STATE OF NEW YORK DEPARTMENT OF PUBLIC SERVICE

THREE EMPIRE STATE PLAZA, ALBANY, NY 12223-1350

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December 2, 2014

Via Electronic Mail
Gerald A. Norlander, Esq.
Executive Director
New York's Utility Project
P.O. Box 10787
Albany, NY 12201
gnorlander@utilityproject.org

Via Electronic Mail
Andrew M. Klein, Esq.
Klein Law Group Pllc
1250 Connecticut Ave NW
Suite 200
Washington, D.C. 20036
AKlein@KleinLawpllc.com

Via Electronic Mail
Maureen O. Helmer, Esq.
Hiscock & Barclay, LLP
80 State Street
Albany, NY 12207
MHelmer@hblaw.com

Re: Determination on remand from the Secretary concerning the exception from disclosure of certain records requested by Mr. Norlander

Dear Mr. Norlander, Ms. Helmer, Mr. Klein:

By e-mail dated June 17, 2014, Mr. Norlander, on behalf of New York's Utility Project (PULP), requested certain records related to pending Commission Case 14-M-0183.[1] The records sought by Mr. Norlander were, at the time, all subject to requests for exception from disclosure pursuant to Public Officers Law (POL) §87(2)(d). In accordance with the requirements of POL §89(5), I issued my determination concerning access to those records by letter dated July 22, 2014.

By filing on August 1, 2014, Time Warner and Comcast (the Companies) appealed my determination to the Secretary with respect to four records, namely, the Companies' response to information request DPS-26, and information request exhibits 24, 26 and 46.[2] By letter dated August 15, 2014, the Secretary remanded my determination in light of a July 31, 2014, decision by the Albany County Supreme Court on July 31, 2014, in *Verizon New York Inc. v. New York State Public Service Commission* (Index No. 6735-13) (*Verizon*), with instructions that I consider "whether the information sought to be protected is 'trade secret'."

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[1] Case 14-M-0183, *Joint Petition of Time Warner Cable Inc. and Comcast Corporation for Approval of a Holding Company Level Transfer of Control*. Comcast Corporation and Time Warner Cable Inc. are referred to herein as Comcast and Time Warner, respectively.

[2] The exhibits were attachments to the responses of Comcast and Time Warner to information requests DPS-24, DPS-26, and DPS-46, respectively.

In order to allow Comcast and Time Warner to address the *Verizon* case, I authorized the companies to submit supplemental information in response to the Secretary's remand. Neither did so.

In my determination on remand, I noted that under the Commission's rules, a party seeking an exception from disclosure under POL §87(2)(d) on trade secret grounds must demonstrate that maintaining the confidentiality of that information gives it "an opportunity to obtain an advantage over competitors who do not know or use it." I reasoned that the standard for that showing should be the same as that applied to exception requests based on claims that disclosure would cause substantial competitive injury, namely that the proponent of the exemption has the burden of presenting "specific, persuasive evidence" in support of its claim, and "not merely ... a speculative conclusion." In my original determination, I found that the claims of Comcast and Time Warner were entirely general and speculative, and failed to articulate any clear nexus between disclosure and substantial competitive injury. The companies provided no new information on remand. Consequently, I found that there was also no "specific, persuasive evidence" available in the record that could be cited in support of a finding that the information sought to be protected provides Comcast or Time Warner with an opportunity to obtain a competitive advantage. Therefore, I concluded that the information could not be considered trade secret and was not entitled to an exception from disclosure under FOIL.

Time Warner and Comcast again appealed my determination, and by letter dated October 3, 2014, the Secretary again remanded, finding that I had failed to discharge the mandate of the first remand that I consider whether the information sought to be protected from disclosure constituted trade secrets. To aid in consideration of the issue, the Secretary propounded a series of questions/information requests to be addressed, and invited the parties to present such additional proof as might be appropriate.

By email ruling on October 6, 2014, I authorized the parties to respond to the Secretary's remand by October 20, 2014. The Companies submitted a response, as did PULP. In addition, on October 17, 2014, Verizon submitted comments which it characterized as in the nature of an *amicus curiae* filing. By email ruling on October 22, 2014, I advised the parties that I would accept Verizon's comments and authorized responses to them to be submitted by October 29, 2014. PULP and the Companies submitted responses.

The balance of this letter addresses the Secretary's questions and provides my determination pursuant to POL §89(5)(a)(1).

The Secretary's Questions and the Parties' Responses

1) Under the Commission's regulations "[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." 16NYCRR 6-1.3(a). Please specify how the information at issue on the appeal is a "formula, pattern, device or compilation of information ...."

The Companies contend that the information for which they seek an exception from disclosure is a "compilation of information" and/or a "pattern." Citing Merriam-Webster, they say that the plain meaning of "compilation" is "a group of things...that have been gathered into a collection." Their response to DPS-26 and Exhibits 24 and 26, they say, present data compiled from each of the Companies' call centers concerning hours, locations, staffing levels and call routing techniques, while Exhibit 46 compiles a list of rural cable build-out projects planned by Time Warner for 2014 showing franchise area, county, miles built, premises passed and estimated completion dates.

Again citing Merriam-Webster, the Companies argue that a "pattern" is "a reliable sample of traits, acts, tendencies, or other observable characteristics of a person, group, or institution." The call center information provided in the response to DPS-26 and Exhibits 24 and 26, if publicly disclosed, could, they contend, reveal "traits, acts, tendencies" the Companies use to meet varying customer demand levels within and across call centers. They also argue that the cable deployment plans listed in Exhibit 46 can be considered patterns because they reveal the traits, acts or tendencies of Time Warner in expanding facilities to new customers.

Verizon argues that the Secretary's question is effectively irrelevant. It says that the "catch-all" term "compilation of information," when combined with the modifier "any," encompasses all types of content, without restriction. Any record setting forth "facts, ideas, proposals, plans, assessments, analyses, assumptions, deductions, predictions, explanations, guesses, and so forth" constitutes a compilation of information. Therefore, Verizon concludes, the phrase "any formula, pattern, device or compilation of information" cannot be interpreted as limiting the types of content to which the "opportunity to obtain an advantage" test may be applied." This interpretation, it says, is consistent with Department precedent which has found Verizon's cost studies to be trade secrets without any detailed analysis of whether they were formulas, patterns, devices, or compilations.

PULP does not directly address the Secretary's question. Rather, it points out that the term "trade secret" is undefined in the Public Officers Law, as was the "substantial competitive injury" test of POL §87(d)(2) prior to *Encore College Bookstores v. Auxiliary Serv. Corp.*[3] In *Encore*, the Court of Appeals noted that the federal Freedom of Information Act (FOIA) included an analogous exception from disclosure for "commercial or financial information [that is] privileged or confidential," and that the courts had established that the standard for finding that such commercial information should be treated as confidential was that its disclosure would

[3] 87 N.Y.2d 410 (1995).

cause "substantial injury to the competitive position of the person from whom the information was obtained."[4] In making the language of POL §87(2)(d) virtually identical to the analogous federal exemption, the Court found, the Legislature had signaled its intent that the scope of the state exception be comparable to that of its federal counterpart. Therefore, it said, the Court would look for guidance to federal cases interpreting the requirement.

The same parallel exists with respect to the trade secret exception, PULP argues. Therefore, following the Court of Appeals' decisional methodology, the Department should also look for guidance to federal law interpreting FOIA. In *Public Citizen Health Research Group v. FDA*, the D. C. Circuit restricted the definition of "trade secret" to a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort."[5] It reaffirmed that conclusion in *Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin*.[6] The D. C. Circuit's standard was also adopted by the 10th Circuit, which found that the narrower definition was more consistent with the policies behind FOIA than the broader Restatement of Torts definition which forms the basis for the definition incorporated in the Commission's rules. The Restatement definition, the 10th Circuit found, "would render superfluous" the confidential commercial information category of the FOIA exemption, "because there would be no category of information falling within" the category that would be "outside" the reach of the trade secret category.[7] The Department, PULP argues, should adopt the federal courts' test for trade secret which, it says, the Court of Appeals, after *Encore*, "surely would apply."

2) The definition of "trade secret" in the regulation further states that, to be a trade secret, a formula, pattern, device or compilation of information must provide "an opportunity to obtain an advantage over competitors who do not know or use it." 16NYCRR 6-1.3(a). Please specify how the information at issue on the appeals provides "an opportunity to obtain an advantage over competitors ...." and how such an opportunity is to be proven.

With respect to the call center data, DPS-26 and Exhibits 24 and 26, the Companies offer the declarations of Comcast Senior Director of Regulatory Affairs Don Laub and Time Warner Regional Vice President of Operations Terrence Rafferty, which were filed in support of the Companies' appeal of my initial determination. Mr. Laub says that disclosure of Comcast's call center information "would assist [competitors] in the development of similar methods and procedures required to offer competitive products and services, and would give them detailed knowledge as to the expected costs and operational functions that would be required to compete against Comcast in given geographic markets." Thus, he continues, less efficient competitors could mimic Comcast's processes, and might attempt to exploit the "granular" information by

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4 *Id.* at 419 (internal quotes omitted).

5 704 F.2d 1280, 1288 (D.C. Cir. 1983).

6 244 F.3d 144, 150-51 (D.C. Cir. 2001).

7 *Anderson v. HHS*, 907 F.2d 936, 944 (10th Cir. 1990).

misusing it to tout their supposedly superior staffing levels. Comcast, not having similar information from its competitors, would be unable to respond effectively. Mr. Rafferty expresses essentially the same concerns with respect to the data for Time Warner's call centers. The declarations of Mr. Laub and Mr. Rafferty, the Companies conclude, show "through verified facts" that the call center information satisfies the "opportunity to obtain an advantage over competitors" element of the definition of trade secret.

As to the system build-out information in Exhibit 46, Mr. Rafferty says disclosure would provide advance insight to competitors as to where Time Warner Cable plans to offer increased speeds and additional services. Those competitors might then gain an unfair advantage by responding to those plans before they are made public. Therefore, he says, Time Warner has the opportunity to gain an advantage over its competitors by keeping the information confidential.

Verizon takes no position on the proper classification of the records at issue. On the general question of how to establish an "opportunity to obtain an advantage over competitors," however, Verizon argues that the trade secret test is met "if it can be cogently demonstrated that the nature of a record is such that its disclosure could confer a competitive advantage (on the recipient) or a competitive harm (on the owner/creator/provider of the record)." No limitations on the type of evidence that can be provided to make the showing should be imposed, Verizon argues, and no artificial filing requirements, such as detailed expert affidavits, should be mandated. Nor should proof that actual harm has resulted from past disclosures be required. The Commission should take a flexible approach, Verizon argues, recognizing that in each case the question should be "whether the requisite opportunity has been demonstrated in a way that goes beyond merely asserting that it exists."[8]

PULP did not respond to this question.

3) The second prong of the Encore test is stated in terms of probabilities - "a likelihood of substantial competitive injury." Is "the opportunity to obtain an advantage over competitors" similarly, a probabilistic test? If so, what is the probability? Is there some more explicit quantum of information, beyond a probability, that must be shown to prove that "any formula, pattern, device or compilation of information" is a trade secret? Please explain how your answer to this question supports (undermines) your view on whether the information at issue should be protected.

The Companies argue that the trade secret standard of "opportunity" for competitive advantage is a lesser standard than the "likelihood of substantial competitive injury" under *Encore*. Opportunity, they say, again citing Merriam-Webster, is a chance for advancement. It does not imply certainty or even quantifiable odds that a result will be achieved. Therefore, the test is one of possibility, rather than probability. Imposing a probabilistic test, the Companies contend, would run afoul of the *Verizon* court's holding that a party claiming a trade secret exemption from disclosure need not demonstrate a "likelihood of substantial competitive injury."

[8] Verizon Comments, p. 6.

Verizon, similarly, argues that *Encore's* "likelihood of substantial competitive injury" standard was applicable to the evaluation of confidential commercial information. After the *Verizon* court's separation of the two prongs of POL 87(2)(d), this test no longer has any relevance to a trade secret claim. The test for trade secrets refers to an "opportunity," which Verizon suggests is only a possibility of an advantage, while "likelihood," it says, implies a probability of competitive injury. Therefore, Verizon concludes, the opportunity test is less exacting than the likelihood test.

PULP points out that the general policy of FOIL is that agency records should be publicly disclosed. Those seeking to suppress disclosure, PULP argues, "should be required to make a specific factual showing show that it is more likely than not that competitive injury will flow from release."[9] Bare, conclusory allegations of competitive injury are clearly insufficient, PULP says, citing an Appellate Division decision.[10]

4) The ALJ applied Markowitz v. Serio. 11 N.Y.3d 43 (2008), as precluding speculation in concluding that the material has not been shown to be "trade secret." Markowitz seems to pertain to application of POL §87(2)(d) generally, 11 N.Y.3d at 50, so after Verizon shouldn't it still apply to "trade secrets," even though the Court observed in that case that "[t]rade secrets were not at issue in [Markowitz]." Verizon, slip opinion at 21, note 16? Please explain your answer and how that answer means the information at issue in this case should be protected (disclosed).

The Companies contend that the *Markowitz* decision only analyzes the test for substantial competitive injury which applies to the second alternative under POL §87(2)(d). It does not analyze the test for trade secrets. Therefore, the Companies contend, the case cannot be read as pertaining to POL §87(2)(d) generally. Application of *Markowitz* to trade secrets, they say, would conflict with the definition of trade secret which requires only an opportunity to obtain a competitive advantage. The Companies' submission goes beyond the minimum required by that definition, they say, as the declarations of Mr. Laub and Mr. Rafferty explain how keeping the information confidential provides the Companies with a real opportunity to obtain a competitive advantage.

Verizon states that the *Verizon* court found that *Markowitz* addressed the test for confidential commercial information, not trade secrets. It has no relevance whatsoever to the separate trade secret standard. According to Verizon, the facts of the case show clearly that the court's disposition of the case was based exclusively on the confidential commercial information test.

9 PULP Response, p. 4.

10 *Lamitie v. Emerson Elec. Co*., 142 A.D. 2d 293 (3rd Dept. 1988). It should be noted that although this is a New York State court decision, the court was interpreting the requirements of federal law, not FOIL.

PULP states merely that there needs to be a factual showing that the *Public Citizen* standard for a "trade secret" is satisfied, and that this cannot be based on mere theoretical possibilities or conjecture.

5) The ALJ stated, correctly it seems, POL §89(5)(e), that the burden of proving "trade secret" is on the proponent of exemption from disclosure. What burden must be met by an entity seeking to exempt a "trade secret" from disclosure? How has that burden been met (or failed) with respect to the information at issue?

The Companies acknowledge that they have the burden of demonstrating that the information for which they are seeking protection from disclosure is trade secret, but say that that requires only a showing that exemption would afford the Companies the potential to obtain a competitive advantage. This, they say, they have done.

Verizon states that it is important that the Department not apply the burden of proof in a way that imposes inappropriate barriers to obtaining the protection from disclosure intended by the Legislature in enacting POL §87(2)(d). The party seeking an exemption from disclosure is properly obligated to make a *prima facie* case, it says, but thereafter, it should be required only to meet and rebut those arguments for which an opposing party has met its own burden of going forward. It should not be forced to rebut all conceivable counterarguments, nor should it be forced to meet an unreasonably exacting standard of proof, such as "clear and convincing," or be required to use some specific method of proof such as affidavits in every case.

PULP cites the Court of Appeals holding in *Markowitz* that "[t]o 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." It says that Time Warner's evidence is theoretical at best, and its objection to disclosure should not be indulged.

DISCUSSION

Responses to the Secretary's Questions

Question 1. Initially, I decline to adopt PULP's suggestion that the term "trade secret" as used in FOIL be defined as it is by the federal courts interpreting FOIA. At least until the New York courts directly address the issue, I am bound by the definition of trade secret incorporated in the Commission's regulations unless that definition is manifestly inconsistent with the statute, I do not find that it is. The definition was taken from the Restatement of Torts §757, comment b, which was cited with approval for purposes of POL §87(2)(d) by the Court of Appeals in *New York Tel. Co. v. Public Service Commission*,[11] and again eleven years later in *Ashland Management v. Janien*.[12]

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[11] 56 N.Y.2d 213, 219, n. 3 (1982).

[12] 82 N.Y.2d 395 (1993).

I also reject Verizon's contention that the scope of the term "compilation of information," as used in Rule 6-1.3(a) is unlimited. If that interpretation were accepted, all of the language in POL §87(2)(d) after the words "are trade secrets" would effectively be written out of the statute. Any information from a commercial enterprise that was incorporated in a record could be considered eligible for trade secret status. No one requesting an exception from disclosure would ever be required to demonstrate that public release of its information would cause substantial injury to its competitive position. Such a result would be contrary to the well-accepted rule of statutory construction that all parts of a statute are to be construed together and harmonized to give "effect and meaning ... to the entire statute and every part and word thereof."[13]

Furthermore, Verizon's suggestion is inconsistent with the normal connotation of the word "compilation." The plainest definition of the word is "something compiled."[14] "Compile," in turn, is defined as composing out of materials from other documents, or collecting and editing into a volume. Examples of compilations are books of poems, lists of names, findings in a report, and so forth.[15] It is common usage to refer to compiling a list, a collection, a report, a summary, findings, or data. It would sound strange to hear someone say that they were compiling an email, a letter, or a memorandum. Compilation connotes the gathering of related information from diverse sources into a single work or record that has added value because it places all that information in one place.

<u>Question 2</u>. Verizon contends that the test for a trade secret, that the information provides an opportunity to obtain an advantage over competitors, is met if it is "cogently demonstrated" that disclosure of a record will either confer an advantage on a competitor of the owner of the record, or cause the owner competitive harm. This showing has been made, it argues, when "the requisite opportunity has been demonstrated in a way that goes beyond merely asserting that it exists." I agree, because for all practical purposes, this is a restatement of the standard enunciated by the Court of Appeals in *Markowitz*.

In *Markowitz*, the Court begins its analysis of the requested exception from disclosure by noting that the party seeking it has the burden of demonstrating that the material it seeks to protect "falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access."[16] As is evident from the cases cited by the Court and the use of the indefinite article "a," this is a general requirement applicable to all exceptions including both of the grounds for non-disclosure provided by POL §87(2)(d). To meet the burden, the Court then says, the party seeking an exception "must present specific, persuasive evidence ...; it cannot merely rest on a speculative conclusion." In making that statement, the Court clearly was

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13 *Friedman v. Connecticut Gen. Life Ins. Co.*, 9 N.Y.3d 105, 115 (2007).

14 http://www.merriam-webster.com/dictionary/compilation (retrieved Nov. 13, 2014).

15 http://www.merriam-webster.com/dictionary/compile (retrieved Nov. 13, 2014).

16 *Markowitz at 51.*

not shifting its focus from a general discussion of the burden of proof to a category-specific one. The burden applies to all categories of exemption; so does the required showing. Consequently, I conclude that there is no difference between trade secrets and commercially sensitive information in terms of the evidentiary burden that must be met. Whether it is an opportunity for competitive advantage or a risk of substantial competitive injury that the proponent of non-disclosure seeks to demonstrate, the claim must be supported by specific, persuasive evidence and not merely a speculative conclusion, or, in Verizon's terminology, a cogent demonstration that goes beyond merely asserting that the advantage or danger exists.

Question 3. The Companies and Verizon are correct in stating that the *Verizon* decision holds that parties claiming an exception from disclosure for trade secrets do not have to demonstrate that disclosure would present a risk of substantial competitive injury. That does not, however, imply that the standard for determining that information should be considered trade secret in the first place is necessarily less stringent than the test for determining that it constitutes commercial information, the disclosure of which would cause substantial competitive injury. That argument is based entirely on the semantic notion that the words "opportunity" and "likelihood" connote different degrees of probability. An opportunity is merely a possibility; a likelihood is more possible than not.

Not only is there no support for this position in the case law, but it is also illogical given the history of POL §87(2)(d). Trade secrets were made exempt from disclosure in the original version of the section. Protection for other commercially sensitive information was added later. The evident purpose of the 1990 amendment, as demonstrated by the discussion of the legislative history set forth in the *Verizon* case, was to allow for the exception from disclosure of information that did not rise to the level of trade secret.[17] To now argue that trade secrets should be considered relatively easy to prove makes no sense, is contrary to the policy of open government underlying FOIL, and cannot be supported by any reading of the "plain meaning" of the statutory language.

That said, I have no basis in the case law or the arguments presented here to reach a conclusion as to the specific quantum of probability required to find that a chance of gaining or maintaining a competitive advantage rises to the level of an "opportunity." I can only say, based on my interpretation of *Markowitz*, that whatever that showing is, it must be supported by specific, persuasive evidence and not merely a speculative conclusion.

Question 4. As discussed above, although the Court in *Markowitz* decided the case based solely on the commercially sensitive information provision of POL §87(2)(d), its discussion of the showing required to sustain an exception from disclosure was clearly not specific to that section. It was a general explanation of the level of proof necessary to sustain the burden of overcoming FOIL's presumption in favor of disclosure.

[17] *Verizon*, pp. 14-16. Note particularly the memorandum to the Counsel to the Governor from the Deputy Commissioner of the Department of Economic Development explaining that the bill was needed to protect commercially sensitive information that "does not constitute a trade secret and ... is not maintained for the purpose of 'regulation'."

The Companies and Verizon contend that imposing the *Markowitz* standard on parties attempting to demonstrate the existence of a trade secret would violate the holding in *Verizon*. That argument conflates the standard to be met with the showing required to meet it. Even if the level of competitive significance for a trade secret were lower than that for commercially sensitive information, that would not mean that the quality of evidence used to prove that significance must also be lower. It is entirely appropriate to require that evidence offered to support any claim of exception under FOIL be specific, persuasive, and non-speculative, as stated by the Court in *Markowitz*.

Question 5. The Companies and Verizon acknowledge that the burden of proving entitlement to an exception from disclosure under FOIL is on the party claiming it. Verizon asks only that the Commission not apply that burden in a manner that imposes "inappropriate" barriers on parties attempting to make the required showing. PULP supports the standard enunciated in *Markowitz*. As do I.

Application of the Responses to the Disputed Records

Exhibit 24. Exhibit 24 is a spreadsheet showing the general function, city location, address, types of calls handled, and hours of operation for Time Warner's New York call centers, along with the number of full-time equivalent positions at each call center, both in total and broken down by shift, and call interflow parameters explaining how calls are distributed when the numbers exceed the capacity of a particular center. Because it gathers several categories of data about multiple locations into a single document, I find that it is a "compilation of information" as that term is used in Rule 6-1.3(a). I also find that the information is used in Time Warner's business. The question, therefore, is whether the information provides Time Warner the opportunity for a competitive advantage.

Initially, I see no reason why disclosing the general function, city location, addresses, and hours of operation would be helpful to a competitor or detrimental to Time Warner. Indeed, the Companies acknowledge that center hours of operation are likely publicly available.[18] Considering the factors set forth in Rule 6-1.3(b)(2), I find that the information is either known by competitors ((b)(2)(ii)) or can be developed with little difficulty ((b)(2)(v)), and is of little commercial value ((b)(2)(iii)).

As to the balance of Exhibit 24, however, it is evident that the information concerning shift staffing and call processing is at a level of detail that could only be developed through experience, a trial-and-error process of estimation, operation, evaluation, and revision. Disclosure of the information could allow a competitor to improve its operations without the investment of time required to refine the process. This would be an advantage to the competitor, and a competitive loss to Time Warner. The information is potentially of value to competitors and would be difficult to develop independently. Consequently, I find that Exhibit 24 should be

[18] Supplemental Statement of Comcast Corporation and Time Warner Cable Inc. on Secretary's Second Remand of Foil Issues, p. 3-4.

exempted from disclosure, with the exceptions noted. The Companies should submit a redacted version of Exhibit 24 that can be made publicly available.

Response to DPS-26. The Companies' response to DPS-26 describes the call interflow parameters for Comcast call centers. For the reasons stated with respect to Exhibit 24, I find this information should be excepted from disclosure.

Exhibit 26. Exhibit 26 is a table of Comcast's call centers in the northeastern United States showing the city location, hours of operation, total staffing, and staffing broken down by function. Because it gathers several categories of data about multiple locations into a single document, I find that it is a "compilation of information" as that term is used in Rule 6-1.3(a). I also find that the information is used in Comcast's business. Again, therefore, the question is whether the information provides Comcast the opportunity for a competitive advantage.

Although the document overall is not as detailed as Exhibit 24, the information concerning total and functional staffing levels is competitively sensitive for the same reasons discussed with respect to that exhibit. As with Exhibit 24, I conclude that the record is entitled to exception from disclosure, except that city location and hours of operation should be disclosed. Therefore, the Companies should provide a redacted version of Exhibit 26 that can be made publicly available.

Exhibit 46. Exhibit 46 is a list of "New York State Rural Builds" scheduled by Time Warner for 2014. The list has five column headings: Franchise, identified by Town, Village, or City; County; Total Miles; Passings; and Estimated Completion. Because it combines data concerning hundreds of projects into a single document, I find that it is a "compilation of information" as that term is used in Rule 6-1.3(a). I also find that the information is used in Time Warner's business. The question, therefore, is whether the information provides Time Warner the opportunity for a competitive advantage.

The Companies defend their claim of trade secret status for Exhibit 46 on the ground that the document provides specific details about Time Warner's build-out and deployment plans that, according to Mr. Rafferty, "would provide advance insight to competitors," allowing them "to gain an unfair competitive advantage by being able to respond to Time Warner Cable's deployment and upgrade plans well before such plans are made public."[19] I agree with the Companies that advance disclosure of a planned Time Warner project could diminish the Company's competitive advantage by allowing a competitor to, say, target marketing efforts specifically at customers in the affected locality. Keeping the project confidential as long as possible helps preserve that advantage. Once actual construction begins, however, the project is no longer secret; it is public. Exhibit 46 shows that of the 225 projects listed, 183 have not only been started, but completed. Continued non-disclosure of the information concerning those projects serves no further strategic purpose with respect to the competitive position of Time Warner. Of the remaining 42 projects, 39 are listed as having estimated completion dates between April and October of 2014. It may be presumed that those projects are now complete,

[19] Declaration of Terence Rafferty, p. 3-4.

or at least underway. One project is scheduled for completion in November. It, too, is likely completed or in progress. Two projects have estimated completion dates of December 2014. One of those, the largest project in the entire list, is fully described, with detailed maps, in public filings with the Commission, and is also the subject of at least one Albany Times-Union newspaper article. The other project with an estimated December completion is likely underway.

Therefore, I find that Exhibit 46 is not entitled to exception from disclosure under POL §187(2)(d) and should be released to Mr. Norlander upon the expiration of the period specified in Commission Rule 6-1.3(d)(5); provided, that if the Companies certify that build-out has not been initiated for a project, and the project has not otherwise been disclosed publicly, then the information for that project may be redacted. If the Companies contend that any such redaction is necessary, they must submit a redacted version of Exhibit 46, together with the required certification and an estimate of when the redaction may be removed.

Conclusion

The requests of the Companies for exception from disclosure pursuant to POL §87(2)(d) and 16 N.Y.C.R.R. §6-1.3(b)(2) of records requested by Mr. Norlander are granted or denied as set forth in the body of this determination. Review of my determination may be sought, pursuant to POL §89(5)(c)(1) and 16 N.Y.C.R.R. §6-1.3(g), by filing a written appeal 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 December 3, 2014, and the deadline for the receipt of any such written appeal will be December 12, 2014.

Sincerely,

/s/

David L. Prestemon
Administrative Law Judge

cc: Robert.Freeman@dos.ny.gov
AZoracki@KleinLawpllc.com
Kathleen H. Burgess, Secretary