SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of the Application of

VERIZON NEW YORK INC., MCIMETRO ACCESS TRANSMISSION SERVICES LLC, MCI COMMUNICATIONS SERVICES LLC, METROPOLITAN FIBER SYSTEMS OF NEW YORK, INC., and XO COMMUNICATIONS SERVICES LLC,

Petitioners,

For an Order Pursuant to Article 78 of the Civil Practice Law and Rules

- against -

NEW YORK STATE PUBLIC SERVICE COMMISSION ("the Commission"), MICHELLE L. PHILLIPS, as Secretary to the Commission, NEW YORK STATE DEPARTMENT OF PUBLIC SERVICE ("the Department") and MOLLY MAGNIS, as Records Access Officer for the Department,

Respondents.

Index No. 910896-23

PETITIONERS' REPLY MEMORANDUM OF LAW
IN FURTHER SUPPORT OF ARTICLE 78 VERIFIED PETITION

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Petitioners Verizon New York Inc., MCImetro Access Transmission Services LLC, MCI Communications Services LLC, Metropolitan Fiber Systems of New York, Inc., and XO Communications Services, LLC (collectively "Verizon"), respectfully submit this Reply Memorandum of Law in further support of their Article 78 Verified Petition and Order to Show Cause for a Stay pursuant to the New York Civil Practice Law and Rules ("CPLR").

PRELIMINARY STATEMENT

Respondents' opposition memorandum of law ("Opp.") emphasizes the importance of the Freedom of Information Law ("FOIL") in preserving the "people's right to know the process of governmental decision-making." Publ. Off. Law § 84. That is an important goal, but irrelevant here. Respondents' sharing of detailed information about Verizon's copper cable network in the State of New York will not provide the public with any information about how the government makes decisions. Nor will it improve the regulatory process, since all involved State agencies already have access to the information provided by Verizon. It will serve primarily to injure Verizon and subject it to unfair competition in New York State.

On the merits of the FOIL claim, Verizon showed in its Memorandum of Law in Support of Article 78 Verified Petition and Stay ("Opening Mem.") that the detailed information at issue here, concerning the copper cables that it uses to provide service to New York customers, is both a trade secret and confidential commercial information. That showing was supported by three declarations and a Statement of Necessity. In its opposition, Respondents do not dispute that Verizon uses in its business the databases detailing the nature of its network of copper cables (lead-sheathed or otherwise), but contend that Verizon's information should not be protected because the specific form of that information requested by Respondents, was not used in Verizon's business. This form-over-substance contention is at odds with settled law.

Respondents rely on one case in their attempt to draw a distinction between information compiled from a database and the database itself, arguing that compiled information is not protected by the exemption. But that case dealt only with the government's obligations to preserve records and has no applicability here. Respondents cannot claim that the information compiled at their behest represented such an insignificant portion of the total, underlying data as to eliminate the confidential nature of the compilation. Rather, Verizon provided an inventory of confidential information that reflects the nature of its entire copper cable network in New York State.

Verizon demonstrated in its opening papers that the remaining columns of Exhibit A (*i.e.*, the ones that Respondents did not agree to except from public disclosure) provide highly detailed information regarding the nature of Verizon's copper cable network, including how much is lead-sheathed and in what environment it is deployed (aerial, underground [in conduit], buried [not in conduit], submarine, and buildings). Despite tacitly conceding that Verizon operates in a highly competitive market, Respondents contend that Verizon is simply speculating that it will be competitively injured if this information is disclosed. But Verizon's sworn declarations made by persons who work every day in that competitive environment are not speculation, and Respondents have not offered any proof to contradict those declarations. Verizon pointed to a prior example of its competitors using and misusing similar information to its disadvantage, making competitive injury likely – all that is required. Common sense dictates that providing competitors with detailed information concerning the percentage and total miles of aged lead-sheathed copper cables is giving competitors information that they can and will likely use to Verizon's detriment.

Finally, Respondents point to public statements Verizon has made regarding its copper cable network generally – statements which Respondents acknowledge are not the same as the confidential information at issue in this proceeding. Respondents rely on these limited public

statements to argue incorrectly that: (1) Verizon has waived its trade secret protection; (2) Verizon does not even have standing to bring this proceeding; and (3) the issues raised by the Verified Petition are moot. But the owner of a claimed trade secret has standing as a matter of law to try to protect that information, and Respondents also acknowledge that, other than one high-level summary figure (the total miles of copper cable in New York State), none of the other information is public. And it is that information that Verizon has demonstrated through its employees' declarations and other sources of proof is a trade secret and confidential commercial information that should be protected.

ARGUMENT

I. THE RECORDS ARE EXEMPT FROM DISCLOSURE UNDER § 87(2)(D) OF FOIL.

A. Verizon Established that Disclosure of the Nature of Verizon's Cables Constitutes Trade Secrets for Which No Further Showing Is Required.

There is no dispute that Verizon uses the databases from which the information at issue in this proceeding was derived in providing service to thousands of customers. (Ex. F ¶ 5.) Respondents nevertheless contend incorrectly that Verizon did not satisfy the first element of the trade secret standard in Section 87(2)(d) because it failed to show that it used in its business the specific inventory that Respondents requested. (Opp. at 22.) Respondents argue that Verizon did not present any evidence "that it used information as to the lengths of lead-sheathed cable in its copper network before the government's request for that information – only that the databases from which the information was compiled are potentially, trade secrets." (Opp. at 23.) But that circular claim is based on the format that Respondents requested the data.

Respondents' attempt to exclude Verizon's confidential information from the protection afforded by Section 87(2)(d) simply because the Commission asked for the information in a specific format must fail. The argument prizes the form of the information rather than the

substance, which must be rejected when considering trade secrets. *Compare Verizon New York Inc. v. Pub. Serv. Comm'n,* 991 N.Y.S.2d 841, 862 (Sup. Ct. 2014), *aff'd* 23 N.Y.S.3d 446 (3d Dept. 2016) (holding that information regarding costs and methods and procedures submitted in response to a regulatory request were trade secrets) *with Time Warner Cable Info. Servs. (New York) v. Pub. Serv. Comm'n,* Index No. 901189-18 (Albany Cnty. Sup. Ct. Jan. 28, 2019) (finding that monthly service quality reports created in response to petitioner's regulatory reporting obligations were not trade secrets).

By analogy, just as Verizon spent enormous sums of money to develop and deploy its copper cable network, software companies like Microsoft or Google expended similar resources developing the source code for Windows and the Google search source code functionality. If a regulator like the Commission requested, for example, a printout of Microsoft Windows or Google search source code, while the printout itself would not be used in Microsoft or Google's business, the underlying source code – in electronic form – would. Courts have long held that computer source code is a trade secret. *See, e.g., Agency Solutions.com v. TriZetto Grp.*, 819 F. Supp. 2d 1001, 1017, 1028 (E.D. Cal. 2011) (holding that "source code is undoubtedly a trade secret"); *Cousineau v. Microsoft*, No. 11-1438, 2014 WL 11961979, at *1 (W.D. Wash. Mar. 20, 2014) (same); *Future Fibre Techs. Pty. v. Optellios*, No. 09-346, 2010 WL 11479272, at *3 (D. Del. Sept. 22, 2010) (same). The confidential information at issue in this proceeding should not lose protection simply because it was provided in an easy-to-understand format when requested by one of Verizon's regulators.

Moreover, as discussed in Verizon's Opening Memorandum of Law, the engineering data systems from which the confidential information requested by Respondents was compiled are "vitally important to the creation, maintenance, extension, and augmentation of Verizon's

network." (*See* Opening Mem. at 15; Ex. F ¶ 5.) While it took Verizon time to compile the information from these data systems to respond to a regulatory request, that does not mean the underlying information from those data systems was not "ready for business use." (*See* Opp. at 23.) In fact, these systems are used regularly in order to reliably provision "advanced, high-quality communications services to the company's customers." (Ex. F ¶ 5.)

Respondents cite *Matter of Hearst Corp. v. New York* to argue that there is a difference between a database that qualifies as a trade secret and data culled or exported from that database, which they contend does not qualify as a trade secret. (Opp. at 24.) But *Hearst* does not support this contention. In *Hearst*, the petitioner (a publishing company) submitted a FOIL request to a state agency seeking payroll records from an Oracle database. *Matter of Hearst Corp. v. New York,* 24 Misc.3d 611, 612 (Sup. Ct. Albany Cnty. 2009). Oracle was not a party to the proceeding – it was simply the company that created the database software. At issue was whether the FOIL request was fairly characterized as a permissible request to manipulate and extract data or an impermissible request to create documents that did not previously exist. *Id.* at 614. In determining that the request was a permissible request for a data extraction, the Court noted in *dicta* that respondents "failed to demonstrate that exporting specified data from these tables into an electronic spreadsheet format would result in the disclosure of Oracle's trade secrets or that any such disclosure would cause substantial injury to Oracle's competitive position." *Id.* at 621. Here, however, Verizon, a party to the proceeding and owner of the data in its confidential databases, has made the requisite showing of trade secret protection.

Contrary to Respondents' claims that Verizon failed to show the confidential information would be useful to its competitors (Opp. at 25.),[1] the confidential information benefits competitors

[1] Verizon withdraws its argument that the confidential information would be helpful to determine the extent of Verizon's fiber optic network. *See* Verified Petition ¶ 23.

because it provides insight into other competitively relevant operational parameters relating to Verizon's network in New York. Respondents' contention that removing location-specific information would not help a competitor in a local marketing campaign (Opp. at 25) ignores that the data produced by Verizon relates solely to the State of New York. The New York State market in which Verizon operates is a geographically discrete market with a specific type of competition, one in which it "competes head-to-head with other providers offering alternative communications services using technologies similar to, or vastly different from, those used by Verizon." (Opening Mem. at 19; Ex. F ¶¶ 10-11; Ex. G ¶ 3.) The information at issue is directly relevant to competitors in that statewide market, so its disclosure could be exploited by competitors to target that market,[2] creating damaging business consequences and allowing competitors to cut into Verizon's market share. *Id.* As discussed in Verizon's Opening Memorandum of Law, the confidential information at issue here provides a roadmap for targeting Verizon's New York customers and provides detailed information about its infrastructure, which competitors can use to argue that Verizon's service offerings utilize less advanced technology than its competitors.[3] (Opening Mem. at 19.)

Respondents cite instances in which Verizon disclosed *general* information regarding the total copper cable mileage in its network and nationwide information regarding whether that cable is lead-sheathed. (Opp. at 17, 19-21, 27-29, 37-38.) But, general information about the total mileage of copper cable in its network, or an acknowledgment that portions of its copper cable network are lead-sheathed, is not the confidential information at issue Verizon seeks to protect

[2] To the extent Respondents argue that Verizon did not advance the relevant market as the State of New York before the RAO and Secretary (Opp. at 26), that argument is flawed given the very request for this information was by the State of New York and it sought statewide information, making it obvious that the relevant market would be as such.

[3] While Respondents argue that age is not a category of information in the spreadsheet (Opp. at 27), Verizon notes that the fact that Verizon's lead-sheathed cables were placed decades ago speaks to the age of the cables.

from disclosure in this proceeding. The confidential information at issue in this proceeding includes:

- The total mileage and percentage of Verizon's copper cables in New York State that are lead-sheathed;
- The total mileage and percentage of Verizon's copper cables in New York State by environment (aerial, underground [in conduit], buried [not in conduit], submarine, and buildings); and
- The total mileage and percentage of Verizon's lead-sheathed copper cable in New York State by environment.[4]

That Verizon revealed top-line information about its entire nationwide footprint generally does not mean that it revealed the specifics of its New York network so as to render this proceeding moot.

Last, Respondents argue that reputational harm resulting from the release of the confidential information does not result in protection under the analogous FOIA Exemption 4.[5] (Opp. at 32-33.) Respondents failed to point to any New York State FOIL precedent bearing on this issue. But what is at issue here is not "mere" reputational damage; it is the potential use of the information for an attack on the Verizon "brand," an attack that creates a significant potential for financial harm. As discussed in Verizon's Opening Memorandum of Law, the detailed information – even if not location specific – gives competitors an opportunity to "identify[] and target[] Verizon's service territory or customers and tailor their service offerings to the capabilities of Verizon's network." (Opening Mem. at 18.) Competitors can use this information to try to attack the age, efficiency, and safety of Verizon's network by focusing on lead-sheathed copper cable.

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[4] Information on the percentage and amount of copper cables that are lead-sheathed could shed light on Verizon's potential exposure to remediation costs, an important, and competitively relevant, financial parameter concerning its operations.

[5] FOIA exemption 4 protects "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4).

The confidential information at issue thus meets the requirements of § 87(2)(d) and should be protected from disclosure as a trade secret.

B. Verizon Established that Disclosure of the Nature of Verizon's Cables Will Create a Likelihood of Substantial Competitive Injury.

Verizon has likewise met its burden of establishing that disclosure of the confidential information will create a likelihood of substantial competitive injury. The evidence submitted by Verizon to the Secretary establishes that:

1. The confidential information provides, by wire center and, where available, by municipality, the total mileage of the copper cable network of Verizon New York Inc., broken down by the general cable environment involved, and by whether the cable in question was or was not lead-sheathed. This information is used internally by Verizon in connection with the maintenance and provision of its network in a fiercely competitive market. (Ex. F ¶¶ 3, 5, 10.)

2. The information is maintained as confidential by Verizon and is not available to Verizon's competitors. (Ex. E ¶¶ 5-10; Ex. F ¶¶ 6-8.)

3. The confidential information was created by Verizon at substantial time and expense. (Ex. F ¶ 5.)

4. The confidential information is commercially valuable, and its disclosure would likely result in lost customers and lost revenues for Verizon (a substantial competitive injury) because it would:

   a. Allow Verizon's competitors to tailor their service offerings to the capabilities of Verizon's network in the State;

   b. Provide guidance on how to compete against Verizon more effectively; and

   c. Put competitors in a better position to increase their market share and poach customers from Verizon by suggesting that Verizon's technology and networks are inferior to theirs. (Ex. F ¶¶ 10-11.)

Only the last point is disputed, with Respondents claiming that Verizon did not present that it suffered actual competitive harm as a result of its whispering campaign example. (Opp. at 35.)

That claim misapplies the standard in *Encore Coll. Bookstores v. Auxiliary Serv. Corp.*, the leading precedent on the applicability of the "confidential commercial information" branch of the

§ 87(2)(d) exemption. The Court in *Encore* rejected the assertion that actual competitive harm is required and instead holds that "actual competition and the likelihood of substantial competitive injury is all that need be shown." 87 N.Y.2d 410, 421 (1995) (quoting *Gulf v. W. Indus. v. United States*, 615 F.2d 527, 530 (D.C. Cir. 1979)). Respondents do not dispute that Verizon competes in a competitive market, so the only issue is whether there is a "likelihood" of a competitive injury. Verizon has made this showing. The whispering campaign discussed in the declarations was just an example of the type of competitive harm that likely could result from the disclosure of information regarding the safety of Verizon's network. Fortunately, in that case, Verizon was able to stop its competitor from continuing to target its customers by issuing a cease-and-desist letter, thereby stopping it from trying to steal Verizon's customers and hurt its overall competitive position in that market. (Opening Mem. at 20; Ex. F.) As discussed earlier, the same likelihood of substantial competitive injury exists here.

Once again, Respondents argue incorrectly that there is no competitive harm because some limited general information regarding the existence of lead-sheathed cable in Verizon's copper network was made public. (Opp. at 35.) But that claim lacks legal support; just because a competitor might be able to attack Verizon based on publicly disclosed information, that does not mean that additional, more detailed, confidential information should also be disclosed so that competitors can mount an even better campaign that would unfairly injure Verizon. As noted *supra* pages 6-7, the remaining information at issue in Exhibit A is different and more detailed than what was made public by Verizon, and it is likely that competitors will take advantage. And even if partial disclosure of the information had occurred, courts have agreed that full disclosure of the information is still protected. *See Broker Genius, Inc. v. Zalta*, 280 F. Supp. 3d 495, 518 (S.D.N.Y. 2017) (holding that plaintiffs could still have a viable trade secret claim "if elements of

the trade secret [went] beyond what was disclosed"); *see also ISC-Bunker Ramo Corp. v. Altech, Inc.*, 765 F. Supp. 1310, 1334 (N.D. Ill. 1990) ("[Plaintiff's] partial disclosures to third parties who are under obligations of confidentiality do not alter the trade secret status of [Plaintiff's] computer programs, compilations, technical information and procedures."); *West Shore Home, LLC v. Graeser*, No. 22-cv-499, 2023 WL 2504759, at *10 (M.D. Pa. Mar. 14, 2023).

Last, Respondents contend that Verizon has not demonstrated what competitive disadvantage it would experience from the disclosure of this data, given it is now outdated. (Opp. at 38.) Verizon acknowledges that this information was subsequently refined (and may be further refined in the future due to the comprehensive and time-consuming nature of compiling what was requested by the Respondents). In fact, Verizon disclosed that this information was being updated in its appeal of the RAO Determination and in the spirit of cooperation and providing the most accurate and up-to-date information to the regulators, Verizon produced an updated inventory of records on September 8, 2023, and October 26, 2023. Even if it was subsequently refined, the confidential information at issue here is detailed and allows competitors to attack the safety and/or inferiority of Verizon's network. Further, the specific challenges raised by competitors could be based on outdated or incorrect information, forcing Verizon into the position of having to refute inaccuracies that have the imprimatur of government-sanctioned records.

II. VERIZON HAS STANDING UNDER CPLR § 3211.

In another circular argument, Respondents contend that Verizon does not have standing to bring this Article 78 proceeding "because Verizon's public statements have revealed large portions of the information it seeks to redact," thus rendering this proceeding "both moot and not redressable." (Opp. at 16-17.) According to Respondents, a "decision in this matter would not redress or prevent" Verizon's concerns because "Verizon has already publicly disclosed the length

of its copper network, both in New York and nationwide, and acknowledged that portions of its copper network are lead-sheathed." (Opp. at 17.)

While partial public disclosure might, to some extent, impact factors bearing on whether information is a trade secret (as discussed *supra)*, it does not impact standing, and Respondents cite no authority to support this proposition. Respondents do not dispute that with the exception of one data point (*i.e.*, the total miles of Verizon's copper cables in New York State), the remaining information in Exhibit A is not public. And Respondents do not cite a single case that stands for the proposition that the owner of a claimed trade secret does not have standing to try to limit its public disclosure. To have standing to bring an Article 78 proceeding, a petitioner need only allege it seeks redress for harm that is in some way different from that of the public and that the injury falls within the zone of interests sought to be protected by the statutory provision under which the agency has acted. *See Wittenberg Sportsmen's Club, Inc. v. Woodstock Planning Bd.*, 792 N.Y.S.2d 661, 663 (3d Dept. 2005) (citing *Society of Plastics Indus. v. County of Suffolk,* 77 N.Y.2d 761, 774, 570 N.Y.S.2d 778, 573 N.E.2d 1034 (1991)). Verizon's injury is of course different than that of the general public because only Verizon's confidential information will be disclosed. As discussed previously, Verizon will suffer direct harm should the confidential information at issue be disclosed, and its Verified Petition falls within the zone of interests created by Publ. Off. Law §§ 87(2)(d) and 89(5), under which the agency acted.

Respondents also rely on *Associated Gen. Contrs. of N.Y. State, v. Dormitory Auth. of the State of N.Y.* ("*Associated General Contractors*") to argue that Article 78 proceedings are rendered moot where those proceedings seek the release of information or documents pursuant to FOIL that have already been released. (Opp. at 15-16.) In *Associated General Contractors*, all of the information at issue had been disclosed. 173 A.D.3d 1523, 1525 (3d Dept. 2019), *app. denied* 34

N.Y.3d 906 (2019). Verizon does not dispute that it publicly disclosed general, high-level information regarding the total length of its copper cable network. Nor does it dispute that it has disclosed the very fact that it has some lead-sheathed cable in its network nationwide. But it has not provided the public with the detailed confidential information at issue in this proceeding, and, as discussed above, Verizon has not disclosed this information to anyone else. Otherwise, Verizon would not have brought this proceeding to protect it. Moreover, as discussed in Verizon's prior pleadings, the information Verizon is seeking to protect from disclosure is, in fact, confidential. It is not publicly available and cannot be replicated, absent disclosure under the statute.

Accordingly, Verizon has standing to pursue its claims in this proceeding.

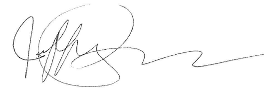
CONCLUSION

For the foregoing reasons, and for the reasons set forth in its Opening Memorandum of Law, Petitioners Verizon New York Inc., MCImetro Access Transmission Services LLC, MCI Communications Services LLC, Metropolitan Fiber Systems of New York, Inc., and XO Communications Services, LLC respectfully request that the Court grant the Petition in its entirety, permanently enjoin Respondents from enforcing the RAO's and Secretary's Determinations and from disclosing the Records, and grant Petitioners such other and further relief as the Court deems appropriate.

Dated: New York, New York
December 13, 2023

Respectfully submitted,

MCGUIREWOODS, LLP



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CERTIFICATION OF WORD COUNT

Jeffrey J. Chapman certifies that the foregoing memorandum of law contains 3,819 words, exclusive of the caption, signature block, table of authorities and contents, and the certification page, based on the word count provided by the word-processing system used to prepare this document, and that this memorandum complies with the word count limit under the Uniform Rules for N.Y. State Trial Courts § 202.8-b because it contains fewer than 4,200 words.

Dated: New York, New York
December 13, 2023

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