STATE OF NEW YORK DEPARTMENT OF PUBLIC SERVICE

THREE EMPIRE STATE PLAZA, ALBANY, NY 12223-1350

www.dps.ny.gov

Via Electronic Mail

November 4, 2013

Richard Brodsky, Esq.
212 Saw Mill River Road
White Plains, NY 10607
Richardbrodsky@msn.com

Joseph A. Post, Deputy General Counsel
Verizon New York, Inc.
140 West Street, 27th Floor
New York, NY 10007-2109
joseph.a.post@verizon.com

RE: Case 13-C-0197 Tariff filing by Verizon New York Inc. Request for Records.[1]

(DETERMINATION – Trade Secret 13-05)

Dear Mr. Brodsky and Mr. Post:

This letter is a Determination pursuant to §89(5) of the Public Officers Law (POL).[2] It discusses the entitlement to an exception from disclosure as trade secrets or confidential commercial information, of certain records submitted pursuant to POL §89(5)(a)(1) by Verizon New York, Inc. (Verizon) in the above-entitled matter.

---

[1] 1) Actual costs and expenses associated with repair, upkeep and maintenance of the wire line system on Fire Island for past ten years; 2) Projected costs and expenses of repair, and/or rebuilding of wireline system on Fire Island; 3) Location of any planned or active offering of Voice Link service in New York, and location of actual installation of Voice Line in New York; 4) All information on intercompany cost allocation; 5) Source and amount of any extra company monies or support received as a consequence of Hurricane Sandy; 6) Marketing and training materials used on Fire Island or elsewhere in New York relating to Voice Link service; 7) All information related to Company assertions concerning the cost of repair, replacement, rebuilding, or substitution of system service.

[2] POL §89(5)(a)(3) provides that information submitted as trade secret and/or critical infrastructure information shall be excepted from disclosure and be maintained apart by the agency from all other records until 15 days after the entitlement to such exception has been finally determined or such further time as ordered by a court of competent jurisdiction. The RAO does not make a determination on the merits of the request unless a third party seeks access to the document. See §89(5) (b).

The 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[3] in comments to the Public Service Commission on September 13, 2013. The request does not identify specific records, but rather seeks documents containing seven general categories of information that corresponds to responses by Verizon to certain interrogatories and document production requests (IRs) propounded by Department of Public Service Staff (Staff) in connection with a tariff filing by Verizon.[4]

BACKGROUND

On May 3, 2013, Verizon submitted to the Secretary,[5] Proposed Amendments to Verizon New York Inc. Tariff PSC No. 1 which consisted of revisions to allow it to discontinue its current wireline service offerings in a specified area and instead offer a wireless service as its sole service offering in the area, to wit, the western portion of Fire Island.[6]

Beginning May 24, 2013, Staff propounded a series of IRs in connection with Verizon's submittal.[7] Verizon submitted written replies and documents in response to Staff's requests through the Records Access Officer (RAO) and sought protection from disclosure as trade secret and confidential commercial information pursuant to POL §87(2)(d) and 16 NYCRR §6-1.3.[8] No redacted copies were filed with the Office of the Secretary at the time that Verizon made its submittals to the RAO.

On September 13, 2013, the Brodsky Group submitted comments in the Fire Island proceeding in which it stated that it found the Company's responses and other documents in the Record to be redacted to the extent that they denied the public and the Group the ability to adequately comment on the proceedings. The Group asked that the areas of inquiry by Staff (listed in footnote 1) be made available for public inspection.

---

[3] Referred to herein as "the Group" or "the Brodsky Group".

[4] See Appendix A attached hereto. The responses listed in Appendix A contain information in one or more of the seven categories for which Verizon has sought confidential treatment.

[5] POL Article 6, Freedom of Information Law (FOIL), applies to agencies of state or municipal government. See POL §86(3). However, when a non-governmental entity submits records to an agency subject to FOIL, that record then becomes a record of that agency and thus subject to FOIL. The non-government entity, in this case, Verizon, is not directly subject to FOIL.

[6] Briefly referred to herein as, "Voice Link Certification for Fire Island".

[7] See 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. DPS Staff Request. (May 24, 2013; June 26, 2013; June 28, 2013; August 22, 2013; August 28, 2013; August 30, 2013; and September 5, 2013).

[8] 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 23, 2013, the RAO advised Verizon, through its attorney, of the Brodsky Group's request and of DPS' intention to determine the entitlement of such records to an exception from public disclosure. The RAO also advised Verizon of the opportunity to submit a statement of necessity for the granting or continuation of such exception pursuant to POL §89(5)(b). Additionally, since Verizon did not submit redacted versions of its responses to Staff IRs to the Secretary, the RAO directed Verizon to comply with this filing requirement as soon as practicable.[9] On October 4, Verizon submitted redacted versions of IR responses it determined relevant to the Brodsky Group's FOIL request.[10] Verizon submitted its statement of necessity on October 7, 2013 which included the attached Appendix A.

On October 9, the RAO sent a letter to the Brodsky Group and Verizon requesting Mr. Brodsky to review the redacted submissions, and on or before October 24, 2013, provide a written acknowledgement stating whether or not the provision of requested records "as is" fulfilled his FOIL request. The RAO further stated that, if the Group did not believe that the records as redacted fulfilled its request, a Determination would be made on November 4, 2013 as to the entitlement to an exception from public disclosure for the redacted information, pursuant to POL §89(5).

On October 11, 2013, Mr. Brodsky submitted additional comments, and an initial response to and comments on the statement of necessity filed by Verizon on October 7, 2013, and an initial response to the RAO letter of October 9, 2013 to both the Secretary and the RAO. This submittal will be addressed herein.

On October 21, 2013, the RAO directed Verizon to comply with the Secretary's filing guidelines and file redacted copies of responses to all Staff IRs in the above entitled matter as soon as practicable. On October 23, 2013, Verizon responded to the RAO via email stating that it would provide, as soon as practicable, redacted copies of the responses to discovery requests in this case for which it has sought confidential status under the Public Officers Law.

On October 24 Mr. Brodsky sent an email message to the RAO in which he rejected the redacted documents submitted to the Secretary by Verizon as insufficient and not in fulfillment of his request.

Verizon's Statement of Necessity

Initially, Verizon argued that the RAO must deny the FOIL request because the documents contain non-public, competitively-sensitive information – including 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. In this regard, Verizon cited a 1999 ruling of ALJ Joel Linsider. [11]

---

[9] See www.dps.ny.gov, Guidelines for Filing Documents with the Secretary (Updated 8/14/2012); specifically 16 NYCRR §3.5.

[10] See Case 13-C-0197, Letter to Secretary Burgess, October 4, 2013.

[11] Case 99-C-0529, "Ruling Concerning Proprietary Material" (issued December 13, 1999), at 2.

Verizon argued that the Group has not provided any legitimate justification for the documents identified in its FOIL request and argued that the request is moot in light of Verizon'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.[12]

Verizon addressed four subject areas that coincide with the Group's request. This Determination will follow the same style for purposes of presenting the Company's arguments.

1. Cost and Network Information

According to Verizon, the first four requested items – Nos. 1 through 4 on Appendix A (see attached) – relate to the costs of constructing Voice Link, DLC, and FTTP networks on western Fire Island, and information bearing on those costs, such as the specific equipment to be utilized, the cost of that equipment to Verizon, and demand projections.[13]

More specifically, Verizon states:

- DPS-1, Response to Information Request No. 7: While most of Verizon's response consists of non-confidential cross-references to other responses, the confidential portion of the response sets forth certain assumptions underlying the cost studies, including demand forecasts.

- DPS-1, Response to Information Request No. 8: The confidential data in this response is set forth in Confidential Exhibit 2, which provides detailed backup for the estimated costs of constructing a DLC network and an FTTP network on Fire Island. The costs set forth in the Exhibit include materials costs, plant labor costs, the costs of pair-gain (DLC) equipment, trenching costs, and the costs of reconnecting customers to the new network. The materials costs include detailed breakout of quantities and unit costs for specific, identified types of copper and fiber cable, circuit cards, cabinets, and other equipment.

- DPS-1, Response to Information Request No. 9: The confidential information in this response set forth certain costs associated with the Distributed Antenna System on Fire Island.

- DPS-1, Response to Information Request No. 10: This response provides backup for the company's estimate of the cost of installing a Voice Link network on Fire Island, including the cost of the in-home devices themselves. Also included in the response are the costs of carrying out Verizon's commitment to provide copper loops to municipal locations.

The Company argues that these costs are all relevant to its provision of highly competitive retail services, to wit, Verizon offers a wide range of services throughout the State

[12] See Case 13-C-0197, Order Cancelling Report (issued October 24, 2013).

[13] According to Verizon, the information here consists of very granular data on equipment costs, labor costs, etc. that underlies high-level estimates, as well as some costs that were not addressed at all in the Certification.

over DLC and FTTP networks, as well as over other types of network architecture, in a fiercely competitive environment that has resulted in the loss of some 70 percent of the company's access lines since 2000, with a correspondingly severe impact on its finances.[14]

Verizon argues that it is irrelevant that it has no wireline competitors on Fire Island itself; the costs at issue here are equally relevant to similar networks constructed and used to offer competitive retail services in other parts of the State. The Company is also beginning to roll out Voice Link service on an optional basis, which, like its wireline offerings, will compete with voice services provided by other carriers. Moreover, on Fire Island itself, Verizon's wireline and optional Voice Link services compete with other providers' wireless services. (As the Revised Certification notes, wireline services are in decline on Fire Island, and usage data indicates that far more wireless calls are made on the Island than wireline calls.)

The Company asserts that information on the costs of offering service over telecommunications networks has great value in a highly competitive environment. For example, knowing a provider's costs gives competitors information on whether, and under what circumstances, and to what extent, the provider will be able to meet price reductions by the competitor. It therefore provides valuable input to the competitor's own pricing decisions. It also gives a competitor a window into a provider's financial strength, and thus into the likelihood of success of, and the likely returns from, a competitive offensive.

The Company argues that this information would not be available to competitors other than through the regulatory process. Competitors could construct their own cost models and develop their own estimates of Verizon's costs, but the level of effort and expense involved in such attempts would be substantial, and the results would not be as detailed and accurate as Verizon's own data.

The Company stated that the Commission and Department have consistently concluded that detailed cost data is entitled to trade secret protection under FOIL.[15] In a 2002 ruling,[16] ALJ

---

[14] 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), at 35; Id. at 26, 54-55; Department of Public Service Staff, Report on Verizon Service Quality – Second Quarter 2013 (filed Session of August 15, 2013), at 1.

[15] See, e.g., Case 95-C-0657, et al., Ruling Concerning Trade Secrets and Motion to Strike Portions of a Brief (issued February 18, 1997) and Ruling Concerning Phase 2 Trade Secrets (issued January 7, 1998); Case 98-C-1357, Ruling Extending Module 3 Schedule, Setting a Separate Schedule for Line Sharing Rates, and Affording Trade Secret Protection to an Exhibit in Module 2 (issued March 17, 2000), Ruling Concerning Proprietary Status of Exhibit 106-P (issued April 17, 2000), Ruling on Proprietary Status of Line Sharing Exhibits (issued May 26, 2000), Ruling on Proprietary Status of Module 3 Testimony and Exhibits (issued January 31, 2002); Case 01-C-0767, Ruling Concerning Trade Secret Information (issued August 26, 2002).

[16] Case 02-C-1425, Ruling on Confidential Trade Secret Status of Testimony and Exhibits (issued October 8, 2004) (the "Hot Cut Ruling").

Elizabeth Liebschutz upheld Verizon's claims to trade secret protection for certain cost data relevant to Verizon's retail operations. That ruling also granted trade-secret status to information on the terms on which Verizon purchased materials from its vendors.[17]

2. Information on Voice Link Installations Outside of Western Fire Island

- DPS-3, Information Request No. 3 asked for information concerning "Voice Link devices/services that have been installed at any customer premises locations outside of the Western Fire Island area." The relevant and confidential portion of Verizon's response is the first tab in Confidential Exhibit IR-3 (Item 5 on Appendix A), which provides, for each such installation, the location (by municipality or borough and by zip code) and the installation date.

Verizon argues that this information should be exempt from disclosure under FOIL because it would identify specific areas where Verizon is rolling out a new service, and thus help other providers of similar home wireless services, such as Consumer Cellular's "Wireless Home Phone" service, endorsed by AARP, to target competitive responses. Collecting this information through statewide surveillance of Verizon's offerings would be a far more expensive, more time-consuming, and less complete way of obtaining this information.

3. Information on Verizon's Methods and Procedures

- DPS-3, Information Request No. 4 requested "marketing materials, scripts, and/or training materials in use by Verizon employees or contracted third party workers to inform customers about Voice Link service." Thirteen documents were produced in response to this request. (Appendix A, Item No. 6) They include training materials, memoranda, and M&P (methods and procedures) documents, addressed to supervisors, field technicians, and call center employees, that are intended to inform, instruct and advise them on various aspects of the company's interaction with customers concerning Voice Link.

Verizon avers that it does not publicly disclose these M&Ps, and that they would not be available to competitors except through the regulatory process; and that they would be of significant value to competitors who seek to develop M&Ps for their own, comparable service offerings. Verizon states that the documents embody a great deal of thought and experience, acquired at great expense and over a considerable period of time, concerning the questions customers might ask, the most appropriate way to respond to those questions, and the procedures that will enable company employees to guide potential customers through the ordering process and subsequent interactions with the company in the most efficient and effective manner. The Company argues that these documents are in effect intellectual property created by Verizon, and competitors should not be enabled to piggy-back on Verizon's knowledge and experience for free, simply by obtaining M&P documents through FOIL. Verizon adds that its competitors do not make their own, comparable documents available to Verizon, so disclosure under FOIL

[17] Id. at 21-22. See also N.Y. State Elec. & Gas Corp. v. N.Y. State Energy Planning Bd., 221 A.D.2d 121, 125 (3d Dep't 1996), app. granted, 89 N.Y.2d 803 (1996), app. withdrawn, 89 N.Y.2d 1031 (1997).

would place the company at a unique competitive disadvantage. Verizon cites an ALJ Ruling to support its claim.[18]

4. Insurance Coverage Information

- The confidential portion of Verizon's response to DPS-4, Information Request No. 2 (Item No. 7 in Appendix A) provides a detailed description of the scope and extent of the company's (and its affiliates') insurance coverage with respect to losses related to Superstorm Sandy.

Verizon states that its insurance coverage is intensely negotiated, through a formal sourcing process. Some of the coverage that Verizon is able to negotiate, in terms of the risks covered and the amount of the coverage, may not be generally available to other insured companies that do not have a comparable scope and volume of business to offer the insurer or that otherwise are not similarly situated to Verizon. The Company likens its coverage information to information on vendor discounts that Verizon is able to negotiate for telecommunications equipment, information that was held to be subject to trade-secret protection in the Commission's 1995-1997 and 1998-2002 UNE costing inquiries and other, related cost proceedings. Verizon argues that disclosure may make providers less willing to negotiate unique, customized coverage with Verizon. Additionally, knowledge of the type or amount of Verizon's coverage could affect its negotiations with contractors and other third parties who may expect some of that coverage to be made available for their benefit in case of loss or accident. It also argues that disclosure of coverage information is within the exception for information that if disclosed would impair present or imminent contract awards or collective bargaining negotiations, pursuant to POL§ 87(2)(c).

The Brodsky Group's Arguments

To the extent the Brodsky Group's arguments address the merits of the underlying case they will not be discussed here. However, those arguments that address Verizon's entitlement to protection from disclosure will be summarized here and addressed in the Discussion.

The Group objected to the Company's challenge to the relevance and/or mootness[19] of its request. The Group argued that as a matter of law and Commission policy, a requester is not required to make a showing of relevance as an element of a FOIL request, that FOIL rests on the presumption that the public has a right to see documents in the possession of a state agency and that there is no requirement that the relevance of the document be established.

That being said, the Group contends that the matters before the Commission include those affecting both persons and interests on Fire Island and across the state. The Group asserts that the information sought is necessary and relevant to its ability to make arguments to the Commission on the merits of the case, as well as its right to receive the information under FOIL.

The Group argues that Verizon has not fully complied with the RAO's directive to submit redacted documents in the case and has limited its submission of redacted documents to a subset of the response that it believes conform to the Group's request. The Group states that it does not

[18] See Case 02-C-1425, Hot Cut Order, at 11.

[19] See Case 13-C-0197, Verizon Statement of Necessity, Filing 68, Page 3.

yet fully understand what redacted responses have not been filed with the Commission as ordered, and reserves its right to seek access to all such documents.

The Group argues that Verizon has not met the burden of proof allowing non-disclosure, citing relevant case law.[20] The Group argues with respect to the "windfall" assertions by the Company, that the information sought here falls outside the ambit of the concerns discussed in Encore. First, the information sought is not itself expensive to collect, and competitors would receive no economic windfall by avoiding such collection costs. Second, the entities seeking the information are not competitors of the Company and are incapable of receiving something of economic value as a consequence of reviewing the information. Third, the Company has no competitors on Fire Island. The information is Fire Island-specific and of no value to the Company's competitors elsewhere. Fourth, any of the Company's concerns would be addressed by a protective order limiting disclosure of the information.

With respect to the "substantial competitive injury" test, the Group argues that Verizon offers a series of conclusory assertions that amount to speculation about general and vague concerns and that this is legally and factually insufficient to sustain the Company's burden of proving that the information should remain protected.

The Company's cites a prior Determination of the RAO for the proposition that simple speculation that the potential for some damage to occur exists is insufficient to support a finding for non-disclosure. Further, mere conclusory statements do not provide the necessary causal link between the disclosure of the records and the likelihood that it would cause substantial injury to the competitive position of a commercial enterprise.[21] The Group also cites a "litany of generalities and self-serving assertions" in Verizon's Statement of Necessity that it claims is neither specific nor persuasive evidence of economic injury.[22]

DISCUSSION

Statement of Applicable Law

POL §87(2) provides, in pertinent part: Each agency shall, in accordance with its published rules, make available for public inspection and copying all records, except that such agency may deny access to records or portions thereof that: . . . (d) 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.

---

[20] Capital Newspapers v. Burns, 67 N.Y.2d 562, 566, 570 (1986); Markowitz v. Serio, 11 N.Y.3d 43 (2008); and Encore College Bookstores v. Auxiliary Service Corp., 87 N.Y.2d 410 (1995).

[21] Matter 10-02562, 10-02634, 10-02693, 11-00463, 11-00938, 11-01705, 11-02263 - Request for un-redacted copies of purchase orders issued by Consolidated Edison Company of New York, Inc. and submitted to NYS Department of Public Service pursuant to Quarterly Contract Filing Requirements in Commission regulations. (Determination – Trade Secret 12-2).

[22] See Case 13-C-0197, Verizon Statement of Necessity, Filing 68, Page 3, 5, 6, 8, and 10.

The Court of Appeals, in Matter of New York Telephone Co. v. Public Service Commission,[23] held that the Commission had not only the power but also the affirmative responsibility to provide for the protection of trade secrets and cited the definition of "trade secret" contained in Restatement of Torts §757, comment (b) (1939).[24] Thereafter, the Commission adopted a virtually identical definition of "trade secret". According to 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."

Because the overall purpose of FOIL is to ensure that the public is afforded greater access to governmental records, FOIL exemptions are interpreted narrowly.[25] In Capital Newspapers v. Burns,[26] the Court of Appeals held that the exceptions from disclosure in POL §87(2) are to be narrowly construed, that the party resisting disclosure bears the burden of proof, and that such party must demonstrate a particularized and specific justification for denying access. The Court of Appeals, in Ashland Management, Inc. v. Janien,[27] again cited the Restatement of Torts definition of "trade secret." In addition, the Court noted that Restatement §757, comment b suggested the following factors be considered in deciding a trade secret claim:

1. the extent to which the information is known outside of his business;
2. the extent to which it is known by employees and others involved in his business;
3. the extent of measures taken by him to guard the secrecy of the information;
4. the value of the information to him and to his competitors;
5. the amount of effort or money expended in developing the information; and
6. the ease or difficulty with which the information could be properly acquired or duplicated by others.

The explicitly non-exclusive list of factors to be considered in explaining whether information constitutes a trade secret that is set forth in 16 NYCRR §6-1.3(b)(2) is similar, though not identical, to the Restatement list. The only substantial dissimilarities between the two lists are that the list adopted by the Commission does not explicitly contain a factor like the third factor quoted above and that it does include two additional factors, as follows: "(i) the extent to which the disclosure would cause unfair economic or competitive damage; [and] (vi) other statute(s) or regulations specifically excepting the information from disclosure."[28]

---

[23] 56 N.Y.2d 213, 219-220 (1982).

[24] Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1973) in which the Court discussed what might constitute a "trade secret", citing Restatement of Torts, §757, comment b (1939).

[25] Washington Post Co. v New York State Ins. Dept., 61 NY2d 557, 564 (1984).

[26] Supra.

[27] 82 N.Y.2d 395, 407 (1993).

[28] 16 N.Y.C.R.R. §6-1.3(b)(2) also provides: "In all cases, the person must show the reasons why the information, if disclosed, would cause substantial injury to the competitive position of the subject commercial enterprise."

The Court of Appeals, in Encore College Bookstores v. Auxiliary Services Corp.,[29] stated that the Legislature had signaled its intent that the "substantial injury to the competitive position" language of POL §87(2)(d) should be similar in scope to the "substantial competitive harm" test announced in National Parks and Conservation Association v. Morton,[30] a case that arose under the federal Freedom of Information Act.[31] In particular, the Court paraphrased and quoted with approval from another D.C. Circuit Court of Appeals decision in Worthington Compressors v. Costle.[32]

Thus, the Court in Encore stated that, where government disclosure is the sole means by which competitors can obtain the requested information, the inquiry ends with a consideration of how valuable the information at issue would be to a competing business and how much damage would result to the enterprise that submitted the information. By contrast, the Court held that, where the material is available from another source at some cost, consideration must be given not only to the commercial value of such information but also to the cost of acquiring it through other means, because competition in business turns on the relative costs and opportunities faced by members of the same industry, which might be substantially different if one could obtain information by paying the copying cost rather than the cost of replication.
The Court also observed that the reasoning underlying these considerations is consistent with the policy behind POL §87(2)(d) to protect businesses from the deleterious consequences of disclosing confidential commercial information to further the state's economic development efforts and attract business to New York. Finally, in applying the enunciated test to Encore's request, the Court concluded that the information submitting enterprise was not required to establish actual competitive harm. Rather, it was required, in the words of Gulf and Western Industries v. United States, to show "actual competition and the likelihood of substantial competitive injury".[33]

While "competitive injury" is not defined by the statutes, regulations, or case law, the Court of Appeals has interpreted the phrase on various occasions since its 1995 decision in Encore. In 2008, the Court appears to have "raised the bar" as to what is necessary to sustain the burden of proof required to exempt information from public disclosure in Markowitz v. Serio,[34] a case involving the New York State Insurance Department and the issue of "redlining." There the Court stated that "to meet its burden, 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." (emphasis added).[35]

---

[29] Supra.

[30] 498 F.2d 765, 770 (D.C. Cir., 1974).

[31] Encore, supra at 419 – 420.

[32] 662 F.2d 45, 51 (D.C. Cir., 1981).

[33] 615 F. 2d 527, 530 (D.C. Cir., 1979).

[34] ~~Supra~~11 NY3d 43 (2008).

[35] Id at 51; Encore, supra.

In at least one lower court case since Markowitz, the evidence offered to sustain a finding of competitive injury was quite extensive and sophisticated. In Saratoga Harness Racing, Inc. v. Task Force on the Future of Off-Track Betting,[36] petitioners Saratoga Harness Racing, Inc. (Saratoga) and Finger Lakes Racing Association, Inc. (Finger Lakes) sought exemption from disclosure of information contained in their 2004-2008 year-end financial statements. Petitioners provided this information to the New York State Racing and Wagering Board (RWB), which compiled it into chart form and provided it to respondent, Task Force on The Future of Off-Track Betting (FOTB). The FOTB planned to publish the chart on its website. The Court found that petitioners had demonstrated that the information they sought to prevent from disclosure was not publically available and exhausted their administrative remedies challenging disclosure.

Saratoga submitted affidavits of its executives and of experts in gaming market analysis and labor negotiations. The affidavit submitted by Saratoga's General Manager established the competitive pressures Saratoga faces. It detailed Saratoga's racing and gaming competitors, outlined Saratoga's food and beverage competitors, set forth Saratoga's current and future labor negotiations (union and nonunion) and the potential for outside competitors to enter the market that Saratoga serves. The injuries that the disputed information would cause Saratoga were detailed by its General Manager, along with a gaming market analysts' expert opinion affidavit. The injury Saratoga would suffer by the disclosure of the disputed information was detailed by its Human Resources Director and an expert in labor negotiations. The court found that Saratoga demonstrated "specific, persuasive evidence" that Respondents' dissemination of its financial data falls "squarely within a FOIL exemption."[37]

Likewise, the court found that Finger Lakes demonstrated the applicability of Public Officers Law § 87(2)(d)'s exemption. Its Director of Labor Relations detailed the competitive pressures of Finger Lakes' labor market, and the injury that Finger Lakes would suffer if the disputed financial information were released. Finger Lakes submitted the affidavit of a Vice President of its parent company which oversees its financial performance. That affidavit set forth the specific racing and gaming venues Finger Lakes competes against, explained the potential for competition from national gaming companies, and corroborated Finger Lakes' labor market pressures. Finger Lakes also submitted affidavits of a gaming market analyst and an expert in labor negotiations. The court found that Finger Lakes outlined the competitive pressures facing it, and the injury it would face if the disputed financial information were released, and therefore, demonstrated that the trade secret exception squarely applied.[38]

DETERMINATION

Application of Pertinent Law

On the issue of trade secrets or confidential commercial information, the two-pronged test established by the Court in Encore is applicable. In applying the first prong of the Encore test, in which the Court implicitly assumed the non-public nature of the information in question,

---

[36] Saratoga Harness Racing, Inc. v. Task Force on the Future of Off-Track Betting, 2010 N.Y. Misc. LEXIS 2531 (Sup. Ct. Albany Co. 2010).

[37] Supra.

[38] POL §87(2)(d).

the existence of competition must first be established. In general, the existence of competition in the telecommunications industry in New York State has been established.[39] Verizon also argues and demonstrates the existence of competition in the field.[40]

With respect to the information in Request 1 and a limited amount of the information in Request 3, Verizon makes a valid case that the information provided in response to the Group's requests fits within the definition of trade secret.[41] The information in response to Request 1 consists of sensitive cost analysis for each type of network construction done by the Company, more fully described by Verizon herein.

The information in response to Request 3 consists of 13 documents – 330 pages – with blanket redactions except for the page headings and page numbers – described by Verizon herein, including its M&Ps. While Verizon did not identify which of the 13 documents consist of M&Ps, it appears that documents (1), (2), and (10) of the filing meet that description. Verizon discusses several factors mentioned in the regulations, including the degree of difficulty and cost of developing the information, but limits its arguments to the M&Ps. While Verizon makes a valid case for that portion of the response to Request 3 that consists of its M&Ps, it does not address the remainder of the blanket-redacted documents provided in response to the request. Therefore, Verizon fails to make a valid case that the remaining 10 documents in this response are trade secret material.

Further, Verizon fails to make a valid case that the information provided in response to the Group's requests 2 and 4 are trade secret material. The information on Voice Link Installations Outside of Western Fire Island in response to request 2 is generic data including general location (municipality) and zip code, and installation date. None of this information is secret, and, since it is presented in the aggregate, it does not disclose any personal consumer/customer data. In order for information contained in a record to constitute a trade secret, the subject of the trade secret must in fact be a secret.[42] Further, since Verizon already has the ability to offer Voice Link as an "Optional" service throughout its entire service footprint, it is generally understood that installations might have taken place anywhere it provides service.

---

[39] 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 (Trade Secret 11-04) Determination of Appeal of Trade Secret Determination (issued August 26, 2011).

[40] See footnote 1~~3~~4.

[41] 16 NYCRR §6-1.3(a).

[42] Kewanee Oil Co. v. Bicron Corp., 416 US 470 (1974).

Verizon's response to request 4, insurance information, also fails the trade secret test. This response provides a detailed description of the scope and extent of the company's and its affiliates' insurance coverage with respect to losses related to Superstorm Sandy. Although it contains dollar figures, they are presented in the aggregate and represent compensation for all Verizon affiliates in numerous coastal states, including New York, and therefore do not constitute trade secrets. Verizon argues that disclosure may make providers less willing to negotiate unique, customized coverage with Verizon and that knowledge of the type or amount of Verizon's coverage could affect its negotiations with contractors and other third parties who may expect some of that coverage to be made available for their benefit in case of loss or accident. This argument is speculative, lacks factual support, and does not meet the legal standard for what constitutes a trade secret.

The question of whether the information at issue – specifically the cost information and the M&Ps – are entitled to an exception from disclosure as trade secrets or confidential commercial information turns on the proper application of the second prong of the test — whether disclosure will cause substantial injury to the competitive position of the subject enterprise. In this regard, I first note that almost all information possessed by a business would have some commercial value to its competitors; however, the question is whether the information at issue is sufficiently valuable that its disclosure will cause substantial competitive injury. Because the information in question appears to be available solely through disclosure by DPS, I must consider only the commercial value of such information to competitors and the competitive injury to the commercial enterprise possessing the information that would likely result.

The party seeking protection from disclosure must satisfy both prongs of the test enunciated in Encore as exemplified in Markowitz. Verizon satisfied the first prong with regard to cost information in Request 1 and M&Ps in Request 3, but failed to satisfy the second prong of the Encore test. Verizon offered no factual support to sustain a finding that disclosure would cause substantial injury to the competitive position of the subject enterprise. Instead of showing what might happen if its competitors had access to the information, Verizon argues that the windfall resulting from disclosure alone is enough to demonstrate competitive injury.

The Company has not demonstrated that disclosure of the information would be likely to cause substantial injury to the competitive position of a commercial enterprise and therefore has not met the burden of proof it bears pursuant to POL §89(5)(e). To meet its burden, the party seeking the exemption must present specific, persuasive evidence that disclosure will cause it (or another affected commercial enterprise) to suffer a competitive injury; it cannot merely rest on a speculative conclusion that disclosure might potentially cause harm.[43] The Company must provide the necessary causal link between the disclosure of the information and the conclusion that it will cause substantial injury to the competitive position of a commercial enterprise.[44] Verizon did not accomplish this. Mere conclusory allegations, without factual support, are insufficient to sustain non-disclosure.[45] The party resisting disclosure must demonstrate a particularized and specific justification for denying access.[46] It is only with more compelling

[43] Markowitz, supra at 51.

[44] See, Saratoga Harness Racing, Inc., supra.

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

facts (perhaps submitted in an affidavit by an economist or other expert) and stronger arguments that Verizon can meet the burden of proof it bears pursuant to POL §89(5)(e).

The test prescribed by the Court of Appeals must be met before an exception from disclosure may be granted because that test is essentially reflected in the Commission's regulations.[47]

As to Verizon's argument that disclosure of its insurance coverage is entitled to protection from disclosure under POL §87(2)(c), I reject this contention because the cited exception from disclosure is inapplicable. This exception applies where an agency or a party to negotiations maintains records that have not been made available to others. For example, if an agency seeking bids or proposals has received a number of bids, but the deadline for their submission has not been reached, premature disclosure of those bids to another possible submitter might provide that person or firm with an unfair advantage in relation to those who already submitted bids. Further, disclosure of the identities of bidders or the number of bidders might enable another potential bidder to tailor a bid in a manner that provides him with an unfair advantage in the bidding process. In such a situation, harm or "impairment" would likely be the result, and the records could justifiably be denied.[48]

Verizon's response does not state that it is currently involved in an RFP process, or that it is currently negotiating terms of coverage. It simply argues that, because its insurance is procured through an intensely negotiated, formal sourcing process, it is entitled to non-disclosure. Staff's IR regarding insurance coverage is for an existing contract, not one that is the subject of on-going negotiations. There is no present or imminent contract award that could be impaired by the disclosure of this record; therefore, I reject this argument.[49]

I reject Verizon's contention that the Group has not provided any legitimate justification for the documents identified in its FOIL request and that the request is moot. FOIL implements the legislative declaration that government is the public's business[50] and imposes a broad standard of open disclosure upon agencies of the government. The statute proceeds under the premise that the public is vested with an inherent right to know and that official secrecy is anathematic to our form of government.[51] In furtherance of the legislative objective, all records of an agency are presumptively available for public inspection and copying, unless they fall within one of ten categories of exemptions.[52] To give the public maximum access to records of government, these statutory exemptions are narrowly interpreted, and the burden of demonstrating that requested material is exempt from disclosure rests on the agency.[53] FOIL

---

[46] Capital Newspapers v. Burns, 67 N.Y.2d 562, 566, 570 (1986).

[47] Bahnken v. New York City Fire Department,17 A.D.3d 228 (1st Dept., 2005).

[48] N.Y. State Comm Open Govt, AO 13400.

[49] Cross-Sound Ferry v. Department of Transportation, 219 AD2d 346 (1995).

[50] POL §84.

[51] Fink v Lefkowitz, 47 NY2d 567, 571 (1979).

[52] POL §87(2).

[53] Washington Post Co. v New York State Ins. Dept., 61 NY2d 557 (1984).

does not require that the party requesting records make any showing of need, good faith or legitimate purpose; while its purpose may be to shed light on government decision-making, its ambit is not confined to records actually used in the decision-making process.[54] Full disclosure by public agencies is, under FOIL, a public right and in the public interest, irrespective of the status or need of the person making the request.[55] Therefore, I reject Verizon's argument that the Brodsky Group's request required a showing of necessity and that it is moot.

Furthermore, the Company's reliance on rulings of Department ALJs on trade secret matters in the context of administrative proceedings is inapposite here.[56] The roles of the RAO and ALJ are similar in that both must determine whether a document filed with DPS is entitled to protection from disclosure. However, the ALJ's role is narrow since it is limited to deciding questions regarding discovery by parties in an administrative proceeding that is finite in duration.[57] In many instances, ALJ rulings on trade secret are procedural and not material in nature. In contrast the Department RAO's role is quite broad.[58] The RAO has the duty of coordinating the agency's responses to FOIL requests and,[59] 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.[60] While the rulings cited by the Company may demonstrate some support for its assertions, the rulings are limited to the relevance of those records only in the context of the particular administrative proceeding and the parties thereto.

CONCLUSION

Although Verizon met the test for trade secret for Request 1 and the three M&P documents provided in response to Request 3, it did not carry its burden of proof with respect to competitive injury. As for the documents submitted in response to Request 2, 4, and the remaining 10 documents responsive to Request 3, it did not meet the initial test of proving that they constitute trade secret. As the court in Bahnken v. New York City Fire Department[61] observed, the Encore test is the one to be used in determining whether portions of records should be excepted from public disclosure pursuant to POL §87(2)(d).[62] In light of all the forgoing, the information claimed by Verizon to be trade secrets or confidential commercial information does

---

[54] Westchester Rockland Newspapers v. Kimball, 50 NY2d 575, 581 (1980).

[55] Farbman & Sons, Inc. v. New York City Health and Hospitals Corp., 62 N.Y.2d 75, (1984).

[56] See footnotes 14 and 15.

[57] See 16 NYCRR §6-1.4, Special rules applicable when a presiding officer is assigned.

[58] See POL §§87 and 89; and 16 NYCRR §6-1.3, Records containing trade secrets, confidential commercial information or critical infrastructure information.

[59] N.Y. State Comm Open Govt. AO 11641. See, 16 NYCRR §§6-1.1 and 6-1.2.

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

[61] Supra.

[62] As noted above, this test was updated and strengthened in Markowitz v. Serio, supra.

not warrant an exception from disclosure and its request for continued protection from disclosure is denied.

Review of my determination may be sought, pursuant to POL §89(5)(c)(1), by filing a written appeal along with a less redacted version of the requested records, with Kathleen H. Burgess, Secretary at the address given above, within seven business days of receipt of this determination. Unless a contrary showing is made, receipt will be presumed to have occurred on November 4, 2013, so the deadline for the receipt of any such written appeal is November 15, 2013.

Sincerely,

Donna M. Giliberto
Assistant Counsel & Records Access Officer

cc: Robert.Freeman@dos.state.ny.us

APPENDIX A

ITEM	SET	REQUEST	STAFF REQUEST	RELEVANT BRODSKY REQUEST	STATUS/CONFIDENTIALITY
1	DPS-1	7	Provide support for cost and revenue estimates in the Company's revised Certification #8, to include-prestorm Fire Island revenues, post-storm estimates and how derived (including what assumptions were made regarding rebuilding all lines or a portion based upon penetration estimates).	[2] "Projected costs and expenses of repair, and/or rebuilding of wireline system on Fire Island." [7] "All information related to Company assertions concerning the cost of repair, replacement, rebuilding, or substitution of system service."	**Answered 6/17/13.** Written response contains CONFIDENTIAL information.
2	DPS-1	8	For the costs estimates identified in the revised Certification #8 for restoring wireline service, provide detailed support for both options, i.e., $4.8 million for voice only digital loop carrier vs. $6 million for fiber. Identify all investment and associated construction cost by equipment element/facility type with unit/mileage cost and quantity provided.	[2] "Projected costs and expenses of repair, and/or rebuilding of wireline system on Fire Island." [7] "All information related to Company assertions concerning the cost of repair, replacement, rebuilding, or substitution of system service."	**Answered 6/17/13.** Written response does not contain confidential information. Exhibit 2 contains CONFIDENTIAL information.
3	DPS-1	9	Provide detailed support of the costs associated with the installation of the distributed antennae system (DAS). Include investment and associated construction cost for make ready work, telephone poles, DAS equipment, backhaul cabling and other static and recurring costs necessary to provide the Voice Link service. Describe the arrangement between Verizon and Verizon Wireless regarding the DAS deployment expenses, operating expenses, ownership of facilities, etc., specifying costs to be allocated to Verizon vs. Verizon Wireless.	[7] "All information related to Company assertions concerning the cost of repair, replacement, rebuilding, or substitution of system service."	**Answered 6/17/13.** Written response contains CONFIDENTIAL information.
4	DPS-1	10	Provide support for the $500,000 Voice Link service deployment cost identified in revised Certification #8.	[7] "All information related to Company assertions concerning the cost of repair, replacement, rebuilding, or substitution of system service."	**Answered 6/17/13.** Written response contains CONFIDENTIAL information.
5	DPS-3	3	Please provide the following information for all Voice Link devices/services that have been installed at any customer premises locations outside of the Western Fire Island area: (a) Customer address, (b) Date Voice Link Installed, (c) Reason Voice Link Installed, (d) Was customer advised Voice Link service was optional or not, (e) Voice Link Service Calls/Repairs identified by location, date, reason for service visit, repair action taken, (f) If applicable to any locations, date Voice Link was uninstalled/disconnected and reason for termination	[3] "Location of any planned or active offering of Voice Link service in New York, and location of actual installation of Voice Line in New York"	**Answered 7/22/13.** Written response does not contain confidential information. **Supplemented 7/24/13.** Written response does not contain confidential information. Exhibit IR-3 contains CONFIDENTIAL information. **Supplemented 8/7/13.** Written response does not contain confidential information.
6	DPS-3	4	Please provide any marketing materials, scripts, and/or training materials in use by Verizon employees or contracted third party workers to inform customers about Voice Link service.	[6] "Marketing and training materials used on Fire Island or elsewhere in New York relating to Voice Link service"	**Answered 7/22/13.** Written response does not contain confidential information. Exhibits IR4[1] through IR-4[11] contain CONFIDENTIAL information. **Supplemented 8/15/13.** Written response does not contain confidential information. Exhibits IR4[12] and IR-4[13] contain CONFIDENTIAL information.
7	DPS-4	2	Did Verizon apply to or receive any form of aid, funds or other compensation for restoration and/or losses related to Sandy and its aftermath, including, but not limited to: FEMA, other federal/state/local government agencies and insurance carriers? Please itemize the source, description, and dollar amounts of such funds, aid and/or compensation, and when it was received or is expected to be received by Verizon.	[5] "Source and amount of any extracompany monies or support received as a consequence of Hurricane Sandy"	**Answered 9/3/13.** Written response contains CONFIDENTIAL information.