

Proceedings

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STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

VERIZON NY, INC., ET AL,

Petitioner,

-against- No.: 910896-23

NEW YORK STATE PUBLIC SERVICE COMMISSION, ET AL,

Respondent.

SHOW CAUSE ORDER APPLICATION/TRO

Albany County Supreme Court
16 Eagle Street
Albany, New York 12207
November 15, 2023

B E F O R E:

HONORABLE PETER A. LYNCH,
Supreme Court Justice

Shannon L. Hostash
Columbia County Court Reporter

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A P P E A R A N C E S

McGuireWoods LLP
Attorneys for the Petitioner
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New York, New York 10020
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Attorneys for the Respondent
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BY: JOHN SIPOS, Deputy General Counsel
JOHN C. GRAHAM, Assistant Counsel

Also Present:
Stehle Hetman, Law Clerk
Lisa Santillo, Court Clerk

(VERIZON NY vs. NYS PSC)

1 THE COURT: Okay. So this is the matter of
2 the application of Verizon, Inc., et al. It's an
3 Article 78 proceeding against the New York State
4 Public Service Commission, et al.

5 I do note that the Notice of Petition and
6 Petition on the Article 78 are returnable on 12/15.

7 Counsel, let's put our appearances on the
8 record here.

9 MR. CHAPMAN: Thank you, Your Honor.

10 Jeff Chapman and Lauren Mann from
11 McGuireWoods for Verizon New York, et al.,
12 petitioners.

13 MR. SIPOS: And good afternoon, Your Honor.

14 John Sipos, deputy general counsel, for the
15 New York Department of Public Service. And my
16 colleague, deputy solicitor, John Graham.

17 THE COURT: Okay. A couple of things.

18 First of all, there was some confusion.
19 And to the extent that, you know, you had filed your
20 proposed Show Cause Order with voluminous documents,
21 and, of course, they needed to be reviewed.

22 And I, in looking at that, did not focus on
23 a sentence in your application that you wanted to
24 have oral argument on the application. I was going
25 to decide this case on the papers submitted.

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1 Then, received a call from the clerk's
2 office that you all were there at the counter, ready
3 to roll. So I scheduled it for 2:00. And to the
4 extent that you have been inconvenienced, you have my
5 apology. But the practice here is that, in the
6 ordinary course, motions are on paper. And requests
7 for oral argument are not assumed.

8 You have to actually -- whoever the
9 assigned judge is, communicate with them, and ask
10 them if you can have oral argument. So that there's
11 no unfortunate delay that you all suffered today,
12 which I appreciate is problematic for you. But the
13 better practice is to contact chambers, call us, let
14 us know, so we can accommodate your request.

15 So let's talk about this, because I have
16 had an opportunity to review the application.

17 Now, your records access officer issued her
18 Decision on October 10.

19 MR. CHAPMAN: Yes, Your Honor.

20 THE COURT: Filing partially that some of
21 the information was exempt, others not. You had an
22 immense favor of an appeal that was upheld by the
23 secretary by Decision dated November 1st.

24 So here we are now almost two weeks later.
25 And I do note that as part of your application, you

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1 did provide sworn affidavits from three individuals:
2 Declarations, if you will, of David Kass, K-A-S-S,
3 NYSCEF Doc Number 9; Danielle Lasky, L-A-S-K-Y,
4 NYSCEF Doc 10; and a Declaration of Daniel Maloney,
5 NYSCEF Doc 11.

6 And I do note that the records access
7 officer had addressed Maloney in her Decision. I
8 don't recall right now if the records access officer
9 addressed Kass and Lasky, but let's get back to the
10 basic question that we have here today.

11 You're seeking a stay of the respondents
12 releasing information in response to a FOIL request
13 that had been filed by several individuals.

14 MR. CHAPMAN: I believe it was a reporter
15 from the Wall Street Journal, Your Honor.

16 THE COURT: Yes. And I'm trying to see
17 the -- yes, you've got Shalini, S-H-A-L-I-N-A --
18 I-N-I, excuse me, Ramachandran,
19 R-A-M-A-C-H-A-N-D-R-A-N, from the Wall Street Journal
20 had filed that FOIL request.

21 So, Counsel, let's talk about the
22 likelihood of success on the merits.

23 MR. CHAPMAN: Thank you, Your Honor.

24 I want --

25 THE COURT: And one other thing, and I

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1 should have said this: It's okay to sit down. And I
2 prefer it if you use the microphone just for the
3 acoustics.

4 MR. CHAPMAN: Sure. Very good, Your Honor.
5 Happy to do that.

6 I'm happy to address that. I do want to
7 explain to the Court why I came up here from New York
8 City to do this this morning. And the reason I did
9 that is because the Public Service Commission's
10 Decision would become effective tomorrow under the
11 Records Act.

12 THE COURT: I don't have any problem with
13 that --

14 MR. CHAPMAN: Okay.

15 THE COURT: -- but just call us the next
16 time.

17 MR. CHAPMAN: I understand that, Your
18 Honor. I know the procedure and will follow it.

19 So that is sort of the irreparable harm
20 that once this is out here, our Petition is moot.

21 THE COURT: Your allegation is essentially
22 that this is protected commercial information because
23 it would give a competitor an unfair advantage based
24 on the technology and the information you've
25 developed, and you also argued that it falls within

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1 the trade secret exception to the Public Officers
2 Law, vis-a-vis disclosure.

3 So you're claiming irreparable harm, but
4 what is your likelihood of success on the merits?

5 MR. CHAPMAN: We feel very strongly about
6 that, Your Honor.

7 In order for something to become a trade
8 secret, it first needs to be something that you keep
9 confidential. The affidavits we submitted indicate
10 that we keep this confidential. It is not public.
11 Our competitors likely have the same information.
12 They don't know how we keep our networks. They don't
13 know how we keep our networks. It is also something
14 that is essentially -- if I may, just a little bit
15 background.

16 There's two types of fiber optic -- two
17 types of cables by which Verizon and other
18 competitors deliver services. Copper, and more
19 recently and technologically superior, fiber optic
20 cables.

21 And this request is focused on detailed
22 information about how much copper cable we have in
23 the State of New York. Whether it is in the air,
24 underground, in buildings, in a marine environment,
25 all of which we believe if our competitors have this

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1 information, they can target our service offerings in
2 New York by saying Verizon has old, stale cable. We
3 have good fiber optics. They could even adopt some
4 of the standards that the Wall Street Journal has
5 said, which is that this is dangerous.

6 And we've shown example where Cablevision
7 has tried to go out to customers and say our fiber
8 optic cables were in danger. Were a danger. So they
9 could say well, the lead sheath copper cable is also
10 a danger.

11 So the information has value by not being
12 publicly disclosed. And that's our primary argument.

13 THE COURT: And the irreparable harm, but
14 for the stay, if you turn -- if this information is
15 released, would that basically render the Article 78
16 academic?

17 MR. CHAPMAN: I rarely say that something
18 would be moot that I've just filed, but, Your Honor,
19 it's pretty darn close, because that is the relief we
20 are seeking. We feel that relief has meaning. We
21 have that right.

22 And we'd simply like the opportunity to
23 pursue it on the balancing of sort of the equities.
24 I don't know anything that is going to change
25 significantly or any problem that's going to occur if

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1 this information remains confidential for a brief
2 period of time while this Court hears the Article 78
3 merits.

4 THE COURT: Is it your contention that a
5 monetary remedy would not be adequate? That the
6 equitable relief is necessary to preserve the
7 integrity of your company?

8 MR. CHAPMAN: That is correct. Service
9 status quo. Exactly.

10 THE COURT: Balancing the equities given
11 the obvious that FOIL is designed for public
12 disclosure, you've got a reporter seeking the
13 information, you've got the Public Service Commission
14 tasked with the work at hand. Balancing the
15 equities, do they weigh in your favor?

16 MR. CHAPMAN: I think they do, Your Honor.

17 As I said, the reporter has requested the
18 information, the Public Service Commission as well as
19 the New York State Department of Environmental
20 Protection Agency have this information in
21 un-redacted form. They're doing their jobs to keep
22 New Yorkers safe.

23 Verizon takes the safety of the people of
24 New York very seriously, but we also take our trade
25 secrets very seriously. And I think in the balance

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1 of the equities, I don't think that anything is going
2 to change in the -- measured in weeks how long this
3 proceeding is going to happen.

4 I've asked the Public Service Commission if
5 they would agree to a stay, but they did not. I'm
6 sure they had their reasons, but that's why we're
7 here.

8 THE COURT: We are going to find out.

9 MR. CHAPMAN: Yes.

10 THE COURT: So what would be the harm to
11 the reporter seeking the information and/or to the
12 Public Service Commission and just carrying out their
13 work complying with a FOIL request? What would be
14 the harm to wait until such time as there's a merits
15 determination on the underlying Article 78?

16 In other words, what would be the harm of a
17 stay to the other parties?

18 MR. CHAPMAN: I don't believe there would
19 be any harm, Your Honor.

20 I don't know that the Wall Street Journal
21 attorney or lawyer or pardon me, reporter has a
22 planned story or an imminent deadline. I don't know
23 of any eminent crisis at the Public Service
24 Commission as to why this information needs to become
25 public right now.

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1 So I don't know if any harm would occur if
2 the status quo were preserved.

3 THE COURT: Okay. All right. So John has
4 argued.

5 Lauren, is there anything you want to add
6 before I move over to the other side?

7 MS. MANN: Nothing to add.

8 THE COURT: Okay.

9 Counsel, go ahead.

10 MR. SIPOS: Good afternoon, Your Honor.

11 I hope you can hear me from this
12 microphone.

13 THE COURT: I can.

14 MR. SIPOS: But not necessarily used to the
15 acoustics in this courtroom, so please let me know if
16 I'm trailing off.

17 John Sipos, deputy general counsel, for the
18 Public Service Commission.

19 To take a couple of steps back, Your Honor,
20 as the Court acknowledged, there is a presumption
21 under the Freedom of Information Act. The Public
22 Officers Law that documents within the possession of
23 state agencies are available for the public review.
24 And Section 84 of the Public Officers Law lays out
25 the legislative findings and the public policy behind

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1 it.

2 And there's also a statement in there that,
3 you know, for agencies such as ours, says, documents
4 should not be withheld. I believe the phrase is --
5 you know, the public access should not be thwarted by
6 shrouding it, the documents, the information with the
7 cloak of secrecy or confidentiality.

8 So that's our basic admonition to us:
9 That, at the agency that we started --

10 THE COURT: But there are exceptions?

11 MR. SIPOS: There are certainly exceptions,
12 Your Honor, absolutely. We are not contesting that.
13 Exceptions, however, should be construed narrowly in
14 the normal statutory construction for exceptions.

15 In this --

16 THE COURT: Well, the petitioner has relied
17 quite a bit on Encore?

18 MR. SIPOS: Yes.

19 The petitioners assert that the records
20 access officer and then the secretary, the two
21 decision-makers at the Public Service Commission,
22 misapplied that. We disagree.

23 The records access officer Decision is ten
24 10 pages. I would say, it's one of the more thorough
25 FOIL determinations by a state agency. And the

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1 secretary on appeal issued a five-page ruling
2 discussing all of those.

3 And just to the one point that you asked
4 about, where certain Declarations referenced in the
5 records access officer's determination. I was just
6 flipping through it while you were asking that
7 question. And I noted that in addition to Maloney,
8 Kass was also mentioned, I believe, in Footnote --

9 THE COURT: Okay.

10 MR. SIPOS: -- 27. Just that it's a very
11 fast review of that.

12 And so, in this case, it -- the position
13 that I would present to the Court today is
14 Mr. Chapman said Verizon is concerned if a competitor
15 said, well, Verizon has old, stale cables. I think
16 that was one of the concerns.

17 And I would just -- I would note for the
18 record, and it was noted in the secretary's ruling,
19 the DPS secretary's ruling, that Verizon has made
20 public statements about the presence of lead cables
21 on its network. And I have the secretary --
22 secretary, Michelle Phillips, cited to a
23 September 11, 2023, letter from Verizon to United
24 States Representative Ryan, which, in sum and
25 substance --

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1 THE COURT: Okay. What page is that on,
2 John?

3 MR. SIPOS: That is towards the last page
4 of her ruling, and it's the second-to-last -- it's
5 the last footnote. Footnote 31. There's a hyperlink
6 there. And I have a copy of that letter, and I also
7 have a copy of it for Mr. Chapman as well.

8 THE COURT: That Footnote 31 just
9 references a link. I had not a chance to review
10 that.

11 So is the secretary saying that this
12 information about the make-up of the cable lines, or
13 the copper, has distinguished a more modern
14 technology of fiber optics has already been disclosed
15 by Verizon to the public?

16 MR. SIPOS: In sum and substance, yes.

17 Secretary Phillips noted that Verizon has
18 already publicly acknowledged that portions of its
19 cables contain lead sheath cables. That's on
20 pages 4 and 5 of her ruling.

21 THE COURT: Okay. So assume that.

22 The petitioners argument is that, hey, look
23 it. The PSC requested that Verizon file their data,
24 for lack of a better word, with the PSC, and they did
25 so.

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1 And the contention of the petitioner is
2 that this isn't just a portion of their cable
3 network; it's all of it within the State of New York.

4 So would it make a difference if the public
5 knew. Okay. There are some of these copper lead
6 lines as one disclosure versus here's all the lines
7 in the State of New York, and here's how much of it
8 is comprised of that older technology.

9 Would that make a difference?

10 MR. SIPOS: Respectfully, I think it would
11 not make a difference. Verizon has made public
12 statements that a portion of their network contains
13 lead sheath cables. And the information in the
14 document that we are talking about essentially
15 confirms that. If I could, I don't want to speak
16 generally because we are in open court, but it is
17 consistent, and it confirms that.

18 And as to Your Honor's request about the
19 hyperlink in the secretary's ruling, you are correct.
20 There's actually another next step to go to find the
21 letter to -- the entire letter to Representative
22 Ryan. And I just note that for the record. But we
23 do have that here, and that is what the secretary was
24 referring to. So I would be happy to share that with
25 you or not.

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1 THE COURT: Just at this juncture, I'm
2 simply entertaining a Show Cause Order Application
3 with the TRO in my capacity as the Part 1 judge.

4 MR. SIPOS: Understood, Your Honor.

5 THE COURT: I do not know if I am going to
6 be assigned this case or not. And, clearly, on
7 assignment of the case, the Court would have a
8 greater opportunity to review everything.

9 Bear in mind, this submission was after
10 3:00 yesterday afternoon out of the blue, and, you
11 know, there's other things going on.

12 MR. SIPOS: Yes, Your Honor.

13 THE COURT: Okay.

14 So, with that said, though, your contention
15 is the extent of the old types of lines is not the
16 key issue. The key issue is it's been disclosed they
17 have those kinds of lines.

18 MR. SIPOS: That is correct.

19 We are looking at -- you know, we are also
20 rapidly evaluating the filings that Verizon made.

21 And I guess on that point, I would just
22 also note in the Wall Street Journal article that
23 initiated -- if I could use that word -- the process
24 I guess that as to -- that is leading us to where we
25 are here today. I will just note that in the July 9,

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1 2023, Wall Street Journal article there is a
2 quotation from a written statement from Verizon, and
3 I'll just read it into the record, if I may.

4 Quote: There are many lead sheath cables
5 in our network (and elsewhere in the industry) that
6 are still used in providing critical voice and data
7 services, et cetera, et cetera. Close quote.

8 So that's another example of it of the
9 statement already being out in the public square, if
10 you will.

11 And, so, you know, respectfully, the Public
12 Service Commission's view here today is the
13 information is out, and from what Verizon had made
14 public statements. And, now -- and this is, you
15 know, no aspersion at all to Mr. Chapman, Verizon's
16 essentially seeking to use the Public Officers Law as
17 both a sword and a shield. They get to make public
18 statements, but they don't want some columns in this
19 document to be released.

20 THE COURT: Well, the records access
21 officer did find that part of the information was
22 confident.

23 MR. SIPOS: That is correct, Your Honor.
24 In fact, there are some columns in it.

25 So Verizon actually partially prevailed

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1 before the records access officer and the Public
2 Service Commission's secretary, Michelle Phillips.
3 So, you know, portions of the documents will be
4 redacted based on their two rulings. And portions of
5 the document they found were not subject to
6 non-disclosure.

7 So they evaluated it carefully. It was a
8 Solomonic Decision on their part. And given
9 Verizon's statements, as I said, they had already
10 made their statements out -- out to the public in the
11 public square.

12 THE COURT: So your contention is that the
13 administrative review was reasoned based on the
14 administrative record before them and properly
15 applied the law?

16 MR. SIPOS: Yes, Your Honor.

17 THE COURT: Okay.

18 John Graham, do you want to add anything?

19 MR. GRAHAM: No. Thank you, Your Honor.

20 THE COURT: Okay. We'll come back to you
21 guys.

22 MR. CHAPMAN: Thank you, Your Honor.

23 I don't doubt for a minute the Public
24 Service Commission gave this thought and tried to
25 come to the right decision. We disagree with that.

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1 We think that there are errors in the law and use
2 discretion, which are appropriate for review under
3 Article 78.

4 And we are here today only on a stay
5 because we want to make that review meaningful.

6 THE COURT: Which necessitates a finding
7 that there's a likelihood of success on the merits,
8 that there would be irreparable harm, but for the
9 granting of the stay. And balancing the equities as
10 a stay would be appropriate while the merits of the
11 underlying 78 are determined.

12 MR. CHAPMAN: Yes, indeed, Your Honor.

13 THE COURT: How about counsel's argument a
14 moment ago. Hey, look it, Verizon has already gone
15 public with this information. So, basically, what's
16 the big deal. You tell me.

17 MR. CHAPMAN: We have not gone public with
18 the information that is contained in Exhibit A.

19 The statement that he pointed to, I
20 believe, says only in sum and substance that we have
21 some lead sheath cables.

22 And the other statement about "many" was a
23 statement about what both Verizon had, and what we
24 believe our competition has.

25 What would happen if this information would

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1 become public is the precise amount of cables and not
2 just the total precise amount in cables, but how
3 they're deployed. Are they in the air, are they in
4 water, are they in buildings, are they lead sheaths,
5 are they buried? That is a road map to our
6 competitor.

7 THE COURT: So if I'm a competitor --

8 MR. CHAPMAN: Yes.

9 THE COURT: -- and I've got the newest
10 technology in fiber optics, and I find out about the
11 specifics of this old type of line. Is it your
12 contention, I gathered from your papers, that I, as
13 the competitor, can go target the customer --

14 MR. CHAPMAN: Yes, Your Honor.

15 THE COURT: -- in the head? You guys are
16 using old stuff, and we have the new stuff?

17 MR. CHAPMAN: Exactly.

18 And because Verizon would not know this
19 about its competitors, we would not be able to
20 respond. That's the asymmetry. And that is what we
21 believe is the unfair aspect of it.

22 And, again, we did make a public statement
23 to say that we have this. It's a binary issue, but
24 no one knows if we have this much, this much, or this
25 much, and where it is and how it's deployed. And

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1 that's the information that we believe is
2 confidential. We have taken great pains and spent a
3 lot of money to build this network and to keep it
4 confidential. It has value.

5 THE COURT: Okay. I'm going to ask you all
6 to give me about a ten-minute break. I'm going to go
7 up to chambers for a few minutes, think about your
8 respective arguments, and take another look at some
9 of the documents. And I'll be back down in about
10 ten.

11 MR. CHAPMAN: Thank you, Your Honor.

12 MR. SIPOS: Your Honor, I hate to be the
13 last person between you and going back to chambers.
14 Would you like to see the Wall Street Journal article
15 or the letter to Representative Ryan?

16 THE COURT: No, I don't have to see that.

17 MR. SIPOS: Okay. Fine.

18 THE COURT: I'm taking your representation
19 as to what was said as truthful and accurate.

20 MR. SIPOS: Very good, Your Honor. Thank
21 you.

22 THE COURT: Okay. I'll be back in ten
23 minutes.

24 (Whereupon, a recess was held from
25 2:25 p.m. to 2:42 p.m.)

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1 THE COURT: Okay. We are back in session.

2 I have had an opportunity to reflect on the
3 arguments that have been made and based on my review,
4 I really do think there is a distinction between --
5 of Verizon making a statement that they have some old
6 copper leadlines from the identification specifics.

7 Without prejudging the case, one of the
8 difficult issues on a preliminary injunction is the
9 likelihood of success on the merits. And as I've
10 indicated to you, I don't know if this case is going
11 to be assigned to me or not, but any determination on
12 that issue is simply preliminary. And really, has no
13 weight on the final determination of the Article 78
14 proceeding.

15 It appears to me that there is at least a
16 volatile argument by the petitioners that there may,
17 in fact, be a likelihood of success on the merits of
18 this issue.

19 Irreparable harm, I think, is fundamentally
20 clear. And I saw that the records access officer
21 didn't really think that that was the case, but I
22 don't agree.

23 If you're in a highly competitive business
24 and that competitor is given an edge based on your
25 records, I think that there is at least a viable

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1 good-faith basis to indicate that, but for the grant
2 of the stay, Verizon will suffer an irreparable
3 injury.

4 Balancing the equities, I think it's clear
5 that a short delay given the fact that this Article
6 78 proceeding is returnable on December 15.

7 Balancing the equities, both parties should
8 be given a full and fair opportunity to litigate the
9 merits. And I do think that the equities weigh in
10 favor of Verizon to have this stay. I don't see any
11 real harm to the FOIL applicants here.

12 Notwithstanding the fact that FOIL is
13 designed to make information public, it's also ladled
14 with clear exemptions. And I think it is
15 fundamentally unfair to require Verizon to submit
16 this information as part of the regulatory process
17 and then, at the same time, disclose it to the public
18 to give the competitors an unfair advantage.

19 So the application for the stay is granted.

20 Now, I am going to distribute in a moment
21 the Show Cause Order I've made returnable on
22 December 15 at 9:30 a.m., which is the time and date
23 of the return date of the Article 78 proceeding.

24 I note that you, once again, have the line
25 oral argument is requested on the return date of this

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1 motion, and I put a little asterisk on that. Oral
2 argument must be authorized by the assigned justice.
3 It may very well be that the assigned justice will
4 want to hear from you, and it may be that they'll
5 determine it based on the papers, but don't show up
6 on December 15 at 9:30 a.m. unless you've cleared the
7 path for that.

8 MR. CHAPMAN: I understand, Your Honor.

9 THE COURT: Now, you've proposed that John
10 Sipos be served in person or by mail. He's here. In
11 a moment, I'm going to have my clerk distribute them.
12 And just so for technical purposes, we'll give the
13 copies to you, Jeff Chapman, and you can hand a copy
14 to John Sipos. Two copies, actually.

15 Of course, you would still have to serve
16 the attorney general by tomorrow.

17 I've made the responding papers 20 days
18 from today, December 5. Reply papers December 13.
19 And so my law clerk will upload the original Order on
20 the E-filing, and will be distributing the copies
21 now.

22 MR. CHAPMAN: Thank you, Your Honor.

23 MR. SIPOS: Thanks.

24 THE COURT: You acknowledge receipt?

25 MR. SIPOS: I acknowledge receipt, Your

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Honor.

THE COURT: Okay. All right.

So that concludes the matter today. Have a safe trip back on the train.

(Whereupon, at 2:47 p.m., the proceedings in the above-entitled matter concluded.)

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C E R T I F I C A T I O N

I, Shannon L. Hostash, hereby certify and say that I am an Official Court Reporter and Notary Public within and for the State of New York; that I acted as the Court Reporter at the proceedings herein, and that the transcript to which this originally-signed certification is annexed, is a true, accurate, and complete record of the minutes of the proceedings to the best of my knowledge and belief.

Shannon L. Hostash

Shannon L. Hostash,
Court Reporter

Shannon L. Hostash
Columbia County Court Reporter

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