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July 22, 2014

Via Electronic Mail

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Re: Determination concerning request for records submitted by Mr. Norlander on June 17, 2014

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

By e-mail dated June 17, 2014, and addressed to the Records Access Officer, Mr. Norlander, on behalf of New York's Utility Project, requested certain records related to pending Commission Case 14-M-0183,<sup>1</sup> namely:

1. A copy of all the Department of Public Service interrogatories sent to Comcast or Time Warner in Case 14-M-0183 to date.
2. A copy of the responses of Comcast or Time Warner to each staff interrogatory, to date.

Because I am the Administrative Law Judge assigned to this case, this record request was forwarded to me.

By e-mail dated June 24, 2014, I acknowledged receipt of the request and indicated that the interrogatories referred to in item 1 were being reviewed to determine whether they included any information for which an exception from disclosure had been claimed. Subsequently, it was determined that the interrogatories did not contain any such information. Therefore, also on June

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<sup>1</sup> 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, and collectively as the Companies.

24, 2014, electronic copies of the first, second, third, and fourth sets of information requests propounded by DPS Staff were provided to Mr. Norlander by e-mail. This completed the Department's response to item 1 of the records request.

In my acknowledgement of receipt of the request, I also noted that the records sought under item 2 of Mr. Norlander's request were all subject to requests for exception from disclosure pursuant to Public Officers Law (POL) §87(2)(d) and that, accordingly, access to those records would be determined in accordance with POL §89(5). As required by POL §89(5)(b), by separate e-mail dated June 24, 2014, I informed counsel for Comcast and Time Warner of the Department's intention to determine whether the information contained in the requested records was entitled to exception from disclosure, and I advised the Companies of their right under POL §89(5)(b)(2) to submit a written statement of necessity for the exceptions on or before July 10, 2014.

On July 10, 2014, Comcast and Time Warner submitted a "Statement of Comcast Corporation and Time Warner Cable Inc. in Further Support of Trade Secret Designations" (Statement). In it, the Companies reported that they had reviewed the requested records and determined that some of the information they contained did not require exception from disclosure. Consequently, they submitted redacted versions of all of the responses, and limited their requests for exception from disclosure to the redacted material and certain accompanying exhibits. By e-mail dated July 15, 2014, I forwarded those redacted responses to Mr. Norlander. The balance of this letter constitutes my determination pursuant to POL §89(5) as to the entitlement to an exception from disclosure pursuant to POL §89(5)(a)(1) for the portions of the responses to Staff information requests designated DPS-1 through DPS-52 for which the Companies continue to seek confidentiality.

## **DISCUSSION**

### **Statement of Applicable Law**

POL §87(2) provides, in pertinent part, that "[e]ach 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."

The Court of Appeals, in Matter of New York Telephone Co. v. Public Service Commission,<sup>2</sup> 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).<sup>3</sup> Thereafter, the Commission adopted a virtually identical definition of "trade secret." According to 16 NYCRR

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<sup>2</sup> 56 N.Y.2d 213, 219-220 (1982).

<sup>3</sup> 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).

§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.”

In Matter of Capital Newspapers v. Burns,<sup>4</sup> 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 Matter of Ashland Management, Inc. v. Janien,<sup>5</sup> 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.”<sup>6</sup>

The Court of Appeals, in Encore Coll. Bookstores v. Auxiliary Serv. Corp. of State Univ. of N.Y.,<sup>7</sup> 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,<sup>8</sup> a case that arose under the federal Freedom of Information Act.<sup>9</sup> In particular, the Court

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<sup>4</sup> 67 N.Y.2d 562, 566, 570 (1986).

<sup>5</sup> 82 N.Y.2d 395, 407 (1993).

<sup>6</sup> 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.”

<sup>7</sup> 87 N.Y.2d 410 (1995).

<sup>8</sup> 498 F.2d 765, 770 (D.C. Cir., 1974).

<sup>9</sup> Encore, *supra* at 419-420.

paraphrased and quoted with approval from another D.C. Circuit Court of Appeals decision in Worthington Compressors v. Costle.<sup>10</sup>

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 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."<sup>11</sup>

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,<sup>12</sup> 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."<sup>13</sup>

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,<sup>14</sup> 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. They 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

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<sup>10</sup> 662 F.2d 45, 51 (D.C. Cir., 1981).

<sup>11</sup> 615 F. 2d 527, 530 (D.C. Cir., 1979).

<sup>12</sup> 11 N.Y.3d 43 (2008).

<sup>13</sup> Markowitz, *supra* at 51; Encore, *supra*.

<sup>14</sup> 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).

not publicly available and had exhausted their administrative remedies for 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 its food and beverage competitors, set forth Saratoga's current and future labor negotiations 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 it 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 FOTB's dissemination of its financial data fell "squarely within a FOIL exemption."<sup>15</sup>

Likewise, the court found that Finger Lakes demonstrated the applicability of POL § 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 had outlined the competitive pressures facing it and had adequately described the injury it would incur if the disputed financial information were released, and therefore, demonstrated that the trade secret exception squarely applied.<sup>16</sup>

Since Markowitz and Saratoga, the Second Department has held that such evidence may be provided by affidavits that demonstrate the likelihood of substantial competitive injury, and that are based upon the personal knowledge of people employed or retained by the party seeking such exemption.<sup>17</sup>

### **Application of Pertinent Law**

When the issue is whether fulfillment of a request for agency records would result in the public disclosure of trade secrets or confidential commercial information entitled to exception pursuant to POL §87(2)(d), the two-prong Encore test applies. The entity seeking an exception from disclosure has the burden of demonstrating (a) that it faces actual competition, and (b) that disclosure of the information at issue would cause the entity substantial injury to its competitive position. Because the overall purpose of FOIL is to ensure that the public is afforded greater

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<sup>15</sup> Markowitz, supra.

<sup>16</sup> POL §87(2)(d).

<sup>17</sup> See Dilworth v. Westchester County Dep't of Correction, 93 A.D.3d 722, 724-25 (2d Dep't 2012) holding that an affidavit sworn by a Sergeant with the Westchester County Department of Correction provided sufficient evidence to support an exception from disclosure.

access to governmental records, FOIL exemptions are interpreted narrowly.<sup>18</sup> Therefore, to meet its burden, the party seeking the 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.<sup>19</sup>

As to the first prong of the test, the Companies state that the highly competitive nature of the industries in which they operate has been well-established in prior Commission proceedings, and they cite a number of Commission documents in support of that assertion. In a 2011 “Determination of Appeal of Trade Secret Determination,” the Secretary found that the Records Access Officer had correctly concluded that Time Warner Cable faces actual competition that is growing steadily, not only from other cable operators, but also from satellite like DirecTV and internet-based video services such as Netflix.<sup>20</sup> With respect to telephone services, a Staff white paper issued in 2005 found New York to be “one of, if not the, most competitive markets in the nation” and specifically mentioned the then relatively new competition incumbent service providers such as Verizon were facing from “cable companies (primarily Time Warner and Cablevision).”<sup>21</sup> That competition has only grown and intensified since, as evidenced by the extensive television, newspaper, and direct mail advertising by Verizon, Comcast, Time Warner, DirecTV and other cable, telephone, and satellite companies offering comparable phone, internet, and cable television services, advertising in which the companies frequently mention their competitors directly in promoting the superiority of their offerings.

I recognize that the Companies do not face direct competition for all services in all locations in the State, but that is not a requirement of the Encore test. The question is whether the Companies face actual competition, the character of which might be affected by release of the information for which an exception from disclosure has been requested. I find that they do, and, consequently, I find that the first prong of the Encore test is satisfied. I will, therefore, consider as to each of the records for which exception from disclosure has been requested whether public disclosure would cause substantial injury to the competitive position of Comcast or Time Warner. Unless otherwise stated, the information for which exception from disclosure has been requested is available only through disclosure by the Department. Consequently, I must consider only the commercial value of such information to competitors and the competitive injury that would likely result to Comcast or Time Warner if the information were disclosed.

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<sup>18</sup> Washington Post Co. v New York State Ins. Dept., 61 NY2d 557, 564 (1984).

<sup>19</sup> Markowitz, *supra* at 51.

<sup>20</sup> Matter 09-01904, 2010 Customer Service Annual Report for All Time Warner Cable New York Cable Systems, Determination of Appeal of Trade Secret Determination (issued August 26, 2011), p. 7.

<sup>21</sup> Case 05-C-0616, Proceeding on Motion of the Commission to Examine Issues Related to the Transition to Intermodal Competition in the Provision of Telecommunications Services, Telecommunications in New York: Competition and Consumer Protection, A White Paper Prepared by the State of New York Department of Public Service Staff (filed September 21, 2005), pp. 28-29.

DPS-6

The first redaction in the Companies' response to DPS-6 is on on page 9 of its response to Staff's first set of information requests. The redacted language addresses projects undertaken by Time Warner in conjunction with the New York State Energy Research and Development Authority ("NYSERDA") relating to various Time Warner facilities and equipment. The Companies say that the projects may in general be publicly known, but that Time Warner Cable's operations with respect to such projects have not been publicly disclosed, and that disclosure would give competitors information concerning Time Warner's operations and strategies that competitors could use to their competitive advantage by, for example, employing the same or competing strategies.

The redacted sentences list a number of energy efficiency measures at new and existing facilities that Time Warner is implementing in coordination with NYSERDA. The measures are described in entirely generic terms, with no specifications and no data concerning costs, benefits, installation, operation or any other factors of value to competitors. The measures are ones that would be likely to be known by any enterprise operating facilities similar to those of the Companies. It is not credible that disclosure of this information would cause competitive harm to Time Warner. The request to except it from disclosure is denied.

The second redaction, on page 10, relates to strategies being pursued concerning the technology used in Comcast's set-top boxes. It appears that the strategy described would be readily replicable by competitors, and that Comcast's concern that competitors could use the information to develop or accelerate development of competitive responses is valid. Any competitive advantage Comcast might derive from implementing this strategy could be lost if the information were disclosed. Accordingly, the request for exception from disclosure pursuant to POL §87(2)(d) and 16 N.Y.C.R.R. §6-1.3(b)(2) is granted.

DPS-7

DPS-7 requests information concerning instances where Comcast telephone customers who paid for non-published or unlisted service have had their numbers made available to the public. The redacted response provides this information. Comcast asserts that it keeps this information confidential, as do its competitors. Disclosing the information for Comcast could put the company at a competitive disadvantage because competitors could use it in comparative advertising or other marketing materials and Comcast would not have comparable information about the competitors with which to rebut the comparisons.

This concern appears legitimate. While it might be argued that this information should be available to consumers, there is currently no such legal mandate and the data is kept confidential by the companies. Selectively disclosing the information for Comcast could well put the company at a competitive disadvantage, perhaps unfairly. The request for exception from disclosure pursuant to POL §87(2)(d) and 16 N.Y.C.R.R. §6-1.3(b)(2) is granted.

DPS-8, DPS-9, DPS-10, DPS-11, DPS-13, DPS-18, DPS-20, DPS-21, DPS-22, DPS-28, DPS-31, DPS-32, DPS-36, DPS-40, DPS-41, DPS-45, and DPS-48

The Companies state that the redacted information in all of these information requests concerns future business plans. They say these plans are kept confidential and are generally not publicly disclosed. If disclosed, they contend, this information would allow competitors to understand or deduce Comcast's future business plans and develop their own plans accordingly. This information, they say, could be used to Comcast's disadvantage, particularly since it would not have reciprocal information about its competitors.

To satisfy the second prong of the Encore test, the Companies were required to present "specific, persuasive evidence that disclosure will cause [them] to suffer a competitive injury; [they] cannot merely rest on a speculative conclusion that disclosure might potentially cause harm."<sup>22</sup> On their face, the Companies arguments for exception from disclosure for the redacted material in these information request responses are almost entirely speculative. Comcast and Time Warner have presented no specific evidence suggesting that disclosure might cause them substantial competitive injury, and none is readily discernible from the redacted material itself. Accordingly, they have failed to meet their burden of proof and their request for exception from disclosure pursuant to POL §87(2)(d) and 16 N.Y.C.R.R. §6-1.3(b)(2) with respect to the redacted information in these information request responses is denied.

#### **DPS-12 and Exhibit 12-2**

This response and accompanying exhibit provide information about schools and libraries being served by Time Warner in New York State. The Companies state that the response includes information about future business plans. If disclosed, they say, the information could be used by competitors to market services to Comcast's customers.

Again, the Companies' claims are speculative and include no specific information as to how the disclosure of this information could be used in a way that would cause them substantial competitive injury. Presumably, any competitor could today approach these libraries and schools to market its services, and in the absence of any more specific explanation, it is hard to see why the disclosure of the information in these responses would give them any advantage. The Companies have failed to meet their burden of proof and their request for exception from disclosure pursuant to POL §87(2)(d) and 16 N.Y.C.R.R. §6-1.3(b)(2) with respect to the redacted information in these information request responses is denied.

#### **DPS-14**

This response includes information concerning Time Warner's plans for building out its system in rural areas and anticipated plans for incremental build-out following the proposed merger. The Companies say that, if disclosed, such information would provide competitors with detailed information concerning the Companies' build-out plans as well as insight into Time Warner's cost structure, which competitors could use unfairly to the Companies' disadvantage. For example, they say, a competitor might offer promotions or divert capital resources in response to Time Warner's build-out plans.

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<sup>22</sup> Markowitz, supra, at 51.

Although the redacted information does include some specific data, that data is in aggregate form. There is no detail concerning specific projects, and no location information. Without that, it is hard to see how even the Companies' speculative concerns about the consequences of disclosure are justified. The Companies have failed to meet their burden of demonstrating by specific, persuasive evidence that an exception from disclosure is warranted, and the request pursuant to POL §87(2)(d) and 16 N.Y.C.R.R. §6-1.3(b)(2) with respect to the redacted information in this information request response is denied.

### **DPS-15**

This response provides information concerning Time Warner broadband projects funded by federal or state programs including Connect NY Broadband Grants. According to the Companies, while the projects in general are publicly known, Time Warner's operations with respect to such projects have not been publicly disclosed, and thus are not expected to be known by others. They assert that such information, if disclosed, would cause substantial injury to the competitive position of the Time Warner Cable, because the information would give competitors information concerning Time Warner Cable's operations and strategies that competitors could use for their competitive advantage by, for example, employing the same or competing strategies.

Not only is the Companies' support for non-disclosure speculative and non-specific, but much of the information provided in this redacted response is readily publicly available on, for example the website of the New York State Broadband Office (<http://nysbroadband.ny.gov/annual-reports>). The request for exception is denied.

### **DPS-17 and Exhibit 17**

The redacted portions of this response and accompanying exhibit relate to the location and staffing of the walk-in, call, and service centers operated by the Companies in New York. One sentence states Comcast's intentions with respect to post-merger operations and staffing of those facilities. The Companies say the information is kept confidential, would be impossible for a third party to develop without the Companies' consent, would cause substantial injury to the competitive position of the Companies by giving competitors insight into their staffing and management of New York operations. This information, they say, might inform the competitors' own operating strategies.

First, the list and names and addresses of the current facilities are not confidential. Many, if not all, of these offices are clearly identified with signs and logos as being operated by the Companies. It would certainly be easier for a competitor to obtain a list of the facilities through disclosure of this response than through independent research, but it is hard to imagine what value that list would have for the competitor, or what harm its disclosure would do to the Companies.

With respect to staffing levels, current and future, the Companies' concerns are entirely speculative. It is likely that any competitor would have a fairly good idea what personnel would

be needed to run these types of facilities, and the Companies have provided no specific evidence that they have developed and are utilizing any unique staffing techniques that could be considered to constitute trade secrets. If their staffing levels give them a competitive advantage that could be undermined by disclosure of these numbers, they have failed to provide specific evidence to that effect. Therefore, the request for exception as to this response and exhibit is denied.

#### **DPS-19 and Exhibits 19-1 through 19-17**

DPS-19 requested five years of annual telephone and video data concerning certain service quality metrics. Exhibits 19-1 through 19-17 are the reports containing those metrics and correspondence between Staff and the Companies concerning the data. The Companies state that these reports contain detailed, disaggregated customer and service data that is not publicly disclosed and could not be obtained or independently developed by a third-party without the Companies' consent. If disclosed, they say, this information could be used unfairly by competitors in detailed targeted marketing campaigns, while the Companies would not have comparable information about the competitors with which to defend themselves against inaccurate comparisons.

For the same reasons set forth with respect to the response to DPS-7, the Companies' concerns about the potential for unfair competitive injury appear legitimate. Therefore the request for exception from disclosure with respect to the exhibits is granted. With respect to the redacted information in the body of the response to DPS-19, the request is denied. Not only is there nothing in this information that could be considered competitively sensitive in the manner asserted by the Companies, but, in fact, the information tends to corroborate the Companies' concerns that the disclosure of the data in the exhibits would be unfair.

#### **DPS-26 and Exhibits 24 through 27**

Exhibits 25 and 27 are reports concerning call center performance similar to the service quality reports discussed in relation to DPS-19. For the same reasons stated there, disclosure of these reports could put the Companies at an unfair competitive disadvantage. The request for exception from disclosure as to these reports is, therefore, granted.

Exhibits 24 and 26 present detailed facility-by-facility location, hours, staffing, and call handling information for the Companies' call centers. The narrative response to DPS-26, which is redacted in its entirety, provides a general description of call interflow parameters that direct calls to sister call centers. The Companies say this information is kept confidential, could not be obtained or developed independently, and, if disclosed, could give competitors unfair insight into the Companies' operations. While the redacted data clearly seems to be of a type that businesses would not normally disclose publicly or share with competitors, the claims of potential competitive harm made by the Companies are, nevertheless, entirely general and speculative and give no concrete examples of how there might be a nexus between disclosure and substantial competitive injury. If such a nexus exists, the Companies certainly should be able to explain it, but they have not. Accordingly, the request to except Exhibits 24 and 26 and the response to DPS-26 from disclosure is denied.

### **DPS-30**

DPS 30 requested information concerning how Comcast has dealt with cyber-security issues associated with the accessibility and control of home energy features and settings through Comcast's Xfinity Home Service. The redacted material describes the measures taken by Comcast to provide security. The Companies say that release of this information could cause competitive injury to Comcast by allowing competitors to implement similar strategies or to use the information unfairly in comparative advertising. They suggest that the information might even qualify as critical infrastructure information and be excepted from disclosure on that basis.

The description of Comcast's security measures is very basic and general in nature. The information would be readily understandable and familiar to any lay person with an interest in cyber-security. It does not reveal the location or vulnerability of any infrastructure critical to internet operations and, therefore, is not critical infrastructure information. Absent more specific evidence, which was not provided, it does not appear that release of this information would be likely to cause any competitive injury to the Companies. The request for exception from disclosure is, therefore, denied.

### **DPS-33 and Exhibits 33-1 and 33-2**

The response to DPS-33 is redacted in its entirety despite the fact that it contains no information other than a statement of what Exhibits 33-1 and 33-2 contain. The Companies' Statement publicly discloses that Exhibits 33-1 and 33-2 "contain information concerning Time Warner Cable's projects funded by NYSERDA" and that "the projects, in general, are publicly known." Consequently, there is no justification for withholding this response from disclosure. The request for an exception from disclosure is denied.

The Companies state that disclosure of the information contained in the exhibits would give competitors operational and financial information relating to the NYSERDA-funded projects that is not publicly available and could be used by competitors to their advantage. There is not a word about how this might happen; nothing to take the assertion out of the realm of pure speculation. A company should be able to give some concrete example of how another company, in the same business, could gain a competitive advantage through access to information it keeps confidential. That has not been done here. The request for an exception from disclosure for Exhibits 33-1 and 33-2 is denied.

### **DPS -34 and DPS-35**

The responses to DPS-34 and DPS-35 describe current and prospective Comcast initiatives aimed at reducing truck rolls and increasing vehicle fleet efficiency, with associated cost savings. The Companies say this information is kept confidential and that its disclosure would enable competitors to implement similar plans, nullifying Comcast's competitive

advantage. As discussed above concerning set-top box initiatives, this concern appears legitimate. Comcast's advantage, if any, lies in its having the initiative. If that is lost, its competitive position is injured. Accordingly, the request for exception from disclosure for the redacted portions of the responses to DPS-34 and DPS-35 is granted.

### **Exhibit 37**

Exhibit 37 is a chart showing the number of subscribers to Time Warner's "Everyday Low Price" broadband service, broken down by division and operating unit. The Companies say that disclosure of this information, which is not publicly available, would give competitors insight into the market for this service, giving them a competitive advantage as Time Warner does not have reciprocal information concerning their services. It would also, they say, affect investors' perception of the value of Time Warner.

The fact that disclosure might affect investors' perceptions is irrelevant unless the effect would be to do substantial injury to Time Warner's competitive position. No such connection has been shown here. However, customer numbers are a different matter. This information is normally kept confidential by competitive companies. The numbers here, when combined with the pricing information that is revealed in the information request itself could give competitors a very easy way to calculate whether it would be attractive to offer low-cost broadband service in competition with Time Warner in specific areas of New York State. This could substantially injure Time Warner's competitive position, particularly since it does not have comparable data for its competitors. Accordingly, the request for exception from disclosure is granted.

### **DPS-38**

The redacted portions of the response to DPS-38 contain information concerning the number of Wi-Fi hotspots deployed by Time Warner in New York, broken down by county and/or city, as well as type of hotspot (commercial or residential). They also show the numbers for Comcast broken down between home and small business hotspots, and include a statement concerning Comcast's intentions as to post-merger deployment of additional hotspots. The Companies state that this information is kept confidential by the Companies, has not been publicly disclosed, and could not be readily compiled by competitors. Its release, they say, would cause substantial competitive injury to the Companies by giving competitors insight into their current operations and future business plans. This, they argue, might be used to inform competitors' own investment in WiFi as well as the areas where they choose to deploy that investment.

Unlike the customer numbers in Exhibit 37, there is no clear nexus between the numbers provided in this response and the profitability or viability of any particular service or product offered by the Companies. The primary purpose of hotspot deployment appears to be to provide a service enhancement for subscribers to the Companies' cable services by extending their internet access to multiple locations and making it mobile. The value of that enhancement naturally depends on the number of hotspots available, and the Companies tout that number widely in their advertising. The claim that this information is confidential is simply not credible. Each company maintains a web page ( [http://www.comcast.com/wifi/index.html#about\\_xfinity](http://www.comcast.com/wifi/index.html#about_xfinity);

<http://timewarnercable.cellmaps.com/WiFi.html>) showing hotspot locations in detail. It might be tedious for a competitor to count up all the little dots on the maps, but if that had any competitive value, it could easily be done.

The statement concerning Comcast's future deployment plans post-merger is similar to those addressed in my determination concerning DPS-8, et al., above. The mere fact that Comcast does not ordinarily disclose its intentions does not imply that disclosure would cause substantial competitive injury. Nothing other than speculation has been provided to substantiate such a claim, and there is nothing in the redacted sentence from which any potential for competitive injury could be deduced.

The Companies have failed to meet their burden of demonstrating by specific, persuasive evidence that an exception from disclosure is warranted, and the request pursuant to POL §87(2)(d) and 16 N.Y.C.R.R. §6-1.3(b)(2) with respect to the redacted information in this information request response is denied.

#### **DPS-42 and DPS-47**

The responses to DPS-42 and DPS-47 contain information concerning the Companies' operations relating to the Emergency Alert System. This information is confidential, they say, has not been disclosed publicly, and disclosure would cause substantial injury to their competitive positions because it would give competitors insight into the Companies' operations. Competitors might, they suggest, use the information to implement similar operational techniques that they might not have otherwise. In addition, they say, they would "prefer" not to disclose the information because it might be used by a "mal-intentioned" individual to disrupt an emergency alert, and, thus, might be considered critical infrastructure information.

The Companies' contentions concerning the potential for competitive injury are devoid of substance and entirely speculative. Furthermore, it is difficult, if not impossible, to discern how the quality of the Companies' compliance with Emergency Alert System requirements could have any bearing on the competitiveness of their products. As far as critical infrastructure is concerned, the information included in these responses appears to be at much too high a level of generality to be of value to a "mal-intentioned" individual. The responses discuss the equipment used by the Companies and the regulations and emergency plans with which they comply. Information concerning this equipment and those plans and regulations is readily publicly available. In fact, citations pointing to the information are included in the unredacted portions of the responses.

The Companies have failed to meet their burden of demonstrating by specific, persuasive evidence that an exception from disclosure is warranted, and the request pursuant to POL §87(2)(d) and 16 N.Y.C.R.R. §6-1.3(b)(2) with respect to the redacted information in this information request response is denied.

#### **DPS-43**

The response to DPS-43 contains information concerning the number of Comcast's

Internet Essentials customers in New York, as well as Comcast's future business plans for the Internet Essentials program. The Companies say this information is kept confidential. If disclosed, they argue, competitors could alter their business strategies, service offerings, or prices to target Comcast customers based on this information.

The customer numbers, combined with pricing information that is freely advertised, could give competitors a clear picture of the revenue generated by the Internet Essentials program and perhaps influence their decisions to offer similar services. Nevertheless, it is extremely difficult to imagine any circumstances under which the competitive injury to Comcast from such decisions would be significant, much less substantial. Internet Essentials is much more a public service than a competitive offering, as indicated by the unredacted portions of this response. Again, the Companies have failed to meet their burden of demonstrating by specific, persuasive evidence that an exception from disclosure is warranted, and the request with respect to the redacted information in this information request response is denied.

#### **DPS-44 and Exhibits 44-1 and 44-2**

The response to DPS-44 and Exhibits 44-1 and 44-2 contain information concerning the Companies' cellular backhaul service operations and customers. Exhibits 44-1 and 44-2 specifically identify the cell sites currently being served by Time Warner Cable in New York and the sites that are currently pending. The Companies say this information is kept confidential, and if disclosed, could give competitors insight into the Companies' cellular backhaul operations, generally, and specifically could enable competitors to target the Companies' customers for acquisition.

The first redacted paragraph in the response to DPS-44 does nothing more than describe Exhibits 44-1 and 44-2 in the same manner that they are described publicly in the Companies' Statement. An exception from disclosure for this paragraph is denied.

With respect to the more substantive redactions, it is evident that cellular backhaul is a rapidly growing and highly competitive market. Information concerning the sites currently and prospectively served by Comcast, and the products currently under development for service to those customers would be highly valuable to the Companies' competitors, particularly since Comcast does not have access to comparable data from them. Disclosure of the information could cause substantial competitive injury to the Companies. The request for exception from disclosure is granted.

#### **Exhibit 46**

DPS-46 is a follow-up to DPS-14, requesting more detailed information concerning the broadband deployment projects described in the former information request. Exhibit 46 provides that information, showing for each project the franchise area, county, plant mileage built, number of premises passed, and the completion or planned completion date. Although, less aggregated than the data provided in response to DPS-14, the information still does not identify the location of each project beyond the town level.

The Companies say that disclosure would cause substantial injury to the competitive position of Time Warner, because the information would give competitors insight into Time Warner's operations, strategies and future plans, which competitors could use to gain a competitive advantage, particularly since Time Warner does not have reciprocal information about its competitors' deployments and plans. For example, the Companies contend, competitors could alter their deployment plans to certain locations based on this information to obtain a competitive advantage.

Once again, the Companies' support for non-disclosure is entirely general and speculative. They give no example or explanation of how a competitor might use this information to gain an advantage. Surely, that should not be a difficult task if the Companies were able to articulate what they would do with comparable information from a competitor if they had it. As it is, they provide no evidence as to how disclosure could be expected to cause them substantial competitive injury. Accordingly, the request for exception from disclosure is denied.

#### **DPS-50 and Exhibits 49 and 50**

Exhibit 49 is a compilation by region of retail rates, promotional prices, and installation costs for a range of broadband internet access services offered, or planned to be offered, by Time Warner in New York, together with information concerning the pricing of similar services by Time Warner's competitors. The Companies say this compilation is not publicly available and could not be duplicated without the expenditure of significant resources and effort.

The value to a competitor of having a full compilation of Time Warner's pricing policies for broadband internet service is obvious. Although, the information might be acquired by independent effort, the value to a competitor here, as in Encore, is in being able to avoid the time and expense of such research. Accordingly, I find that disclosure of this information would cause substantial competitive injury to Time Warner, and the request for exception from disclosure is granted.

Exhibit 50 is a similar compilation of rate information for Comcast, but covering a number of major market areas other than New York. The same reasoning applies to this exhibit as applied to Exhibit 49. Accordingly, the request for exception from disclosure is granted.

The response to DPS-50 does nothing more than describe very briefly and generally what is presented in Exhibit 50. It is impossible to discern any reason why disclosure of this response (without disclosure of Exhibit 50) could cause any substantial competitive injury to Comcast. Therefore, the request for exception from disclosure is denied.

#### **DPS-52**

DPS-52 sought information concerning the models and types of set top boxes currently used in New York by Time Warner and the company's plans for deployment of Energy Star boxes, with a timetable for roll-out and an estimate of energy and cost savings expected to be realized. The Companies have redacted significant portions of the response. They say the

information withheld concerns confidential business plans and strategies which, if disclosed, could be used by competitors to pursue similar, competing strategies.

The first redaction to the response to DPS-52, on page 11 of the Companies' response to DPS Staff's third set of information requests, and the two sentences completing the carry-over paragraph on page 12, concern past purchases of set-top boxes. It is hard to see how this information could be of benefit to competitors, and the Companies provide no specific information to support a conclusion that it would. The request for exception from disclosure as to this redacted material is denied.

The second redaction on page 11 concerns plans related to development and deployment of set-top boxes in the near future. As was the case with the response to DPS-6, it appears that the strategy described would be readily replicable by competitors, and that Comcast's concern that competitors could use the information to develop or accelerate development of competitive responses is valid. Accordingly, the request for exception from disclosure is granted.

The redacted full paragraph in the middle of page 12 discusses Time Warner's deployment of set-top boxes in general terms. There is nothing presented that would appear to have any strategic significance for the company or its competitors, and no evidence of any such significance has been presented. The request for exception from disclosure is denied.

The redaction extending from the bottom of page 12 through the middle of page 15 simply covers listings of set-top box models currently in use by Time Warner in New York. There is no evident reason for this information to be kept confidential, and none has been presented with any specificity in the Companies' statement. The request for exception from disclosure as to this redacted material is denied.

The balance of the redacted information in the response to DPS-52 describes strategies being pursued by the Companies to achieve additional energy savings from set-top equipment. This, too, is information that could be valuable to competitors and, if disclosed, could deprive the Companies of a competitive advantage they might otherwise have realized. Accordingly, the request for exception from disclosure as to this redacted material is granted.

### **Exhibits 1 and 2**

The Companies' Statement does not mention Exhibits 1 and 2 to the responses to DPS-1 and DPS-2 respectively, for which exception from disclosure was requested at the time of submission. Whether that was intended to signify a withdrawal of the requests for exception is not clear. Therefore, I will consider each record based on the rationale for non-disclosure provided with the original submissions.

Exhibit 1 is a rate sheet for Time Warner that is identical, or at least very similar, to Exhibit 49. For the same reasons stated with respect to Exhibit 49, the request for exception from disclosure of Exhibit 1 is granted.

Norlander, Helmer, Klein  
FOIL Determination

Exhibit 2 is a copy of the redacted version of an annual report submitted to the FCC concerning the Comcast-NBC Universal merger. The need for confidentiality for this document, which appears to have been intended for public disclosure by the FCC, is not apparent and is not substantiated by the general claims made by the Companies. Therefore, the request for exception from disclosure for this record is denied.

### **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 July 23, 2015, and the deadline for the receipt of any such written appeal will be August 1, 2014.

Sincerely,

/s/

David L. Prestemon  
Administrative Law Judge

cc: Robert.Freeman@dos.ny.gov  
AZoracki@KleinLawpllc.com