SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of the Application of

VERIZON NEW YORK INC.,

Petitioner,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules

- against -

NEW YORK STATE PUBLIC SERVICE COMMISSION, KATHLEEN H. BURGESS, as Secretary to the Commission, NEW YORK STATE DEPARTMENT OF PUBLIC SERVICE and DONNA M. GILIBERTO, as Records Officer for the Department,

Respondents.

ALBANY COUNTY
INDEX NO.: 6735-2013

MEMORANDUM OF LAW OF RESPONDENTS PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK AND NEW YORK STATE DEPARTMENT OF PUBLIC SERVICE

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PRELIMINARY STATEMENT

Petitioner Verizon New York (Verizon, VNY) seeks sweeping exemptions from public disclosure under the Freedom of Information Law (FOIL), Public Officers Law (POL) §§ 84-90, for interrogatory responses Verizon submitted to the New York State Department of Public Service (Department). The Secretary of the Public Service Commission of the State of New York (Commission, PSC) found that Verizon had failed to meet its burden of demonstrating a particularized and specific justification, supported by evidence, for almost complete denial of

public access to the interrogatory responses. The Secretary explained which documents, or portions thereof, might warrant protection pursuant to the "trade secret" exception from disclosure under FOIL. Instead of resubmitting the documents, Verizon commenced the instant proceeding to overturn the Secretary's Determination.

VNY maintains that, because the records at issue constitute trade secrets, such records were exempt from disclosure as a matter of law. It claims that the Secretary and the Department's Records Access Officer (RAO) "conceded" that the material Verizon seeks to protect is "trade secret" (VNY Brief at 2). Verizon further contends that, even if it needed to show a likelihood of substantial competitive injury, it exceeded its burden of proof. It also argues that the Secretary was required to protect the documents because Department Administrative Law Judges (ALJs) have protected similar information in other proceedings.

The Secretary's finding that Verizon failed to meet its burden of proving that the likelihood of substantial competitive injury warranted exemption of the entirety of the documents from disclosure is supported by the controlling precedent under FOIL and the record evidence. Verizon's arguments reflect a lack of appreciation of its burden in exempting trade secret material from disclosure. That burden includes making evidentiary showings as needed and redacting documents as appropriate. VNY attempts to escape its statutory burden in four respects.

First, Verizon incorrectly attempts to avoid meeting the substantial competitive injury test. Under FOIL, POL § 87 (2) (d), PSC regulations, 16 NYCRR § 6-1.3 (b) (2), and relevant case law, an entity resisting public disclosure pursuant to the "trade secret" exemption must demonstrate that the records at issue constitute trade secret material and that the disclosure of

such records would cause it substantial competitive injury. Thus, contrary to Verizon's claims, trade secret materials are not exempt from disclosure as a matter of law.

Second, the Secretary properly determined that Verizon failed to meet its burden of proving that blanket exemptions from disclosure were needed to avoid a likelihood of substantial competitive injury. The evidence submitted by Verizon, including three declarations accepted on appeal by the Secretary, failed to allege specific and particularized facts necessary to support a finding of a likelihood of substantial competitive injury from disclosure of Verizon's aggregate cost information and its "methods and procedures" ["M&Ps"] in toto. Inasmuch as Verizon failed to meet its burden, the Secretary properly denied VNY blanket protection under the "trade secret" exemption.

Third, despite Verizon's argument to the contrary, neither the Secretary nor the RAO was required to explain their alleged departure from rulings of ALJs in previous proceedings. Verizon had the burden of demonstrating how the ALJ rulings were compatible to the facts of the instant matter, and failed to meet that burden.

Fourth, since Verizon had the burden of "proving entitlement to the exception" under POL § 89 (5) (e), it, not the Secretary, was responsible for redacting information found to be protected. POL § 89 (5) applies where, as here, an entity seeks to resist disclosure of records from a state agency. VNY's statement of necessity and the accompanying redactions, filed under 16 NYCRR § 6-1.3 (f) (2), have been found inadequate insofar as they sought to protect aggregate cost data and the totality of the "methods and procedures" documents. Verizon, not the Secretary, should be responsible for correcting the flaws in its filing by performing the appropriate redactions.

STATEMENT OF FACTS

A. Verizon's Submission of Documents in Connection with its Tariff Filing and the FOIL Request

In May 2013, Department Staff propounded a series of interrogatories (IRs) in connection with Verizon's telephone service on Fire Island. Fire Island is a barrier island located off the southern shore of Long Island. Verizon's facilities and infrastructure on Fire Island were badly damaged by Hurricane Sandy. Instead of replacing the damaged facilities and lines, Verizon proposed to discontinue its current wireline service offerings in the western portion of Fire Island and offer a wireless service as its sole offering.[1] Verizon submitted written replies and documents in response to Staff's IRs and sought blanket protection from disclosure of such records pursuant to POL § 87 (2) (d) and 16 NYCRR § 6-1.3. Verizon Verified Petition, Exhibit ("Pet. Exh.") A.

On September 16, 2013, Richard Brodsky, Esq. made a FOIL request on behalf of Common Cause New York, Communication Workers of America, Region I, Consumers Union, and Fire Island Association (the CWA Group) for Verizon's responses to certain IRs. On September 23, 2013, pursuant to POL § 89 (b) (2) and 16 NYCRR § 6-1.3 (f) (2), the RAO advised Verizon of the CWA Group's request and her intention to determine the records' entitlement to an exemption from public disclosure. (Pet. Exh. C).

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[1] Verizon proposed a new wireless service, "Verizon Voice Link," as its principal service option on Fire Island. Verizon alleged that the cost of replacing the copper wireline facilities was very high and that the new costly infrastructure could be damaged again in the future by other severe storms. During the course of the proceeding, however, Verizon agreed to rebuild its damaged copper wireline network infrastructure on Western Fire Island. This network is currently under construction and anticipated to be online by May 2014. The VVL wireless network, however, has remained active since May 2013 and, upon completion of the wireline network, will be an optional, non-tariffed service for new customers.

Verizon filed redacted versions of certain IR responses on October 4, 2013, and a Statement of Necessity for its claimed trade secret exemption from FOIL on October 7, 2013. (Pet. Exh. F).[2] Verizon argued, among other things, that information related to VNY's network costs had great value in the highly competitive telecommunications environment and provided valuable input to competitors' own pricing decisions. Similarly, VNY contended that its processes and procedures for marketing and administering its Voice Link offering ("methods and procedures") would be of significant value to competitors seeking to develop comparable service offerings.

On October 11, 2013 and October 21, 2013, Mr. Brodsky asserted that the redacted documents submitted to the Secretary by Verizon did not fulfill his FOIL request. Specifically, the CWA Group averred that Verizon's responses and other exhibits were redacted to the extent that they denied the public the ability to adequately comment on the ongoing proceedings.

B. <u>The RAO's November 4, 2013 Determination</u>

On November 4, 2013, the RAO concluded that Verizon had not demonstrated that a blanket exemption from disclosure for the documents at issue would be needed to avoid substantial injury to Verizon's competitive position. (Pet. Exh. I). The RAO found, among other things, that Verizon had made a valid case for protection of sensitive granular network cost data and three documents within the "methods and procedures" filing, that appeared to contain actual methods and procedures ("M&Ps") related to Verizon's Voice Link service. The RAO noted, however, that Verizon offered no factual support to sustain a finding that disclosure of all of the documents would cause substantial injury to its competitive position. Accordingly, the RAO

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[2] Such a statement of necessity shows why information 1) should be excepted from disclosure as provided for in POL § 87 (2) (d); and 2), if disclosed, would be likely to cause substantial injury to the entity's competitive position and, therefore, would be protected under 16 NYCRR § 6-1.3 (b) (2); (e) (3).

found that Verizon failed to demonstrate a particularized and specific justification for denying access. (Pet. Exh. I at 13-14).

C. Verizon's FOIL Appeal

Verizon appealed the portions of the RAO's FOIL Determination relating to its estimated network costs and "methods and procedures" to the Secretary on November 15, 2013.[3] VNY submitted three declarations, and a memorandum of law, in which it asserted that it could meet its burden under FOIL by providing a cogent and persuasive explanation of how use of the information by a competitor is likely to lead to competitive injury. (Pet. Exh. O, VNY Appeal at 6). Verizon contended that its Statement of Necessity provided such an explanation and, when supplemented by the declarations, satisfied its burden of proof pursuant to POL § 89 (5) (e).

VNY further asserted that "the principle that [its] costs are exempt from disclosure under POL § 87 (2) (d) has been established by numerous rulings issued in Commission proceedings." (Pet. Exh. O, VNY Appeal at 17). Similarly, Verizon contended that "methods and procedures" documents have likewise been found to be entitled to trade secret protection. Verizon took issue with the RAO's conclusion that rulings of Department ALJs allegedly protecting all cost information and "methods and procedures" in the context of administrative proceedings were inapposite. (*Id.* at 13). Thus, Verizon argued that the RAO failed to provide an adequate reason for disregarding the cited rulings.

On November 22, 2013, the CWA Group submitted a letter in support of the RAO's Determination. (Pet. Exh. P). It argued that Verizon merely reiterated earlier broad and conclusory arguments and, therefore, failed to produce coherent, specific and persuasive

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[3] Pursuant to POL § 89 (5) (c) (1) and 16 NYCRR § 6-1.3 (g), the "Secretary who shall hear appeals from such negative [FOIL] determinations" and issue a "written final determination" stating the reasons for such final determination.

evidence of its entitlement to a statutory exemption pursuant to POL § 87 (2) (d). The three declarations, argued the CWA Group, were not properly submitted on appeal, but, in any event, did not substantially change the evidence upon which the RAO's Determination was based and, thus, failed to meet VNY's burden of proof.

D. The Secretary's December 2, 2013 Appeal Determination

On December 2, 2013, the Secretary issued the Appeal Determination, denying Verizon the sweeping redactions it sought. The Secretary accepted the declarations in light of VNY's burden of proof (Pet. Exh. Q; Appeal Determination at 13, n. 39). The Secretary concluded, however, that Verizon had failed to carry that burden of proving that the likelihood of substantial competitive injury supported a blanket exception of the estimated network costs and "methods and procedures" documents from public disclosure under POL §§ 87 (2) (d) and 89 (5) (e). (*Id.* at ¶13-14, 15, 17).

With respect to the network cost information, the Secretary found that Verizon had shown that disclosure of granular (unit) information, relating to estimated network costs, would likely cause competitive injury. The Secretary determined, however, that the declarations of Robert Wheatley II, an Executive Director of Financial Planning and Analysis, and Dr. William Taylor, an expert economist, "failed to offer sufficient support as to how the release of aggregate costs alone would result in competitive injury." (Pet. Exh. Q, Appeal Determination at 13).

Similarly, the Secretary also rejected Verizon's argument that the "methods and procedures" documents were entitled to sweeping protection. (Pet. Exh. Q, Appeal Determination at 15). The Secretary noted that only three of the 13 documents appeared to meet the description of an "M&P." The Secretary further concluded that Verizon had "failed to

demonstrate, in adequate detail, how the complete disclosure of all 13 documents would result in substantial competitive injury." (Pet. Exh. Q, Appeal Determination at 16).

Although the Secretary outlined the information for which Verizon could meet its burden of demonstrating a likelihood of substantial competitive injury, VNY did not resubmit its documents with fewer redactions. Instead, it commenced the instant proceeding, which seeks to overturn the Secretary's Determination denying blanket exemptions from disclosure.

QUESTIONS PRESENTED

1. Is Verizon required to demonstrate the likelihood of substantial competitive injury in order to satisfy its stringent burden of proving that specific records should be protected pursuant to POL § 87 (2) (d) and 16 NYCRR § 6-1.3?

   Yes. The plain wording of both 16 NYCRR § 6-1.3 and POL § 87 (2) (d) requires the entity seeking a "trade secret" exception from disclosure to demonstrate that the information at issue constitutes trade secret material and the likelihood of substantial competitive injury if such information were disclosed. This interpretation comports with the fundamental principles of FOIL and the courts' narrow view of the statutory exemptions to disclosure.

2. Could the Secretary determine, based upon insufficient evidence presented in support of a request for a blanket exemption, that Verizon had not met its burden with respect to the exemption, and, thus, is not entitled to protection from disclosure under FOIL?

   Yes. An entity seeking an exemption has the burden of proving that all of the information is entitled to an exemption from disclosure. The New York State courts disfavor blanket exemption and adhere to a narrow view of the statutory exemptions.

3. Did the Secretary and RAO correctly decline to parse ALJ rulings cited by Verizon without any demonstration that they were pertinent to the instant matter?

   Yes. The Secretary and RAO correctly concluded that ALJ rulings were precedential only to the extent that Verizon could demonstrate that the rulings contained similar facts to those at issue in the instant matter. Inasmuch as Verizon failed to so demonstrate, the Secretary correctly declined to follow those rulings.

4. Does Verizon have the burden of making redactions in response to the Secretary's Determination?

Yes. POL § 89 (5) (e) places a continued burden of proof on an entity resisting disclosure of records from a state agency that requires Verizon to redact the documents it seeks to protect.

SUMMARY OF ARGUMENT

Verizon misstates the legal standard for exemption from FOIL disclosure in claiming that trade secret materials are exempt from disclosure as a matter of law. In contrast, the Secretary's reading of POL § 87 (2) (d) and 16 NYCRR § 6-1.3 (b) (2), as requiring VNY to demonstrate a likelihood of substantial competitive injury is consistent with the policy behind FOIL, the plain language of the statute and regulation, and the applicable case law. The Commission's regulation, 16 NYCRR § 6-1.3 (b) (2), expressly requires an entity seeking protection of alleged trade secret materials to demonstrate the likelihood of substantial competitive injury upon disclosure of the materials. Likewise, the Court of Appeals has held that POL § 87 (2) (d) requires a showing of the likelihood of substantial competitive injury. (*See Matter of Encore Coll. Bookstores v Auxiliary Serv. Corp. of State Univ. of N.Y. at Farmingdale*, 87 NY2d 410, 419-420 [1995]; *Matter of Markowitz v Serio*, 11 NY3d 43, 50-51 [2008]).

The Secretary properly applied that standard in determining that Verizon had failed to meet its burden pursuant to POL §§ 87 (2) (d) and 89 (5) (e) and 16 NYCRR § 6-1.3 (b) (2). Verizon attempted to obtain blanket protection of information, without demonstrating how disclosure of aggregate costs and the entirety of the individual M&P documents would result in substantial competitive injury. Moreover, VNY failed to demonstrate how the ALJ rulings it cited were compatible with the facts in the instant proceeding such that the rulings should be considered and distinctions explained. The Secretary's finding that Verizon failed to meet its burden of proving that the entirety of the documents warranted protection, pursuant to POL §§ 87 (2) (d) and 89 (5) (e) and 16 NYCRR § 6-1.3 (b) (2), should be upheld.

I. THE SECRETARY PROPERLY APPLIED WELL-SETTLED FOIL PRINCIPLES AND THE SUBSTANTIAL COMPETITIVE INJURY TEST.

The Secretary's application of POL § 87 (2) (d) and 16 NYCRR § 6-1.3 (b) (2) to the facts at hand adheres to well-settled FOIL principles imposing a broad standard of open disclosure upon government agencies. Under FOIL, all government records are presumptively open for public inspection unless specifically exempted from disclosure. (*See* POL § 87 [2]; *Matter of Data Tree, LLC v Romaine*, 9 NY3d 454, 462 [2007]; *Matter of Fappiano v New York City Police Dept.*, 95 NY2d 738, 746 [2001]; *Matter of City of Schenectady v O'Keeffe*, 50 AD3d 1384, 1386 [3d Dept 2008]; *Matter of Glens Falls Newspapers v Counties of Warren & Washington Indus. Dev. Agency*, 257 AD2d 948, 949 [3d Dept 1999]).

Notably, "[t]he disclosure provisions of FOIL are required to be given an expansive interpretation and the statutory exemptions to disclosure are to be viewed narrowly" in order to give the public maximum access to government records. (*Matter of Newsday, Inc. v Empire State Dev. Corp.*, 98 NY2d 359 [2002]; *see Matter of Verizon N.Y., Inc. v Bradbury*, 40 AD3d 1113 [2d Dept 2007]). The Secretary's interpretation and application of POL § 87 (2) (d) and 16 NYCRR § 6-1.3 (b) (2) complies with this exacting standard.

A. Trade secrets are not exempt from disclosure as a matter of law.

1. FOIL requires a showing of substantial competitive injury to support exemption of trade secret materials from disclosure.

    a. The language of FOIL requires a showing of substantial competitive injury to protect trade secrets.

Verizon asserts that a determination that materials are trade secret, without more, precludes disclosure as a matter of law. (VNY Brief at 11-12, 16). The Secretary's interpretation of 16 NYCRR § 6-1.3 (b) (2) and POL § 87 (2) (d), as requiring a demonstration

that the disclosure of alleged trade secret materials will cause substantial competitive injury, is consistent with the plain language of, and policy behind, FOIL. "Trade secret" status is not dispositive; Verizon must also show a likelihood of substantial competitive injury to protect records from disclosure.

Under the plain language of FOIL, a party seeking an exemption from disclosure for one of three categories of documents, including "trade secrets," is also required to make a showing of the likelihood of substantial injury upon disclosure. Pursuant to POL § 87 (2) (d), an agency may deny access to records or portions thereof that 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 (emphasis added).

The language of POL § 87 (2) (d) does not treat "trade secrets" differently from records "submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise" with regard to the substantial injury showing. "Where, as here, a descriptive or qualifying phrase follows a list of possible antecedents, the qualifying phrase generally refers to and modifies all of the preceding clauses." (*A.J. Temple Marble & Tile v Union Carbide Marble Care*, 87 NY2d 574 [1996]). Thus, the three categories of materials are all subjected to the showing of substantial injury by the "and" preceding the requirement that substantial injury be shown.

Verizon argues that the need to show "substantial injury to the competitive position" under POL § 87 (2) (d), only applies to records "submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise" and does not apply to "trade secrets." (VNY Brief at 11, 14). Inasmuch as "the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always

be the language itself, giving effect to the plain meaning thereof." (*Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 583 [1998]; *Matter of Price Chopper Operating Co., Inc. v New York State Liq. Auth.*, 52 AD3d 924, 925-926 [3d Dept 2008]). A reading of POL § 87 (2) (d) demonstrates that the entity seeking the exemption is required to satisfy a two-part showing. VNY must first show that the documents at issue constitute either trade secrets or confidential commercial information and, second, that the disclosure of such documents would likely cause substantial competitive injury to the entity.

Likewise, the Commission's regulation, 16 NYCRR § 6-1.3 (b) (2), expressly enunciates this two-part showing. Indeed, the regulation requires the entity "[i]n all cases" to proffer specific reasons of why the information, if disclosed, would be likely to cause substantial competitive injury. The clause "in all cases" is clearly intended to refer to both trade secret and confidential commercial information submitted by an entity. (*See* 16 NYCRR § 6-1.3 [b] [2]).

b. FOIL's legislative history shows "substantial competitive injury" is required to protect trade secrets.

The legislative history of POL § 87 (2) (d) further shows that "trade secret" materials, like records "submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise" require a substantial competitive injury showing to be exempt from disclosure. In 1990, POL § 87 (2) (d) was amended to broaden the language such that the exemption would include protection of records submitted for non-regulatory purposes. (*See* L 1990, ch 289). Originally, the statute allowed for the withholding of records or portions thereof that were "trade secrets or [were] maintained for the regulation of commercial enterprise which if disclosed would cause substantial injury to the competitive position of the subject enterprise." (POL § 87 former [2] [d]). The statute, as amended, now reads that certain records or portions thereof may be withheld provided that the documents "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." (POL § 87 [2] [d] [emphasis added]).

The amendment shows that the Legislature clarified that the substantial competitive injury requirement applied to all three categories of documents in the amended statute. That is, the "which" in the prior statute could arguably have applied the "substantial injury" showing only to records "maintained for the regulation of commercial enterprise." The substitution of "and" for "which" clarifies that the "substantial injury" showing applies to all three alternative types of records, marked with an "and."

The legislative history also reveals that, even prior to the amendment, an exemption from disclosure required a showing of substantial competitive injury for trade secret information. Robert Abrams, the then-Attorney General, explicitly stated that, prior to the amendment, the "substantial injury" prong applied to "trade secrets." The Attorney General explained that POL § 87 (2) (d) "exempt[ed] from disclosure business records submitted to an agency that would cause substantial injury to the commercial enterprise submitting the records only when those records contain 'trade secrets' or 'are maintained for the regulation' of the enterprise. In other words, no matter how harmful disclosure of those records may be to a business, they [were] publicly available if they [were] not trade secrets or maintained for regulation." (Mem of Dept of Law, Bill Jacket, L 1990, ch 289 at 16).

Additionally, comments on the bill by Robert J. Freeman, the Executive Director of the State Committee on Open Government, showed that the protection of information under FOIL is based upon the effect of disclosure (substantial competitive injury) and not the type of record (i.e., trade secret versus confidential commercial information). Mr. Freeman stated that "the

standard is based upon the effect of disclosure, for the authority to withhold is restricted to those situations in which disclosure would cause substantial injury to the competitive position of a commercial enterprise." (Mem of Comm on Open Govt, Bill Jacket, L 1990, ch 289 at 15).

2. FOIL case law applies a two-prong test; substantial competitive injury is the second prong for exemption from disclosure.

a. State courts have applied a two-pronged test.

In *Encore Coll. Bookstores v Auxiliary Serv. Corp. of State Univ. of N.Y. at Farmingdale*, 87 NY2d 410 (1995), the Court of Appeals established a two-prong test for determining whether documents, or portions thereof, may be excepted from public disclosure pursuant to POL § 87 (2) (d). The *Encore* test requires the entity resisting disclosure under POL § 87 (2) (d) to first demonstrate the existence of competition and, second, that disclosure of the information in question would be likely to cause substantial injury to the competitive position of the subject enterprise. (*Id.*; *see City of Schenectady v O'Keeffe*, 50 AD3d 1384, 1386 [3d Dept 2008]; *Verizon N.Y., Inc. v Bradbury*, 40 AD3d 1113, 1115 [3d Dept 2007]; *Glens Falls Newspapers v Counties of Warren & Washington Indus. Dev. Agency*, 257 AD2d 948, 949 [3d Dept 1999]). Notably, the second prong of the *Encore* test is consistent with the Department's regulation, 16 NYCRR § 6-1.3 (b) (2), which also expressly requires a showing of substantial competitive injury in all cases. (*See* 16 NYCRR § 6-1.3 [b] [2]).

Verizon claims (VNY Brief at 17) that, with respect to its cost data, it need only show that the information has value and competitors cannot otherwise obtain it. The case it cites for that proposition, however, applied the "substantial injury" test to cost data inasmuch as it specifically opined that "Respondent . . . is a commercial enterprise, and to permit disclosure of the records would 'cause substantial injury to [its] competitive position.'" (*Matter of Passino v Jefferson-Lewis*, 277 AD2d 1028, 1029 [4th Dept 2000]). The Third Department has also

applied the "substantial injury" test to cost data, without drawing any distinction between "trade secrets" or the other elements of the first prong of POL § 87 (2) (d). (See *City of Schenectady v O'Keeffe*, 50 AD3d at 1386).[4] Further, the First Department has linked "trade secrets" with the "substantial competitive injury" showing, stating "that records containing 'trade secrets . . . which if disclosed would cause substantial injury to the competitive position of the subject enterprise' are exempt from disclosure." (*Matter of Bahnken v. New York City Fire Dept.*, 17 AD3d 228, 230 [1st Dept 2005]).

State courts all agree that, in order to give the public maximum access to government records, FOIL must be liberally construed and its exemptions narrowly interpreted.[5] To construe POL § 87 (2) (d) and 16 NYCRR § 6-1.3 (b) (2) to require the Commission to protect trade secret information as a matter of law would impede the transparency function of FOIL.

b. The federal definition of "trade secret" is not applicable.

Verizon further argues that *Encore Coll. Bookstores* relied on FOIA in defining the test for "substantial injury to the competitive position" and that FOIA does not require such a showing for trade secrets. (VNY Brief at 11, 13, 16, 29, citing *Pub. Citizen Health Research Group v FDA*, 704 F2d 1280, 1286 [DC Cir 1983]). *Encore Coll. Bookstores* did not, however,

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[4] Verizon argues that it is sufficient for it to show "information asymmetry"– the only way competitors can obtain that information is under FOIL. (VNY Brief at 17, 20). It quotes language that "[w]here FOI[L] disclosure is the sole means by which competitors can obtain the requested information, the inquiry ends here." (*Passino*, 277 AD2d at 1029, quoting *Encore,* 87 NY2d at 420). Both cases also require, however, a showing of "substantial competitive injury" to support exemption of records from disclosure under FOIL. Indeed, Verizon's "information asymmetry" argument would eviscerate the "substantial competitive injury" showing for any material not publically available.

[5] *See Matter of Town of Waterford v New York State Dept. of Envtl. Conservation*, 18 NY3d 652, 656-657 (2012); *Matter of Gould v New York City Police Dept.*, 89 NY2d 267, 274-275 (1996); *Matter of M. Farbman & Sons v New York City Health & Hosps. Corp.*, 62 NY2d 75, 80 (1984); *Matter of Fink v Lefkowitz*, 47 NY2d 567, 571 (1979).

rely on the federal definition of "trade secret," but rather relied on the FOIA exemption for commercial information.[6] The Court adopted a test analogous to that applied to the Federal exemption for "commercial or financial information obtained from a person and privileged or confidential" under the Freedom of Information Act (FOIA). (*Encore Coll. Bookstores*, 87 NY2d at 420; *see* 5 USC § 552 [b] [4]).

The federal definition of "trade secret" is of no assistance to Verizon because FOIL, unlike FOIA, requires a showing of substantial competitive injury for trade secrets. FOIA exemption 4 (quoted VNY Brief at 11, n. 8) only protects "trade secrets and financial information obtained from a person and privileged or confidential." (5 USC § 552 [b] [4]). In contrast, FOIL, in POL § 87 (2) (d), specifically protects records or portions thereof that are "trade secrets . . . . and which if disclosed would cause substantial injury to the competitive position of the subject enterprise."

In addition, Verizon does not acknowledge the restrictiveness of the federal definition of "trade secret." Under that definition, a "trade secret" for purposes of FOIA is "a secret, commercially valuable plan, formula, process or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort." (*Pub. Citizen Health Research Group v FDA*, 704 F2d at 1288). It appears that the VNY material would be "confidential commercial information" under FOIA and therefore subject to protection only if there is a showing of "substantial competitive injury." (*See Pub. Citizen Health Research Group v FDA*, 704 F2d at 1290-91).[7]

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[6] *Encore Coll. Bookstores*, 87 NY2d at 419, quoted VNY Brief at 11 (FOIL and FOIA exemptions for commercial information were similar).

[7] *Gulf & Western Industries v. United States*, 615 F.2d 527, 530 (DC Cir 1979), cited VNY Brief at 15 for the protection of costs under FOIA, applied the "substantial competitive" injury test.

In contrast, the New York courts have adopted a broader test for trade secrets, but then makes them subject to protection only if there is a showing of substantial competitive injury. The federal courts rejected the broader test for "trade secret" in the Restatement of Torts, (*Pub. Citizen Health Research Group v FDA*, 704 F2d at 1286-1288). The Court of Appeals, however, adopted that broader definition when it required the Commission to take steps to protect trade secrets. (*Matter of New York Tel. Co. v Public Serv. Commn.*, 56 NY2d 213, 219, n. 3 [1982]).[8]

Verizon seeks to shield estimated cost and marketing information falling within the broader *NY Tel v. PSC* definition based on the Restatement of Torts. Thus, it argues (VNY Brief at 11-12, 14) that its materials are covered by the Commission definition of a "trade secret" stated in 16 NYCRR § 6-1.3 (a). The Commission definition (quoted VNY Brief at 11) is, however, virtually identical to the Restatement definition adopted by the Court of Appeals. (*Matter of New York Tel. Co. v Public Serv. Commn.*, 56 NY2d 213, 219, n 3 [1982]).[9] Under the PSC regulation, it must also be shown why information, if disclosed, would be likely to cause substantial injury to the competitive position of the subject commercial enterprise. (16 NYCRR § 6-1.3 [b] [2]). The "substantial competitive injury" test applies to "confidential commercial information" under FOIA and all categories of information under FOIL. Therefore, it was appropriate for the Commission to apply that test to its similar "trade secret" definition.

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[8] The Court of Appeals quoted the Restatement definition that "[a] trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it." (56 NY2d at 219, n.3.) It has reaffirmed that definition. (*Ashland Mgt. v Janien*, 82 NY2d 395, 407 [1993], quoting Restatement of Torts § 757, comment b).

[9] The PSC regulation provides that "[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." (16 NYCRR § 6-1.3 [a]).

B. The Secretary applied the correct evidentiary standard necessary in order to meet the burden of proof pursuant to Public Officers Law § 87 (2) (d).

Verizon maintains that the Secretary erred in concluding that the Court of Appeals' decision in *Markowitz v Serio* (11 NY3d 43 [2008]) effected "a change in law" with respect to the quantum of evidence which must be adduced by a party seeking to show substantial competitive injury pursuant to POL § 87 (2) (d). (VNY Brief at 30-31). Verizon, however, misstates the Secretary's conclusion. The Secretary expressly stated that *Markowitz* did not change the *Encore* test, but merely clarified the quality of the evidence that must be proffered in order for an entity to sustain its burden of proof to exempt information from public disclosure. (Pet. Exh. Q, Secretary's Determination at 12).[10] Contrary to Verizon's claim (VNY Brief at 29), the Secretary has not set the "bar impossibly high," but protected disaggregated (unit) costs and portions of the "methods and procedures" documents.

In *Markowitz*, the Court of Appeals stated that "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." (11 NY3d

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[10] Verizon cites *Matter of Aurelius Capital Mgt. LP v Dinallo* (22 Misc3d 1122 [A] [Sup Ct, New York County 2009]) in support of its assertion that no court has viewed *Markowitz* as having effected a change in the quantum of evidence necessary to obtain exemption from disclosure pursuant to POL § 87 (2) (d). (VNY Brief at 31-32) . In *Aurelius*, however, Supreme Court distinguished *Markowitz* not on the quantum of evidence presented, but on the specific facts of the case. Indeed, the Court noted that "each case presents a unique set of facts and the ultimate determination of competitive injury is fact specific." (*Id.* at *10). Verizon further asserts that it produced the same "quality" of evidence as that submitted in *Matter of Saratoga Harness Racing, Inc. v Task Force on the Future of Off-Track Betting in New York State* (2010 NY Misc LEXIS 2531 [Sup Ct, Albany County 2010]) wherein Supreme Court found that POL § 87 (2) (d) squarely applied to certain records. (VNY Brief at 32). In that case, petitioners, as the parties seeking an exemption from disclosure, set forth specific, persuasive evidence, including multiple detailed affidavits, showing that disclosure of the subject records "will cause it to suffer a competitive injury." (*Id.* at *4-5). The declarations submitted by Verizon, however, lacked the detail and specificity as those in *Saratoga Harness Racing*, with respect to aggregate costs and the totality of the M&Ps, supporting different results.

at 51). Accordingly, speculative concerns asserting what "could" possibly result from disclosure are not sufficient. Rather, the entity must offer detailed, sophisticated evidence demonstrating the specific injury that will occur upon disclosure of the information at issue. As such, Verizon is wrong when it claims (VNY Brief at 30) that it was enough for it to submit "cogent arguments as well as detailed factual allegations."

Interpreting the *Markowitz* decision as clarifying the level of evidence that is necessary to show substantial competitive injury is consistent with the Court of Appeals' narrow interpretation of FOIL exemptions in order to promote public access to records of governmental agencies. An entity resisting disclosure must demonstrate a particularized and specific justification for denying access to the subject documents. (*See Matter of Capital Newspapers Div. of Hearst Corp. v Burns*, 67 NY2d 562, 566 [1986]; *Matter of M. Farbman & Sons v New York City Health & Hosps. Corp.*, 62 NY2d 75, 80 [1984]; *see also Matter of Verizon N.Y., Inc. v Bradbury*, 40 AD3d 113, 1114 [3d Dept 2007]). Accordingly, the Secretary properly concluded that the generalized and conclusory evidentiary support proffered by Verizon on its aggregate costs and the totality of its "methods and procedures" was insufficient to meet its burden of proof pursuant to POL § 87 (2) (d).

C. Only costs affecting price have consistently been held to create substantial competitive injury.

Despite Verizon's argument to the contrary, not all costs have been found to warrant protection pursuant to POL § 87 (2) (d). (VNY Brief at 14-15). The only costs that courts have consistently found to create a likelihood of substantial competitive injury if disclosed are those related to pricing decisions, as those costs would give competitors the most insight into the company's competitive strengths and weaknesses. (*City of Schenectady v O'Keeffe*, 50 AD3d at

1386 [the Court protected data, including a detailed inventory of the age, cost and extent of property, that was used, in part, to determine the regulated rate that the utility could charge for its services]; *Glens Falls Newspaper, Inc. v Counties of Warren & Washington Indus. Dev. Agency*, 257 AD2d at 950 [the Court held that public disclosure was unwarranted because the details of the information would jeopardize the utility's ability to negotiate effectively with other producers in order to obtain the lowest rates for its customers]; *Matter of New York State Elec. & Gas Corp. v New York State Energy Planning Bd.*, 221 AD2d 121 [3d Dept 1996] [the Court protected the information, noting that the disclosure of the same could result in competitors "inferring essential aspects of [the company's] production costs fundamental to projecting future costs"]; *Matter of Belth v Insurance Dept. of State of N.Y.*, 95 Misc2d 18, 20 [Sup Ct, New York County 1977] [the Court found that the disclosure of the information would be an unfair advantage to competitors because they would be in a position to know how the company arrived at the costs and prices of newly issued insurance policies and could then adjust their own internal cost procedures to take advantage of that knowledge]; *Gulf & W. Indus., Inc. v United States*, 615 F2d 527, 530 [DC Cir 1979] [the Court protected the information on the basis that the company's competitors would be able to accurately calculate its future bids and its pricing structure]; *The Timken Co. v United States Customs Serv.*, 491 F Supp 557, 559 [US Dist Ct, DC 1980] [the Court found that the price data, if disclosed, would allow competitors to make projections of the company's current and future costs and prices and, thus, would likely result in substantial competitive injury to the company]).

In each of these cases, the Court protected the records on the basis that the disclosure would likely cause substantial competitive injury based upon the competitors' ability to use the information to ascertain critical cost information related to a company's price structure. The

Courts noted that disclosure would likely allow competitors to gain critical insight into the subject company's strengths and weaknesses and, in turn, use that information to negatively affect the company's pricing structure and future pricing decisions.

Whether substantial competitive injury exists, for purposes of FOIL's exemption for commercial information, turns on "the commercial value of the requested information to competitors and the cost of acquiring it through other means." (*Encore Coll. Bookstores*, 87 NY2d at 420). As such, granular information, which effectively reveals a company's costs to the extent that the competitor can ascertain critical information relating to the company's pricing structure, must be protected pursuant to POL § 87 (2) (d). As shown, in POINT II. A. below, Verizon has not, however, made a case for withholding aggregated cost information, unrelated to its pricing structure.

II. THE SECRETARY PROPERLY REJECTED VERIZON'S CLAIMS FOR BLANKET PROTECTION OF NETWORK COSTS AND METHODS AND PROCEDURES DOCUMENTS.

Contrary to Verizon's argument, it did not meet its burden in proving that the documents at issue are completely exempt from disclosure pursuant to POL §§ 87 (2) (d) and 89 (5) (e). (VNY Brief at 16-26). Verizon's attempt to obtain blanket protection of information, without demonstrating how individual documents, or portions of documents, would, if disclosed, result in substantial competitive injury, fails to conform to well-settled FOIL principles.

In accordance with a narrow view of statutory exemptions from disclosure, the Court of Appeals has stated that extensive redactions "are inimical to FOIL's policy of open government." (*Gould v New York City Police Dept.*, 89 NY2d at 275; *see Capital Newspapers Div. of Hearst Corp. v Burns*, 67 NY2d at 569; *Matter of DJL Rest. Corp. v Department of Bldgs. of City of*

N.Y., 273 AD2d 167, 168 [1st Dept 2000]; *Brown v Town of Amherst*, 195 AD2d 979, 980 [4th Dept 1993]).

Applying these principles to the facts at hand, the Secretary properly concluded that Verizon's request for blanket exemptions lacked the particularized and specific evidentiary support necessary to meet its burden of proving that the records fall squarely within POL § 87 (2) (d). (Pet. Exh. Q, Appeal Determination at 10). Inasmuch as the exemptions are to be viewed narrowly, the Secretary correctly concluded that, "[a]bsent such a showing of competitive injury covering each document that comprises the response, the speculative concerns articulated by Verizon are not enough to sustain the Company's burden of proving that the information should remain protected as trade secret materials." (Pet. Exh. Q, Appeal Determination at 17). The Secretary, therefore, properly declined to protect aggregate network costs, and the "methods and procedures" as filed, because Verizon failed to meet its burden of proving that complete withholding of the information sought was needed to avoid substantial competitive injury.

A. Verizon failed to meet its burden of proving that the disclosure of the aggregate cost data will likely cause substantial competitive injury.

1. Verizon did not make the required case for protecting aggregated cost data.

Verizon argues that it satisfied the core requirements for entitlement to protection under Public Officers Law § 87 (2) (d), and thus met its burden of proof for exemption of the cost documents from disclosure. (VNY Brief at 17). VNY failed to demonstrate, however, that all of the information contained within its blanket redaction request would likely cause substantial competitive injury if disclosed. Notably, Verizon disclosed only the total cost estimate and failed to demonstrate that the disclosure of aggregate cost elements would result in competitive injury. (Pet. Exh. Q, Appeal Determination at 13-14.)

Verizon contends that the declarations by Robert Wheatley II, and Dr. William E. Taylor, submitted to the Secretary in support of its appeal, demonstrate that the disclosure of all of the estimated network cost information contained within the documents will cause substantial competitive injury. (VNY Brief at 17-18). As found by the Secretary, neither the Wheatley nor Taylor declaration satisfied Verizon's burden of proof as to how aggregate cost information, which cannot be dissected and deciphered in a manner that would be harmful to Verizon, could result in competitive injury if disclosed. (Pet. Exh. Q, Appeal Determination at 14).

Mr. Wheatley avers that "knowledge of Verizon's unique cost structure would provide important input to the pricing decisions of competitors." (Pet. Exh. K, Wheatley Declaration at 2). Mr. Wheatley, however, fails to explain how a competitor could use the high-level aggregate figures, without more specific details, in a way that would likely cause substantial competitive injury to Verizon. Verizon cites Mr. Wheatley's allegation that the cost information at issue "goes well beyond high-level information on aggregate costs and margins that is made available to the public." (*Id.*, cited VNY Brief at 21). This claim fails to meet VNY's burden of showing how aggregate information regarding the estimated total plant labor costs and estimated total material costs, without more granular information, could cause substantial competitive injury. The aggregate cost information, consisting of totaled cost figures, does not provide the type of detailed information that a competitor could use to injure the competitive position of VNY.[11]

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[11] For example, Verizon has failed to show how a competitor could use the estimated "total plant labor" cost, without knowing the precise work performed, the exact number of employees, hourly pay rates, or the total number of hours necessary to complete the replacement to competitively harm Verizon. Likewise, Verizon failed to meet its burden of demonstrating how a competitor could use the estimated "total material costs" figure to harm Verizon if the competitor has no means of determining what types of cables were to be used, the total footage for each particular cable, the brands and models of the cables or the price per foot for each type of cable.

The declaration of Dr. Taylor also lacks the specificity and particularity necessary to meet Verizon's burden of establishing that all of the estimated costs should be protected pursuant to POL § 87 (2) (d). Verizon cites (VNY Brief at 18) Dr. Taylor's declaration insofar as it argues that a competitor's knowledge of unit costs provides a competitive advantage.[12] The issue in this case, however, is protection of aggregate costs. Certainly, the specific network cost information, including the brands and model types of equipment and materials, could harm Verizon if disclosed to a competitor, and that injury was acknowledged by the Secretary in her Determination. (Pet. Exh. Q, Appeal Determination at 13). Dr. Taylor did not, however, provide a causal link between the disclosure of the high-level aggregate network costs and the ability of competitors to respond to disclosure of specific costs, such as unit prices for equipment and materials.

Verizon cites (VNY Brief at 19) Dr. Taylor's claim that knowledge of a competitor's cost structure is particularly valuable to rivals in the telecommunications field. He did not, however, identify the ways in which a competitor can obtain sensitive granular information from the disclosure of high-level aggregate cost figures. (Pet. Exh. J, Taylor Declaration at 5). Moreover, Dr. Taylor's observations about the value of Verizon's cost data (stated in bullets points in VNY Brief at 19) fail to meet Verizon's burden of showing how aggregate cost information can be used by competitors in a way that shows a likelihood of substantial competitive injury. Verizon cites Dr. Taylor's observations on competitors' ability to lower prices, estimate profitability and

[12] Dr. Taylor states that Verizon would be harmed if the information concerning the prices it pays for its inputs, such as cables and electronics, was disclosed because suppliers would have less incentive to offer Verizon discounts for its large purchases. (Pet. Exh. J, Taylor Declaration at 8).

learn vendor prices in ways that allow assessment of price floors. (VNY Brief at 19-20). Such capabilities arise, however, from disclosure of unit costs.[13]

Dr. Taylor's declaration demonstrates, with sufficient detail, that disclosure of specific granular (unit) cost information would be harmful to Verizon. His conclusory assertions about other cost data (cited VNY Brief at 19-20) fail, however, to put forth the detailed explanation as to how aggregate cost figures, if disclosed, would injure Verizon's competitive position that is required to meet Verizon's burden of proof.

2. The Commission Can Distinguish Between Granular and Aggregated Data

To the extent Verizon complains that the Secretary lacked authority to distinguish between aggregate and specific costs (VNY Brief at 21), its argument is without merit. POL § 87 (2) (d) specifically allows an agency to "deny access to records *or portions thereof*" that contain trade secrets or confidential commercial information, which, if disclosed, would cause substantial competitive injury. (POL § 87 [2] [d] [emphasis added]). Similarly, 16 NYCRR § 6-1.3 (b) (1) requires the entity to "identify the records *or portions thereof* considered to be confidential" when requesting an exemption from disclosure (16 NYCRR § 6-1.3 [b] [1] [emphasis added]). Thus, portions of Verizon's costs (the aggregated costs) can be disclosed.

Further, the entity claiming an exemption has the burden of demonstrating that the requested material falls squarely within the ambit of one of the statutory exemptions. (*See* Public Officers Law § 89 [5] [e]; *Matter of Gould v New York City Police Dept.*, 89 NY2d 267 [1996]; *Matter of Fink v Lefkowitz*, 47 NY2d 567, 571 [1979]; *Matter of Verizon N.Y., Inc. v Bradbury*, 40 AD3d at 114; *Matter of Glens Falls Newspapers v Counties of Warren & Washington Indus.*

[13] Further, to the extent the Taylor Declaration rests on claims (cited VNY Brief at 19, 20) about the commercial value of the information and "information asymmetry" resulting from disclosure, it seemingly assumes that "trade secret" status is enough and fails to meet the second prong for protection: a showing of substantial competitive injury.

Dev. Agency, 257 AD2d at 949). Given the courts' narrow view of statutory exemptions, the basis for such an exemption must be a "particularized and specific justification for denying access." (*Matter of Verizon N.Y., Inc. v Bradbury*, 40 AD3d at 1114; *see Matter of Capital Newspapers Div. of Hearst Corp. v Burns*, 67 NY2d 562, 566 [1986]; *Matter of Bahnken v New York City Fire Dept.*, 17 AD3d 228, 230 [1st Dept 2005]). To the extent Verizon demonstrated a need to protect granular costs it should be allowed to do, but it cannot protect aggregate costs, given the lack of the necessary showing under the *Encore* test.

The Third Department has permitted an agency to release partially redacted documents, withholding only those portions for which it had met its burden of establishing the likelihood of competitive harm. (*Matter of Troy Sand & Gravel Co. v New York State Dept. of Transp.*, 277 AD2d 782, 784-786 [3d Dept 2000]). Additionally, at least one Supreme Court has held that an agency can permit partial redaction of numerical figures, which, standing alone, would not cause substantial competitive injury. (*See Gray v Faculty-Student Assn. of Hudson Val. Community Coll.*, 186 Misc2d 404, 408 [Sup Ct, Rensselaer County 2000]). In *Gray*, the Court concluded that the invoices at issue should be redacted so as to disclose only the date of the invoice and the identity and unit price of the books which the bookstore purchased. The Court reasoned that, "absent information with regard to the number of volumes that had been purchased, the unit price, standing alone, is meaningless."[14] (*Id.*). Although the situation in *Gray* represented the opposite scenario – where the disclosure of the unit price would not cause competitive injury – the same rationale can be applied to the instant proceeding.

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[14] In *Gray*, the requester sought information contained in invoices as part of an effort to investigate alleged price gouging at a bookstore. Accordingly, the requester was attempting to obtain access to information regarding the various costs of the books sold at the bookstore.

The Secretary's distinction between redaction of specific granular network costs and disclosure of aggregate costs, was not only appropriate under the circumstances, but fully in accord with court precedent. The Secretary, therefore, correctly declined to except the aggregate network cost information documents from disclosure pursuant to Public Officers Law § 87 (2) (d) and 16 NYCRR § 6-1.3 (b) (2). That decision should be upheld; Verizon should be required to disclose the non-granular aggregated total costs.

B. Verizon has not supported its request for blanket protection for the "Methods and Procedures" documents.

Verizon further argues that all 13 of the "methods and procedures" documents similarly constitute trade secrets and, thus, are exempt from disclosure. (VNY Brief at 22). It asserts that those documents would provide its competitors with guidance on how to compete against the company more effectively, which could result in a loss of customers and revenue for Verizon. (VNY Brief at 25-26). Verizon's generalized assertions, however, fail to show, with sufficient detail, how its competitors could use the 13 documents in their entirety to likely cause competitive injury.[15] As such, the entire filing has not been shown to be entitled to sweeping protection as trade secret material likely to cause substantial competitive injury.

Both the Secretary and the RAO noted the problems that arose based upon the manner in which Verizon requested blanket trade secret protection without adequate segregation or explanation of the documents. Specifically, Verizon submitted 13 documents, consisting of 330 pages of blanket redactions, described the filing collectively as "M&Ps," as known to the Commission, and claimed that all 13 documents were entitled to sweeping protection as trade

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[15] The Secretary concluded that the declaration of Thomas MacNabb, Director of Operations in National Operations, lacked the specific and particularized facts necessary to support a finding of competitive injury, inasmuch as his assertions rested largely on speculative claims as to what competitors "could" do with the information. (Pet. Exh. Q, Appeal Determination at 16).

secret material. As noted by the RAO, however, (Pet. Exh. at 12), only three of the 13 documents appeared to actually meet the definition of an "M&P" document.[16]

Indeed, within the voluminous "methods and procedures" filing claimed to be protected by Verizon were, among other things, two emails which did not appear to contain any material that would typically be identified as an "M&P" by the Commission. Moreover, both types of materials, the M&Ps, as defined by the Commission, and the other documents and presentations (the broader "methods and procedures" advocated by VNY) included information that clearly did not fit within the definition of "trade secret," as such information was available generally to the public (i.e., the publicly available Voice Link User Guide and published pricing information).[17]

As noted by the Secretary, the inability of Verizon to meet its burden rested largely on its failure to 1) properly separate the documents into appropriate categories and to assess each document individually for information that might truly be eligible for exception from disclosure, and 2) explain how disclosure of the information – either individually or collectively – would cause competitive injury. (Pet. Exh. Q, Appeal Determination at 17).[18] Verizon also seemingly

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[16] Verizon claims that the Commission routinely treats "methods and procedures" information as trade secrets (VNY Brief at 23), but Verizon, however, attempts to broaden the Commission's M&P classification to less formal documents. (Pet. Exh. L, MacNabb Declaration at 2). Whether a document is granted protection depends upon the material contained within the document, but Verizon's labeling undercut its ability to meet its burden of showing the entirety of the methods and procedures documents should be protected.

[17] It is well settled that a "trade secret" cannot be of public knowledge. (*See* 16 NYCRR § 6-1.3 [a]; *Kewanee Oil Co. v Bicron Corp.*, 416 US 470, 474-475 [1973]).

[18] Verizon claims that the Secretary overlooked that VNY demonstrated that the value of the "methods and procedures" lay in the total value of the material, as part of an integrated roll-out of the Voice Link service and that it should not be required to demonstrate why each of the 13 documents it filed should be protected. (VNY Brief at 25, 32). Claims that the documents are a totality and should be considered as an integrated whole are not supported by the manner in which the documents were filed. Rather, the "methods and procedures" materials seem to be a hodgepodge, as found by the Secretary. "Verizon has comingled internally published M&Ps with other documents and presentations, or excerpts thereof, produced for similar purpose (i.e. to

made no effort to appropriately redact the documents prior to filing the same with the RAO; rather, the documents submitted were virtually completely redacted, except for page headings and numbers. (See Pet. Exh. H-3 [redacted M&P documents]). Notably, Verizon also requested protection for portions of documents that contained public information.[19]

The declaration of Thomas MacNabb fails to sustain the burden of proof required to completely exempt the "methods and procedures" documents from public disclosure as trade secret material. (*See Matter of Markowitz v Serio*, 11 NY3d 43, 51 [2008]; *Matter of Verizon N.Y., Inc. v Bradbury*, 40 AD3d at 1114; *Matter of Bahnken v New York City Fire Dept.*, 17 AD3d at 230). Verizon (VNY Brief at 25) cites Mr. MacNabb's statement that the release of the M&Ps "could assist [competitors] in the development of parallel methods and procedures for similar products of their own." (Pet. Exh. L., MacNabb Declaration at 5). Mr. MacNabb proffers, however, only speculative claims as to what competitors "could" do with the documents and fails to elaborate precisely how competitors could use the information to cause Verizon substantial competitive injury. Indeed, Mr. MacNabb's showing seems directed largely to the question of whether the "methods and procedures" have commercial value (and are thus "trade secrets") and not to the second prong of the *Encore* test, whether disclosure would create substantial competitive injury.

Rather than separate the materials and attempt to make the appropriate evidentiary showings, Verizon comingled internally published M&Ps with other documents and

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provide training or to describe a proposed or actual internal operation or process), but not specifically identified as an 'M&P.'" (Pet. Exh. Q, Appeal Determination at 17).

[19] Verizon has since acknowledged the presence of a publicly available document (a Voice Link "User Guide") embedded within one of the 13 documents and has withdrawn its request for confidential treatment with respect to that portion only. (VNY Brief at 7, n 6). The documents seem, however, to contain other public information, in the form of scripts provided to customers. (Pet. Exh. L, MacNabb Declaration at 2.)

presentations, some of which contain public information. Although Verizon contends that the disclosure of all these documents would result in an economic windfall, (VNY Brief at 23-26), it failed to organize the material in a way that supports its claim and created confusion between documents specifically described as "M&Ps" and broader categories it seeks to shield. (Pet. Exh. L, MacNabb Declaration at 2). Verizon also failed to articulate how any potential injury would be substantial enough to place all the documents it seeks to protect within the exemption under POL § 87 (2) (d). As such, the Secretary correctly determined that VNY had failed to meet its burden of proving entitlement to a blanket exception from disclosure for the "materials and procedures" documents.

III. THE SECRETARY APPROPRIATELY DECIDED THAT PARTICULAR ALJ FOIL RULINGS CITED BY VERIZON WERE NOT CONTROLLING PRECEDENT.

Verizon argues that the RAO and Secretary expressly refused to follow the Commission's body of FOIL precedent, applying "a far more exacting burden of proof than has ever been applied by the Commission's ALJs." (VNY Brief at 34). It asserts that the Commission was bound to explain why it deviated from alleged past handling of costs and M&Ps by ALJs (VNY Brief at 33-37) and improperly applied a new interpretation of FOIL, the Department's regulations and relevant case law retroactively (VNY Brief at 37). Verizon has not addressed the Secretary's explanation that VNY had the burden of showing which ALJ decisions were on point, so that any deviance needed to be explained under *Matter of Charles A. Field Delivery Serv., Inc.,* 66 NY2d 516, 519 (1985). (Pet. Exh. Q, Appeal Determination at 18-19). The Secretary was not bound to distinguish each ruling in the string citation offered by Verizon (Pet. Exh. O, VNY Appeal at 17, n. 45), absent such a showing.

Initially, VNY misconstrues the precedential effect of ALJ rulings with respect to FOIL determinations before the Secretary. ALJ FOIL rulings are not controlling on the Secretary; their decisions are appealed to the Secretary. 16 NYCRR §6-1.4 (d). Thus, contrary to Verizon's claim (VNY Brief at 35), the requirement that agencies explain why its decisions are consistent does not bind the Secretary to consistency with unappealed ALJ rulings.[20]

Verizon also completely disregards the Secretary's conclusion (Pet. Exh. Q, Appeal Determination at 18-19) that it was VNY's burden to show why particular ALJ rulings should be deemed relevant and any alleged deviation explained. ALJ Rulings are not precedential per se with respect to FOIL matters; rather, every decision reflects an application of the controlling precedent of the New York courts to the facts and circumstances of a particular case.[21]

The decisions of both the RAO and the Secretary to decline to distinguish the ALJ rulings cited by Verizon, have been misconstrued by Verizon as constituting a departure from "the Commission's and Department's longstanding interpretation of FOIL." (VNY Brief at 37). The Department and the Commission have followed 16 NYCRR § 6-1.3 (b) (2), which requires a person seeking an exemption to "show the reasons why the information, if disclosed, would cause substantial injury to the competitive position of the subject commercial enterprise." They have not departed from the determination of FOIL issues based upon the specific facts contained within the record before them.[22]

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[20] VNY's argument turns on its head the relationship between the Secretary and the ALJs; ALJ FOIL decisions are appealed to the Secretary, not the Secretary's FOIL decisions to the ALJs.

[21] In its appeal to the Secretary, Verizon relied upon an unreported New York County case, which affirmed the fundamental principle that "each case presents a unique set of facts and the ultimate determination of competitive injury is fact specific." (*Matter of Aurelius Capital Mgt., LP v Dinallo*, 2009 NY Misc. LEXIS 276, *aff'd* 70 AD3d 467 [1st Dept 2010]).

[22] As the Secretary noted in footnote 54 of her Appeal Determination (Pet. Exh. Q at 18), "the burdens in the context of discovery are not the same as those under FOIL." See, e.g., Case 03-C-

Moreover, Verizon assumes that it has shown an inconsistency, when that is not the case. That different agency employees, with different roles, have reached allegedly different decisions based upon different records creates no basis for claiming that the agency has been inconsistent. At times, the ALJs have protected specific cost information based upon a particular showing through individual records, as described by Verizon (VNY Brief at 14, 33, n. 15). As the Secretary observed, there has, however, been no finding that all network cost information, particularly aggregate cost information, is entitled to protection. (Pet. Exh. Q, Appeal Determination at 19, n. 56).[23] Rather, the RAO and the Secretary have distinguished between aggregate and specific data in the past with regard to the trade secret exemption under FOIL.[24] ALJs, in the rulings cited by Verizon, have protected disaggregated and detailed cost

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0971, Proceeding on Motion of the Commission to Consider the Adequacy of Verizon New York Inc.'s Retail Service Quality Improvement Processes and Programs, Determination on Appeal of Ruling on Access by Competitors to Allegedly Confidential Information (issued March 20, 2007). (Answer Exhibit "Exh" 4) [denying access to documents based on "indispensability" test of civil discovery, citing and referring to cases, including *Curtis v Complete Foam Insulation Corp.*, 116 AD2d 907, 908 (3d Dept 1986), and *Mann v Cooper Tire Co.*, 33 AD3d 24, 31-34 (1st Dept 2006)].

[23] *See* Matter 11-00935, Verizon Unit Cost Schedule (Trade Secret 12-01) (issued February 13, 2012) (Answer Exh. 1) [denying protection to "make ready" costs for pole attachments]; Case 09-S-0029, Proceeding on Motion of the Commission to Consider Steam Resource Plan and East River Re-powering Project Cost Allocation Study, and Steam Energy Efficiency Programs for Consolidated Edison Company of New York Inc., Determination on Appeal of Trade Secret Determination (issued May 12, 2009) (Answer Exh. 3) [denying protection to capital cost estimates].

[24] (Matter 09-01904 – 2010 Customer Service Annual Report for All Time Warner Cable New York Cable Systems [Trade Secret 11-04] [issued August 26, 2011]) ["the extent of aggregation and other facts have been considered by the RAO and Commission in past decisions because the more granular the information is, the easier it is to prove the likelihood of substantial competitive injury."] (Answer Exh. 2 [at 17]). *See also,*; Case 03-C-0971, Status of Service Inquiry Reports Filed Pursuant to Commission Order (Trade Secret 04-1) (dated April 1, 2004) (Answer Exh. 5 [service inquiry reports not protected]); Case 90-C-0018, Status of 1991-1995 Annual Reports Filed by Other Common Carriers (Trade Secret 96-9) (dated December 16, 1996) (Answer Exh. 6 at 10 [protecting disaggregated data]); Request for 1993 Report concerning the Transition Monitoring Plan for Telecommunication Markets (Trade Secret 95-5) (dated June 26, 1995) (Answer Exh. 7 [not protecting aggregated information]).

information, including vendor costs, but not aggregated data.[25] As such, there was no reason for the RAO or the Secretary to explain a departure from prior decisions in deciding that Verizon had only made a case for protecting granular costs.

There was even less of a reason for the RAO or the Secretary to explain an alleged deviation from ALJ decisions protecting "M&P" documents (cited VNY Brief at 33, n. 16). Verizon sought blanket exemptions from disclosure for 13 documents, of which only three were labeled as "M&Ps," and to broaden the "methods and procedures" exemption. (Pet. Exh. L, MacNabb Declaration at 2).

Further, as observed by the Secretary (Pet. Exh. Q, Appeal Determination at 19), Verizon ignores that the procedures followed by the RAO under POL § 89 (5) (b), as implemented by 16 NYCRR § 6-1.3, and those employed by ALJs, under 16 NYCRR § 6-1.4, differ substantially.[26] Only in circumstances where the information is deemed relevant will the ALJ undertake an examination of the documents to determine whether to grant or deny confidential status. (*See* 16

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[25] Cases 95-C-0657, 94-C-0095, 91-C-1174, Ruling Concerning Trade Secrets and Motion to Strike Portions of A Brief (Issued February 18, 1997), (Pet. Exh. G(1) at 4), [protecting "highly disaggregated capital investments projections"]; Case 98-C-1357, Ruling Concerning Proprietary Status of Exhibit 106-P (Issued April 17, 2000), (Pet. Exh. G(5) at 1) [protecting "detailed cost information for components of a highly competitive retail service"]; Case 98-C-1357, Ruling on Proprietary Status of Line Sharing Exhibits (Issued May 26, 2000), (Pet. Exh. G(6) at 1), ["vendor contracts"]; Case 98-C-1357, Ruling On Proprietary Status Of Module 3 Testimony and Exhibits (Issued January 31, 2002), (Pet. Exh. G(7) at 3), [protecting "vendor contract information...with respect to pricing"]; and Case 03-C-0971, Ruling on Protective Order and Access by Competitors to Allegedly Confidential Information (Issued February 23, 2007), (Pet. Exh. G(10) at 5), [protecting "highly disaggregated [cost information] level"], compare Case 02-C-1425, Ruling on Confidential Trade Secret Status of Testimony and Exhibits (Issued October 8, 2004), (Pet. Exh. G(9) at 17) [not protecting aggregated data].

[26] *See, e.g.*, Case 03-C-0971, *supra* at note 22 [competitors have been given access under protective agreements to allegedly confidential information in cases where their interests were substantial, each case must be judged upon the particular circumstances presented]. In contrast, under FOIL, the requestor need not make any showing of need, good faith or legitimate purpose. (*See Matter of Daily Gazette Co. v City of Schenectady*, 93 NY2d 145 [1999]; *Matter of Farbman & Sons v New York City Health & Hosps. Corp.*, 62 NY2d 75, 80 [1984]).

NYCRR § 6-1.4 [b] [1]). In contrast, an entity that submits records to the RAO must, from the outset, request trade secret or confidential commercial status. (16 NYCRR § 6-1.3 [b] [1], [2]).

Finally, the ALJs have the benefit of experience with an evidentiary record, developed in a particular trial-type administrative proceeding, which largely focuses on particular litigated issues. (Pet. Exh Q, Appeal Determination at 19). In contrast, once a request is made for public access, entities seeking to protect documents before the RAO must develop the record by filing a statement of necessity and affidavits and relying, as appropriate, on legal and policy arguments. It was Verizon, the entity with the burden of proof, that was required to explain why an ALJs protection of certain information on a particular record justifies protection of that information on a different record before the RAO. Inasmuch as Verizon failed to do so, the RAO and Secretary correctly declined to distinguish the ALJ rulings cited by Verizon.

IV. THE COMMISSION PROPERLY LEFT REDACTION TO VERIZON.

A. The Commission is not required to redact for the entity seeking an exception from disclosure.

Verizon argues that the denial of its appeal without Commission redaction of exempt information constituted a clear violation of FOIL (VNY Brief at 27). This claim is, however, without merit. Under POL § 89 (5), Verizon should be redacting protected information in response to the Secretary's decision.

Verizon's attempt to resist disclosure of records is governed by POL § 89 (5), which applies only to records of a state agency, as defined in POL § 89 (5) (h). Verizon, as the entity resisting disclosure, has the burden of "proving entitlement to the exception" from disclosure. POL § 89 (5) (e). POL § 89 (5) (b) (2) and implementing Commission regulations, 16 NYCRR § 6-1.3 (f) (2), gave Verizon the ability to file a statement of necessity in support of protecting documents, which would include redaction of documents as appropriate. Here Verizon's

redactions have been found to be inadequate. Verizon, as the entity with the burden of proof, should be required to perform the redactions found necessary by the RAO and the Secretary. Otherwise, Verizon will have no incentive to properly seek protection of its documents, with appropriate redactions, when it files its statement of necessity under POL § 89 (5) (b) (2) and 16 NYCRR § 6-1.3 (f) (2). It can, as here, ask for unwarranted blanket protections and then force an agency to assume the burden of performing any redactions found necessary. That burden is particularly unwarranted when an entity has not tailored its proposed redactions to the proof in its statement of necessity or filed protected materials in a way that permits efficient redaction.

The cases relied upon by Verizon, which purportedly prove that the agency is responsible for redactions, do not involve situations wherein an entity seeks protection of documents pursuant to the trade secret and confidential commercial information exception of POL § 87 (2) (d). They also do not involve situations where an entity seeks to prevent disclosure of records from a state agency, governed by POL § 89 (5).

The cases Verizon cites are situations where an agency was required to redact records for production to an entity requesting the information; not someone seeking to shield the information from disclosure. (*See Matter of Data Tree, LLC v Romaine*, 9 NY3d 454, 464 [2007] [in a case which involved the issue of whether the privacy exemption applied to shield Social security numbers and dates of birth from an entity requesting information, the Court noted that "agencies may be required to prepare a redacted version with the exempt material removed"]; *Matter of Schenectady County Socy. for the Prevention of Cruelty to Animals, Inc. v Mills*, 18 NY3d 42, 46 [2011] [the Court noted that an agency is often ordered to redact when a record contains both

exempt and nonexempt records and, in this case, the agency "could have furnished petitioner a redacted list with a few hours' effort, and at negligible cost"]).[27]

The cases cited by Verizon also largely involve the privacy exemption and situations where the disclosure of personal information is at issue. (*Data Tree, LLC v Romaine*, 9 NY3d at 464 [2007] [agency required to redact Social security numbers and dates of birth from information produced]; *Schenectady County Socy. for the Prevention of Cruelty to Animals, Inc. v Mills*, 18 NY3d at 46 [agency ordered to redact when it "could have furnished petitioner a redacted list with a few hours' effort, and at negligible cost"]). While an agency may be in a position to redact documents containing easily identifiable personal information, voluminous records containing complex commercial information are much more difficult and burdensome.

Verizon further claims that, as a matter of law, the Secretary was required to withhold the entire documents if redaction was impractical, citing FOIA and decisions from other states (VNY Brief at 28). Under FOIL, however, the Secretary was not prohibited from disclosing any portion of the documents for which Verizon sought protection pursuant to POL §§ 87 (2) (d); 89 (5) (e), just because some of the materials might be protected if Verizon performed the appropriate redactions.

The Court of Appeals has noted on numerous occasions that, even where records fall within one of the FOIL exemptions, an agency in its discretion may disclose those records in whole or in part. (*Matter of Hanig v State of N.Y. Dept. of Motor Vehs.*, 79 NY2d 106, 109 [1992]; *Matter of Capital Newspapers Div. of Hearst Corp. v Burns*, 67 NY2d 562, 567 [1986]; *Matter of Short v Board of Mgrs. of Nassau County Med. Ctr.*, 57 NY2d 399, 404 [1982]). Indeed, the Court of Appeals acknowledged that nothing in FOIL law "restricts the right of the

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[27] Similarly in *Matter of Troy Sand & Gravel Co. v New York State Dept. of Transp.*, 277 AD2d 782, 784-786 [3d Dept 2000]) the burden was on the agency since it had denied access.

agency if it so chooses to grant access to records within any of the statutory exceptions, with or without deletion of identifying details." (*Short v Board of Mgrs. of Nassau County Med. Ctr.*, 57 NY2d at 404; *see* Public Officers Law §§ 87 [2] [d]; 89 [5] [e]).

Given the Commission's responsibility to make provision, appropriate to the exercise of its regulatory authority, for the protection of the interest of the utility in any trade secrets (*Matter of New York Tel. Co. v Public Serv. Commn.*, 56 NY2d 213, 220 [1982]), the Secretary provided instructions, to the extent possible, to guide Verizon as to how it could meet its burden of proof pursuant to POL § 89 (5) (e). (Pet. Exh. Q, Appeal Determination at 13, 15, 17). The Determination discussed the specific type of information in both the cost documents and M&Ps that would likely qualify as trade secret material and implicitly gave Verizon the option to resubmit the documents with fewer redactions.[28] If the Court deems it necessary to address this issue, it should order production, pursuant to CPLR 7806, of the aggregate costs and portions of the M&P documents that the Secretary decided should be disclosed.

B. The Court should require Verizon to redact the Cost and M&P documents as directed by the Commission and submit those redactions to the Secretary for approval.

A review of the Secretary's Determination reveals that Verizon's assertion that the Secretary failed to "otherwise separate the portion of the record that is not subject to disclosure" (VNY Brief at 27) is without merit. The Secretary clearly indicated which portions of the

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[28] Verizon asserts that the Secretary adopted an "all or nothing" approach to disclosure by failing to redact the documents (VNY Brief at 29). The Secretary's determination did not, however, declare that the documents were no longer confidential pursuant to 16 NYCRR § 6-1.3 (e) (2). It simply upheld the RAO's decision that Verizon could not seek a blanket exemption and then quoted POL § 89 (5) (a) (3). (Pet. Exh. Q, Appeal Determination at 20). POL § 89 (5) (a) (3) states that information required to be disclosed should be exempt "until fifteen days after the entitlement to such exception has been finally determined or such further time as ordered by a court of competent jurisdiction." Rather than file redacted documents, Verizon sought judicial review of the denial of a blanket exemption and obtained a stay.

network costs that the Secretary found to warrant protection – namely, the specific, granular costs – and expressly stated that the aggregate (total) costs, which had not been shown to cause Verizon substantial competitive harm if disclosed, would not be protected. The Determination also stated, to the extent possible, how Verizon could modify its filing of the M&P materials and refile those materials so as to protect them. (Pet. Exh. Q, Appeal Determination at 15-17.) As the entity with the burden of proof, Verizon should be required to refile those materials with the Secretary under the guidelines in the Appeal Determination.

Verizon argues that all the M&P documents "were the product of significant investments of time, effort and subject matter expertise, and reflect Verizon's business strategies," including its marketing methods, which could provide its competitors with guidance on how to compete against Verizon more effectively. (VNY Brief at 24-26). Verizon is in the best position to identify and explain, in detail, which documents, or portions thereof, if disclosed would cause substantial competitive injury.

To require the Commission to parse through more than 330 pages of Verizon's internal "methods and procedures" documents is not only burdensome, but inefficient. Commission redaction will not best serve the ultimate goal of ensuring that "trade secret" material is protected when there is a likelihood of substantial competitive injury. As the creator of the documents, and as the entity with the burden of proving its entitlement to exemption under POL § 89 (5) (e), Verizon is in the best position to refile the documents with fewer redactions, pursuant to the guidelines expressed by the Secretary in her December 2, 2013 Determination.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Court deny the Petition in its entirety and grant such other and further relief as the Court deems appropriate.

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Albany, New York

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