or regulations were cited by the Companies, which is because there are no additional statutes or regulations that specifically exempt the Deployment Data from disclosure.

#### IV. CONCLUSION

The RAO’s aptly reasoned Determination should not be disturbed. The RAO carefully described the issues and facts presented by both parties, and evaluated those issues and facts against the proper legal standards. In so doing, the RAO correctly determined that the Deployment Data qualified as a trade secret as the information at issue was a compilation of information, thus meeting the general definition of trade secret. The RAO also properly determined that the Deployment Data met each of the trade secret factors. Because the Deployment Data was considered to be a trade secret, the inquiry is complete and the

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<sup>50</sup> Dempsey Declaration at ¶ 13.

<sup>51</sup> Mott Declaration at ¶ 13.

<sup>52</sup> Mott Declaration at ¶ 13.

information is protected from public disclosure. However, the RAO's determination also found that the Deployment Data met the alternate test such that substantial competitive injury would result if the Deployment Data were disclosed. Both standards and tests being met, the Deployment Data should not be disclosed, and Mr. Henner's appeal should be denied.

Dated: May 19, 2016

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*Counsel for Charter Communications, Inc.*

**BEFORE THE  
NEW YORK PUBLIC SERVICE COMMISSION**

Joint Petition of	)	
	)	
CHARTER COMMUNICATIONS, INC.	)	
	)	
and	)	Case 15-M-0388
	)	
TIME WARNER CABLE INC.	)	
	)	
For Approval of a Transfer of Control of	)	
Subsidiaries and Franchises; for Approval of	)	
a Pro Forma Reorganization; for Approval of	)	
Assignment of 16 Franchises; and for Approval	)	
of Certain Financing Arrangements	)	
	)	

**DECLARATION OF JAMES GREGORY MOTT**

1. My name is James Gregory Mott, and I am the Vice President of Field Operations Engineering for Charter Communications, Inc. (“Charter”). My business address is 6399 South Fiddlers Green Circle, Greenwood Village, Colorado 80111. I am responsible for design, construction, and maintenance of Charter’s approximately 210,000 miles of plant, including Charter’s New York State systems. I have held this position since November 30, 2015. I hold a B.A. in geology from The Colorado College, and a Master of Science in Engineering from the University of Michigan, Ann Arbor.

2. I have more than 18 years of experience in the cable industry, and prior to my current position I was Vice President of Field Engineering for Charter’s Northeast Region and had responsibility for approximately 35,000 miles of plant in that region. Prior to joining Charter, I was Senior Vice President of ISP, Construction, and Critical Systems at Cablevision Systems Corporation in Bethpage, New York, where I was also responsible for plant design and construction. Previously I served as Area Director of Technical Operation and Engineering at

Comcast Cable Communications, Inc. in Millersville, Maryland, where I was responsible for all technical operations.

3. I submit this Declaration in connection with the Statement of Necessity submitted in the above-referenced proceeding with regards to the request for confidential treatment of the broadband deployment information (“Deployment Data”) submitted on behalf of Charter and Time Warner Cable Inc. (“TWC”). This declaration addresses the Deployment Data for Charter only.

4. The Charter Deployment Data contains an estimate of the number of homes not served, or not “passed,” by Charter’s broadband-enabled network in each municipality in New York served by Charter’s Plattsburgh System. I have been advised that, on February 18, 2016, the Deployment Data was submitted to the New York Public Service Commission (“Commission”) and the Broadband Program Office with much of the information redacted. Subsequently, on April 8, 2016, Charter and TWC submitted the Deployment Data in a manner that made public all of the information in the document with the exception of the detailed number of homes not passed, the information at issue here.

5. The purpose of this Declaration is to explain how the Charter Deployment Data is of substantial competitive value, and how public disclosure of the information would give unfair advantage to competitors to the detriment of Charter. The Charter Deployment Data was compiled at Charter’s direction with the assistance of a vendor, Frontier GeoTek, Inc. (“Frontier”), and incorporates information from multiple data sources and geographic information systems (“GIS”).

6. I am informed and believe that in preparing the Charter Deployment Data, Frontier drew from data sources including (i) Charter’s internal resources, such as its GIS

database; and (ii) public resources, such as the United States Census Bureau housing unit data and data obtained from the National Telecommunications & Information Administration. Preparation of the Deployment Data required both effort and expense, as Frontier had to evaluate the boundaries of Charter's franchise areas as compared to its deployed network plant, mapping Census Bureau data blocks, and evaluating other data inputs necessary to ultimately derive the estimated number of unserved housing units in Charter's current Plattsburgh System franchise footprint. Charter also incurs expense associated with developing and maintaining the underlying non-public data upon which Frontier relied. For example, creation of Charter's internal data is a multi-step process, including but not limited to, field walks, desktop surveys, field surveys and the development of special algorithms.

7. The Deployment Data results from Charter's detailed analysis of its existing and potential service territories and is an important tool that Charter will use to define its short and long term business strategy and prioritize its plans for facilities investment in the near future. As such, the Deployment Data has tangible value, in terms of the financial and operational investment Charter has made to create the data and the competitive and strategic insight that the data provides to Charter.

8. Perhaps even more importantly, the Deployment Data has tangible financial and strategic value to Charter's competitors. There are a number of other providers in Charter's Plattsburgh service area that compete with Charter for voice, broadband, and video customers. The two major satellite video providers (Dish and DirecTV) provide near ubiquitous service throughout the area. The four major wireless carriers (Verizon, AT&T, T-Mobile, and Sprint), and resellers operating on their networks, also offer competitive voice and broadband services throughout most of the area. Incumbent local exchange carriers (and, in the enterprise market,

competitive local exchange carriers) compete with Charter for wireline and broadband customers. This means that Charter is in constant competition with numerous other providers across all of its lines of service.

9. If allowed access to the data, Charter's competitors would receive a tangible financial benefit, gaining insight into where Charter does and does not currently offer broadband service. The Deployment Data, if made public, would give Charter's competitors a road map to develop strategic business plans for future deployment, including sequencing of construction for the most efficient use of manpower, resources, and money, and to target specific geographic areas for marketing strategies. Competitors could—and given the opportunity would—identify and target their resources to invest and market in areas where Charter is competitively vulnerable or conversely, refrain from targeting certain areas where Charter is competitively strong.

10. Charter's competitors would also benefit by avoiding the significant cost of independently collecting data and information about Charter's deployment of facilities. Competitors could avoid the cost and risk of independent market analysis and simply focus on the easiest market opportunities.

11. The Deployment Data is also not publicly available and it is not disclosed to the investment community. While Charter does provide investors high-level data concerning the aggregate number of homes passed by its network, that data is not specific to a particular system or municipality, and reflects the number of new residential passings and new commercial buildings only after the conclusion of construction.

12. Charter ensures that the Deployment Data is made available within the company only to those who need to access the data to perform their job functions. Only Charter management who are involved in the strategic planning and high-level business decisions have

access to the Deployment Data. To the extent Charter relies on an outside vendor (Frontier) to assist with preparing the Deployment Data, I am informed that Charter's contract with Frontier contains comprehensive terms ensuring that Charter's confidential, proprietary, and trade secret information is handled properly and not disclosed to third parties.

13. Because preparation of the Deployment Data requires access to information available only to Charter or Frontier, it would be costly, complex, time-consuming, and extraordinarily difficult for others to duplicate the Deployment Data. Even to replicate rough estimates of the Deployment Data, a third party would have to expend a tremendous amount of time and money by, for instance, performing a complete visual assessment of every mile of outside plant deployed in the Plattsburgh System. The third party would then have to develop a methodology for matching Charter's defined franchise areas to U.S. Census data and then calculating the number of unserved homes based on all of this information.

14. Disclosure of the Deployment Data will harm Charter if it is made public because (a) it will allow competitors to benefit from Charter's own costly efforts to develop data, thus reducing the competitors' costs as compared with Charter's; and (b) it will provide a road map on how to compete against Charter more effectively. In either case, the result will be competitive harm to Charter in terms of lost customers, lost revenues, lost investments, and lost future business opportunity.

**I declare under penalty of perjury that the foregoing is true and correct to the best of my information and belief.**

  
\_\_\_\_\_  
**James Gregory Mott**

**April 20, 2016**

**BEFORE THE  
NEW YORK PUBLIC SERVICE COMMISSION**

Joint Petition of	)	
	)	
CHARTER COMMUNICATIONS, INC.	)	
	)	
and	)	Case 15-M-0388
	)	
TIME WARNER CABLE INC.	)	
	)	
For Approval of a Transfer of Control of	)	
Subsidiaries and Franchises; for Approval of	)	
a Pro Forma Reorganization; for Approval of	)	
Assignment of 16 Franchises; and for Approval	)	
of Certain Financing Arrangements	)	
	)	

**DECLARATION OF NOEL DEMPSEY**

1. My name is Noel Dempsey, and I am the Group Vice President in the Department of Network Expansion and Outside Plant Design at Time Warner Cable Inc. (“TWC” or the “Company”). I have held this position since April 2013, and my responsibilities include outside plant expansion, construction, activation and design for residential and commercial services. I have more than twenty years of experience in the cable industry and I have held positions in the Regional Engineering Operations and Regional Network Engineering departments at TWC prior to my recent position.

2. I submit this Declaration in connection with the Statement of Necessity submitted in the above referenced proceeding with regards to the request for confidential treatment of the broadband deployment information (“Deployment Data”), as submitted on behalf of TWC and Charter Communications (“Charter”). My declarations are limited to the Deployment Data for TWC only.

3. I have been advised that, on February 18, 2016, the Deployment Data was previously submitted to the Commission and the Broadband Program Office with much of the information redacted, and that the subsequent April 8, 2016 submission released all information with the exception of the detailed number of homes not passed, the information at issue here. The TWC Deployment Data contains the number of homes not served, or not “passed,” by TWC in each municipality in New York by franchise.

4. The purpose of this Declaration is to explain how the TWC Deployment Data is of substantial competitive value to TWC, and how public disclosure of the information would give unfair advantage TWC’s competitors to the detriment of TWC.

5. The TWC Deployment Data was compiled by TWC through a process that incorporates information from multiple data sources and geographic information systems (“GIS”). Pursuant to this process, TWC combines internal data and data from publicly available sources to create a proprietary data resource that it uses to analyze potential opportunities, such as potential residential and commercial passings, and to evaluate and plan strategic and speculative builds that may correspond to a significant residential, commercial or combined revenue opportunity. Data sources include information drawn from (i) TWC’s internal resources, such as TWC’s GIS database; and (ii) public resources, such as the United States Census Bureau housing units data and data obtained from the National Telecommunications & Information Administration (“NTIA”) that TWC acquires, combines and analyzes at its own expense for its own purposes. TWC has invested significant financial and employee resources to procure this data and continues to incur costs to maintain these data assets. The creation of TWC’s internal data is a multi-step process, including but not limited to, field walks, desktop surveys, field surveys and the development of special algorithms. The Deployment Data that was sent to the

Commission includes the output of an analysis conducted by a team of GIS engineers and TWC's internal and consulting data analysts. This effort required mapping of the Census Bureau housing units data blocks, NTIA broadband provider service level data blocks to TWC's proprietary GIS service area environment and other data inputs necessary to ultimately derive the number of unserved housing units in TWC's current franchise footprint outside of New York City.

6. The Deployment Data results from TWC's detailed analysis of existing and potential service territories and is an important tool that the Company may use to define its short and long term business strategy and prioritize its plans for facilities investment. As such, the Deployment Data has tangible value, in terms of the financial and operational investment TWC has made to create the data and the competitive and strategic insight that the data provides to TWC.

7. While the Deployment Data represents homes that are not yet served by TWC, there are other providers in these areas with which TWC faces fierce competition.<sup>1</sup> With the near ubiquitous availability of Satellite, wireless providers, competitive service providers and incumbent carriers, TWC is in constant competition with numerous other providers. As such, the data has tangible financial and strategic value to TWC's competitors. If allowed access to the data, TWC's competitors would receive a tangible financial benefit, in terms of being spared the cost of independently collecting market data and information about facilities deployment. TWC's competitors would also receive competitively valuable insight into TWC's basis for strategic decision-making involving the Company's future investments, facilities construction

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<sup>1</sup> For a complete list of the TWC's competitors in the franchise areas outside of New York City, please refer to Dempsey Declaration, Exhibit 1.

and marketing plans. Clearly, if the situation were reversed, TWC's competitors would be loath to release such information to TWC and other competitors.

8. For the past 10 years, TWC has been investing in updating its plant records to ensure that they are spatially accurate and consolidated into a single GIS system that enables the Company to analyze, manage and present spatial and geographic data to drive intelligent network expansion. TWC's financial investment in this effort exceeds \$128 million dollars. If given access to these data, TWC's competitors would gain a significant unfair advantage, not only because they would gain free information that TWC compiled at its own cost and effort, but also because they could use that information to identify markets that present significant opportunities with little or no competition. Armed with this cost and effort-free information, TWC's competitors could engage in "red lining" or "cherry-picking" hot spots and build their own networks only in the most lucrative and low-risk markets. Additionally, access to this data would enable incumbent providers to better prevent competitive entry, as it would inform them of areas where TWC is actively looking to expand its footprint. Tipping off incumbent competitors gives them the opportunity to initiate marketing campaigns and otherwise lock in their customers to long term contracts to discourage TWC from entering their service areas. This could materially change the penetration rate assumptions on the Company's build plan if the potential customers were all locked into contracts.

9. TWC also uses the Deployment Data to develop strategic business plans for future deployment, including sequencing of deployment for the most efficient use of manpower, resources, and money, and to target specific geographic areas for marketing strategies. If competitors were to obtain TWC's Deployment Data, they could identify and target their resources to invest and market in areas where TWC is competitively vulnerable or conversely,

refrain from targeting certain areas where TWC is competitively strong. In the long term, this will result in market balkanization, as competitors could avoid the cost and risk of independent market analysis and simply pick and choose only the most ripe market opportunities. Moreover, TWC's competitors could use the Deployment Data to gauge the success of TWC's market penetration such that competitors would use that information to develop competitive strategies or in negative marketing campaigns.

10. The Deployment Data is also not publicly available, and is not disclosed to the investment community. TWC's passings data and deployment plans are provided to the investment community only after the conclusion of construction.

11. Within TWC, only TWC employees and vendors who have prepared and compiled the information and only TWC management who are involved in strategic planning and high-level business decisions have access to the Deployment Data. In fact, these data sets in their uncompiled formats are available only to certain teams within TWC. These data sets in their compiled forms are available only to market development and network expansion designers. Otherwise, data sets are compiled only for specific reasons, for example, in this instance, to respond to a Commission request. Compilation of the information was a costly and complex endeavor. As mentioned above, a number of database and information resources are used to develop the information, not to mention the combined efforts of a variety of TWC organizations and outside contractors.

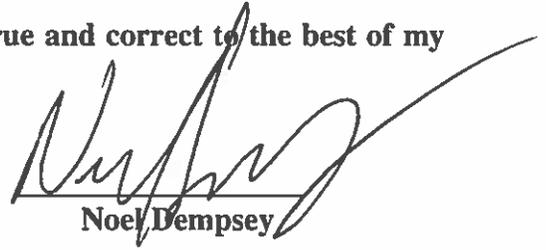
12. After compilation of the information, employees only have access on a need-to-know basis for strategic, facilities and network planning and development and implementation of marketing plans. TWC takes the protection of the Deployment Data very seriously and, in fact, employs a variety of measures to restrict access to sensitive and confidential information,

including the use of password-protected shared document libraries, restring access to information by job description and category also by requiring all employees to participate in annual training to ensure compliance with data protection practices.

13. Because much of the information was developed from TWC databases, it would be extremely costly, complex, time-consuming and extraordinarily difficult for others to duplicate the information. At best, anyone attempting to replicate the Deployment Data would only be able to achieve rough estimates without expending a tremendous amount of time and money by, for instance, going door-to-door to query individual homes.

14. In sum, in my judgment, disclosure of the Deployment Data will harm TWC as (a) it will allow competitors to benefit from TWC's own costly efforts to develop data, thus reducing the competitors' costs as compared with TWC's; and (b) it will provide guidance on how to compete against TWC more effectively. In either case, the result will be competitive harm to TWC in terms of lost customers, lost revenues, and lost investments.

**I declare under penalty of perjury that the foregoing is true and correct to the best of my information and belief.**



Noel Dempsey

**April 20, 2016**

**DEMPSEY DECLARATION - EXHIBIT 1**

**ALTERNATIVE PROVIDERS IN TWC FRANCHISE AREAS OUTSIDE OF NYC**

Adams CATV Inc.  
Deposit Telephone Company, Inc.  
Alteva Hometown, Inc.  
Frontier Communications Corporation  
Armstrong Telephone Co of New York  
Atlantic Broadband (Penn), LLC  
Berkshire Cable Corp.  
Berkshire Telephone Company  
Cablevision Lightpath, Inc.  
Cogent Communications Group  
Level 3 Communications, LLC  
Light Tower Fiber LLC  
Verizon New York Inc.  
Cassadaga Telephone Corporation  
Castle Cable TV, Inc.  
Champlain Telephone Company  
Charter Communications Inc.  
Chautauqua & Erie Telephone Corporation  
Chazy & Westport Telephone Corporation  
Citizens Telephone Company of Hammond, NY  
Comcast of New York, LLC  
Crown Point Network Technologies, Inc.  
CSC Holdings, Inc.  
Delhi Telephone Company  
MTC Cable  
Delhi Telephone Company  
DFT Local Service Corporation  
Dunkirk and Fredonia Telephone Company  
Edwards Telephone Company, Inc.  
Empire Long Distance Corporation  
Empire Telephone Corp.  
Fiber Technologies Networks, L.L.C.  
Finger Lakes Technologies Group  
Haefele TV Inc.  
Keene Valley Video, Inc.  
Mid-Hudson Cablevision, Inc.  
Margaretville Telephone Co Inc  
MegaPath Corporation  
MTC Cable  
Newport Telephone Company, Inc.  
Nicholville Telephone Company, Inc.

Slic Network Solutions, Inc.  
Northland Networks  
Oneida County Rural Telephone Co.  
Ontario Telephone Company Inc.  
Oriskany Falls Telephone Corp  
Pattersonville Telephone Company  
Port Byron Telephone Company  
Primelink, Inc.  
Slic Network Solutions, Inc.  
Southern Cayuga County Cablevision, LLC  
State Telephone Company, Inc.  
Taconic Telephone Corporation  
The Middleburgh Telephone Co  
Township Telephone Company, Inc.  
Trumansburg Telephone Company, Inc.  
Westelcom Network  
Vernon Telephone Company, Inc.  
Windstream Corporation