SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of the Application of VERIZON NEW YORK INC., *Petitioner*, For an Order Pursuant to Article 78 of the Civil Practice Law and Rules - against - NEW YORK STATE PUBLIC SERVICE COMMISSION ("the Commission"), KATHLEEN H. BURGESS, as Secretary to the Commission, NEW YORK STATE DEPARTMENT OF PUBLIC SERVICE ("the Department") and DONNA M. GILIBERTO, as Records Access Officer for the Department, *Respondents*.	Index No. 6735-13

PETITIONER'S MEMORANDUM OF LAW
IN SUPPORT OF ARTICLE 78 VERIFIED PETITION AND STAY

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Petitioner Verizon New York Inc. ("Verizon"), by and through its attorneys, Greenberg Traurig, LLP, respectfully submits this Memorandum of Law in support of its Article 78 Verified Petition and Order to Show Cause for a Stay pursuant to the New York Civil Practice Law and Rules ("CPLR").

PRELIMINARY STATEMENT

This is a special proceeding brought by Verizon pursuant to CPLR § 7803(3) and the Freedom of Information Law, New York Public Officers Law, Article 6 ("FOIL"), against the respondents: the New York State Public Service Commission ("the Commission"), Kathleen H. Burgess, as Secretary ("Secretary") to the Commission, the New York State Department of Public Service ("the Department"), and Donna M. Giliberto, as Records Access Officer ("RAO") for the Department (collectively, "Respondents"). Verizon seeks to (a) overturn a final determination by the Secretary that declined to accord trade secret status under FOIL to certain records (the "Records") that Verizon had submitted to Respondents in a regulatory proceeding; and (b) prevent Respondents from violating their statutory obligations by publicly disclosing Verizon's trade secrets in response to a FOIL request made by third-parties.

At the time of submission, Verizon formally requested confidential treatment for the Records under New York Public Officers Law § 87(2)(d) — FOIL's statutory exemption for records that contain either trade secrets or other commercial information which, if disclosed, would cause substantial competitive injury — and the Department's regulations implementing FOIL.

Subsequently, Respondents received a submission that they treated as a FOIL request for information included in the Records. In response, Verizon presented evidence establishing that the Records contained trade secrets, including commercially valuable information that would other-

wise be unavailable to Verizon's competitors. Verizon also showed that the Records were created at great expense and their public disclosure would result in substantial competitive injury to Verizon. Indeed, in the hands of Verizon's competitors, the Records would provide a powerful tool with which to map out a competitive strategy more targeted and precise than could be derived from any other source. Verizon also pointed out that the Commission has, in numerous prior decisions, ruled that records substantially similar to those at issue here were subject to trade secret protection under FOIL and the Department's implementing regulations.

Notwithstanding the Secretary's agreement with Verizon that the Records contain confidential, commercially-valuable trade secrets, she determined that this information is not exempt from disclosure. That determination is improper and unlawful for several reasons.

First, the Secretary erred by holding that Verizon was required to establish that disclosure of its trade secrets would cause substantial injury to its competitive position. Under FOIL, trade secrets are exempt from disclosure without the necessity of showing competitive injury.

Second, even if a showing of substantial competitive injury were required, Verizon significantly exceeded its burden. As an initial matter, the RAO and Secretary conceded that much, if not all, of the information contained in the Records constitutes commercially-valuable, confidential trade secrets not otherwise available to Verizon's competitors. Moreover, Verizon submitted declarations from an economics expert and company representatives describing in detail the nature of the Records, the competitive nature of Verizon's industry, the value of Verizon's information to its competitors, and the substantial harm to Verizon that would result from disclosure. The Secretary's suggestion that more "specific and sophisticated" evidence is required is irrational and, if upheld, would eviscerate the exemption set forth in FOIL § 87(2)(d).

Third, the Secretary violated settled law by applying an "all or nothing" approach, in which she ordered all of Verizon's Records be disclosed, notwithstanding that she found some information in the Records was exempt from disclosure. Once the Secretary found that at least a portion of Verizon's Records were exempt, she was prohibited from disclosing the exempt portions and obligated, at a minimum, to identify the specific portions that could be redacted.

Finally, the Secretary violated bedrock principles of administrative law and due process by refusing to apply well established agency precedent. Indeed, the Secretary even concluded that the Department's Administrative Law Judges ("ALJs") and the RAO should be allowed to apply FOIL inconsistently, in light of the different roles they play and the context of their decisions. Thus, regulated companies such as Verizon[1] can now expect that while their trade secrets will be protected from disclosure in an administrative proceeding, such trade secrets will likely be disclosed as the result of a FOIL request — despite the fact that the two determinations would be governed by the same FOIL standards.

The Secretary's determination indicated that Verizon's trade secrets and commercially valuable information would be disclosed as soon as December 17, 2013. Verizon, on the consent of the Respondents, thus seeks a stay of the determinations below pursuant to CPLR § 7805, and a permanent injunction enjoining Respondents from engaging in such unlawful conduct.

[1] Although Verizon, by virtue of its status as a regulated company, often must submit confidential and proprietary information to the Commission or the Department, many of Verizon's most significant competitors are not subject to the Commission's regulatory oversight, are rarely if ever required to submit confidential documents to those agencies, and thus do not face the risk of disclosure of such information under FOIL. The Respondents' improper determinations under FOIL therefore impose an asymmetric competitive burden upon Verizon.

STATEMENT OF FACTS

I. Verizon's Submission of Confidential Records

Beginning in May 2013, Department staff propounded a series of interrogatories and document production requests to Verizon in a proceeding (Case 13-C-0197) arising out of a Verizon tariff filing. (Verizon's Verified Petition ("Pet.") ¶ 17.) Verizon submitted written replies and exhibits to the discovery requests. Certain portions of the replies and exhibits (including the Records at issue in this proceeding) were submitted to the Department's RAO under formal requests that they be treated as trade secrets and/or confidential commercial information, pursuant to FOIL, *see* N.Y. Pub. Off. Law §§ 87(2)(d), 89(5)(a)(1), the Department's implementing regulations, *see* 16 N.Y.C.R.R. § 6-1.3, and the applicable procedures governing access to records submitted in confidence by a commercial enterprise. (Pet. ¶ 18; Exhibit ("Ex.") A.[2])

On September 13, 2013, in written comments submitted to the Commission in Case 13-C-0197, Richard Brodsky, Esq., on behalf of Common Cause of New York, Communications Workers of America Region I, Consumers Union, and the Fire Island Association (collectively, the "Brodsky Group"), expressed opposition to Verizon's confidentiality claims. (Pet. ¶ 19; Ex. B.)

On September 23, 2013, the RAO issued a letter in which she concluded that the Brodsky Group's comments should be treated as a FOIL request in accordance with New York Public Officers Law § 89(5),[3] seeking, among other things, the following general categories of

[2] All exhibits cited herein refer to and accompany the Affirmation of Henry M. Greenberg in Support of Verified Petition and Order to Show Cause, dated December 13, 2013.

[3] N.Y. Pub. Off. Law § 89(5)(a)(3) provides that information submitted as trade secret and/or critical infrastructure information shall be excepted from disclosure and be maintained apart by the agency from all other records until 15 days after the entitlement to such exception has been finally determined or such further time as ordered by a court of competent jurisdiction. *See also* 16 N.Y.C.R.R. § 6-1.3(e)(1) ("Until such time as the department makes a determination, confidential information submitted . . . shall be excepted from disclosure and be maintained apart and in a secure manner from other department records.").

information: (a) information relating to costs incurred or expected to be incurred by Verizon in connection with certain networks and services on Fire Island;[4] and (b) marketing and training materials used on Fire Island or elsewhere in New York relating to Verizon Voice Link ("VVL") service. VVL is a competitive wireless service provided by Verizon. (Pet. ¶¶ 19-21; Exs. B & C.) In her letter, the RAO expressed her intention to determine the entitlement of the requested records to an exception from public disclosure on the ground that they contained trade secrets, and directed Verizon to submit (i) copies of the Records redacted to eliminate any confidential information, and (ii) a Statement of Necessity providing a legal basis to support any redactions. (Pet. ¶ 22; Ex. C at 1-2; Ex. D.)

A. Statement of Necessity Submitted

On October 7, 2013, Verizon submitted to the RAO a Statement of Necessity, which established that the Records contained non-public, competitively-sensitive trade secrets and were exempt from disclosure under FOIL. (Pet. ¶ 24; Ex. F.) Additionally, Verizon argued that disclosure of the trade-secret information would create a windfall for Verizon's competitors that would undermine not only the State's policies favoring economic development, but also the pro-competitive policies of the Commission. In this regard, Verizon cited a substantial body of Commission precedent in the form of ALJ opinions. (Pet. ¶ 24; Exs. F & G(1)-(10).)

B. Redacted Documents Submitted

In addition to its Statement of Necessity, and pursuant to the RAO's directive, Verizon provided redacted versions of the Records. (Pet. ¶ 25; Ex. H.) As relevant to this proceeding, the

[4] Fire Island is a barrier island located about 5.5 miles off of the southern shore of Long Island. While Verizon has no wireline competitors on Fire Island itself, its wireline and optional Verizon Voice Link services compete with other providers' wireless services. Moreover, the cost information in the Records is equally relevant to similar networks constructed, and used to offer competitive retail services, in other parts of the State.

information redacted from the Records falls into the following two categories: (a) cost and network information ("Cost Information"); and (b) Verizon's VVL methods and procedures ("M&P Information"). (Pet. ¶ 26.) Each category is described in turn.

1. Cost Information

The Cost Information is found on eight pages. (Ex. H(1).) It consists of granular and sensitive cost data and analysis relating to the offering of VVL service in western Fire Island, and two alternative wireline networks (Digital Loop Carrier ("DLC") and Fiber to the Premises ("FTTP")), along with information bearing on costs, such as the specific equipment to be utilized, the cost of that equipment to Verizon, and demand projections. (Pet. ¶ 27.) More specifically, the Cost Information includes:

- Assumptions underlying Verizon's cost studies regarding VVL, DLC, and FTTP;
- Materials costs,[5] plant labor costs, the costs of pair-gain (DLC) equipment, trenching costs, and the costs of reconnecting customers to the new network;
- Certain costs associated with a Distributed Antenna System on Fire Island; and
- Costs of installing a VVL network on Fire Island, including the costs of the in-home devices themselves. (Pet. ¶ 28.)

The Cost Information includes detailed costs for specific network components and other confidential cost information. It also provides significant information concerning Verizon's cost structure for providing consumer service that goes well beyond the high level information on aggregate costs and margins that is made available to the public. (Pet. ¶ 29; Ex. K ¶ 3.)

2. M&P Information

The M&P Information consists of 13 documents — 331 pages — used by Verizon in connection with the offering of VVL. (Ex. H(3).) These documents include: scripts for call center

[5] The material costs include detailed breakout of quantities and unit costs for specific, identified types of copper and fiber cable, circuit cars, cabinets, and other equipment. (Ex. I at 4.)

representatives, training materials, and similar documents, all of which are intended to inform, instruct, and advise Verizon's employees on various aspects of how they should interact with current and prospective VVL customers. (Pet. ¶ 30; Ex. L ¶ 2.) The M&P Information was generated as part of an integrated process that involved multiple work groups and demanded significant investments of time, effort and subject matter expertise. It consists of confidential, commercially-valuable information that gives insight into Verizon's methods and procedures in a highly competitive market.[6] (Pet. ¶ 31; Ex. L ¶ 4.)

II. The RAO's Determination

Verizon's request for confidentiality notwithstanding, on November 4, 2013, the RAO issued a determination ("RAO's Determination"), finding that none of the information submitted by Verizon warranted an exception from disclosure. (Ex. I at 15-16.) The RAO analyzed separately each of the categories of information that had been redacted by Verizon. (*Id.* ¶ 35.) With respect to the Cost Information, the RAO found that it "fit[] within the definition of trade secrets" and would not be available to competitors other than through disclosure under FOIL. (*Id.* at 12.) However, the RAO concluded that Verizon had not established a reasonable likelihood that disclosure would cause substantial competitive injury to it. (*Id.* at 13.) Similarly, with respect to the M&P Information, the RAO found that three of the 13 documents (those formally labeled as "Methods and Procedures") constituted trade secrets, but nevertheless should be disclosed because no evidence had been produced to support a finding that disclosure would cause substantial injury to Verizon. (*Id.* at 12.)

[6] One of the 13 documents contains an embedded copy of a publicly available document (a VVL "User Guide"), and therefore Verizon withdraws its request for confidential treatment with respect to that portion only. (*See* Ex. H(3), Exhibit IR-4(2) at 16-20.) While this portion of the Records was redacted when submitted to Respondents, it is un-redacted as submitted herein.

As for the remaining 10 documents falling into the category of M&P Information, the RAO was under the misimpression that the documents did not set forth Verizon's methods and procedures. Accordingly, the RAO concluded that Verizon had failed to make a valid case that the 10 documents constituted trade secret material. (*Id.* at 12, 15.)

The RAO also rejected as irrelevant multiple rulings by Department ALJs submitted to her by Verizon that held information substantially similar to that found in the Records constituted trade secrets and were exempt from disclosure under FOIL. (*Id.* at 15.) While conceding that the decisions "demonstrate some support" for Verizon's position, the RAO held that the decisions were "limited to the relevance of those records only in the context of the particular administrative proceeding and the parties thereto." (*Id.*) She also concluded that ALJ decisions were not, as a general rule, binding on the RAO. (*Id.*)

III. Verizon's Administrative Appeal

On November 15, 2013, pursuant to N.Y. Pub. Off. Law § 89(5)(c) and 16 N.Y.C.R.R. § 6-1.3(g), Verizon filed an appeal with the Commission's Secretary, seeking reversal of the RAO's Determination concerning the Cost and M&P Information.[7] (Pet. ¶ 39; Ex. O.) In support of its appeal, Verizon submitted a 23-page memorandum of law, (Pet. ¶ 40; Ex. O); and detailed declarations from Dr. William E. Taylor, an expert economist, (Pet. ¶ 40; Ex. J), Robert Wheatley II, a member of Verizon's Finance team with specific experience in pricing Verizon's competitive mass-market services, (Pet. ¶ 40; Ex. K), and Thomas MacNabb, a Director of Operations in the National Operations organization at Verizon and project director for VVL. (Pet. ¶ 40; Ex. L).

[7] Pursuant to N.Y. Pub. Off. Law § 89(5)(c)(1) and 16 N.Y.C.R.R. § 6-1.3(g), the "Secretary shall hear appeals from such negative determinations" and issue a "written final determination . . . which determination specifically states the reason or reasons for such final determination."

IV. The Secretary's Determination

On December 2, 2013, the Secretary issued a final agency determination (the "Secretary's Determination"), denying Verizon's appeal. (Pet. ¶ 42; Ex. Q.) The Secretary concluded that Verizon had failed to carry its burden of proving that the Cost and M&P Information were entitled to the exception from public disclosure under § 87(2)(d) of FOIL. (Ex. Q at 20.)

With respect to the Cost Information, the Secretary stated that Verizon "makes . . . a valid case that certain granular information provided . . . might fit within the definition of trade secret." Nevertheless, the Secretary found that Verizon had

> failed to offer sufficient support as to how the release of aggregate costs alone would result in competitive injury. In other words, but for Verizon's failure to submit documents with fewer redactions, as directed by the RAO it might have satisfied its burden of proof. Accordingly, I must conclude that Verizon has failed to demonstrate that all of the cost information, both aggregate and specific, contained within the documents would result in substantial competitive injury if disclosed through the instant FOIL request.

(*Id.* at 12-13.)

As for the 13 documents that compose the M&P Information, the Secretary agreed with the RAO that three documents expressly labeled as "Methods and Procedures" constituted trade secret material entitled to protection. (*Id.* at 15.) The Secretary ruled, however, that Verizon's arguments and factual submissions with respect to the balance of the M&P Information did "not constitute the type of specific and sophisticated evidence necessary to sustain a finding of competitive injury. Rather, these statements . . . offer only conclusory allegations that lack factual support." (*Id.* at 15-16.) The Secretary concluded that, even though at least some portion of the M&P Information contains trade secrets, it all would be disclosed because, in her view, Verizon had over-redacted the documents.

Finally, the Secretary rejected Verizon's argument that the RAO's Determination had improperly failed to apply well-established agency precedent, in the form of prior rulings by ALJs in proceedings before the Commission. (*Id.* at 18-20.) The Secretary concluded that the Commission's ALJs may interpret FOIL and the Commission's implementing regulations one way, while the RAO is free to construe them a markedly different way. (*Id.*)

Pursuant to New York Public Officers Law § 89(5)(a)(3), confidential information submitted to an agency "must remain exempted from disclosure 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." *See also* 16 N.Y.C.R.R. § 6-1.3(c)(5) (exempting from disclosure confidential information "until 15 days after entitlement to confidential status has been finally denied or such further time as ordered by a court of competent jurisdiction"). Accordingly, the Secretary's Determination indicated that the Records would be released fifteen days after its issuance on December 2, 2013. (Ex. Q at 20.)

This Article 78 proceeding ensued.

ARGUMENT

I. THE RECORDS ARE EXEMPT FROM DISCLOSURE UNDER FOIL

The Cost and M&P Information are exempt from disclosure pursuant to § 87(2)(d) of FOIL, which requires agencies to deny access to records 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.

N.Y. Pub. Off. Law § 87(2)(d).

The purpose of this provision is "to protect businesses from the deleterious consequences of disclosing confidential commercial information, so as to further the State's economic

development efforts and attract business to New York." *Matter of Encore Coll. Bookstores, Inc. v. Auxiliary Serv. Corp.* ("*Encore*"), 87 N.Y.2d 410, 420, 663 N.E.2d 302, 307, 639 N.Y.S.2d 990, 995 (1995). In crafting § 87(2)(d), the Legislature tracked a parallel exemption in the federal Freedom of Information Act ("FOIA");[8] accordingly, New York courts rely on both federal and state case law to construe the statute. *See Encore*, 87 N.Y.2d at 419, 663 N.E.2d at 307, 639 N.Y.S.2d at 995 (stating that legislative history underlying § 87(2)(d) "refers to the similarity between the FOIL exemption for commercial information and the Federal exemption for commercial information").

Like its federal counterpart, § 87(2)(d) has two prongs. First, "[i]f the requested documents contain 'trade secrets,' they are exempt from disclosure, and no further inquiry is necessary." *Pub. Citizen Health Research Grp. v. FDA,* 704 F.2d 1280, 1286 (D.C. Cir. 1983). Second, if the documents do not contain trade secrets, but were submitted by "a commercial enterprise or derived from information from a commercial enterprise," their exempt status depends on a showing that disclosure "would cause substantial injury to the competitive position of the subject enterprise." N.Y. Pub. Off. Law § 87(2)(d).

The phrase "trade secret," as used in § 87(2)(d), is not statutorily defined. However, the Department and Commission, in their regulations implementing FOIL, broadly define trade secret as follows: "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 N.Y.C.R.R. § 6-1.3(a) (italics in original). The Court of Appeals has held that the Commission has an affirmative obligation to

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

protect a company's trade secrets, emphasizing "[t]he importance of trade secret protection and the resultant public benefit[.]" *Matter of N.Y. Tel. Co. v. Pub. Serv. Comm'n*, 56 N.Y.2d 213, 219-20, 436 N.E.2d 1281, 1282-83, 451 N.Y.S.2d 679, 680-81 (1982) (citing *Kewanee Oil Co. v. Bicron Corp.*, 41 U.S. 470, 481-82 (1974)). This obligation is reinforced by New York Public Officers Law § 74(3)(c) (prohibiting officers and employees of state agencies from disclosing confidential information obtained in the course of official duties), and New York Public Services Law § 15 (making the disclosure of confidential information a misdemeanor).

Similarly, the phrase "substantial injury to competitive position of the subject enterprise," as used in § 87(2)(d), is not statutorily defined. But New York courts have provided considerable guidance in this area. The leading case is the Court of Appeals' 1995 decision in *Matter of Encore College Bookstores, Inc. v. Auxiliary Service Corp.*, 87 N.Y.2d 410, 663 N.E.2d 302, 639 N.Y.S.2d 990 (1995). *See generally, Matter of N.Y. Racing Ass'n, Inc. v. State Racing & Wagering Bd.*, 21 Misc. 3d 379, 384, 863 N.Y.S.2d 540, 544 (Sup. Ct. N.Y. Cnty. 2008) ("the lower courts in this State have utilized the test set forth in *Encore*"). Relying on federal case law construing FOIA, the Court ruled that the existence of "substantial competitive harm"

> turns on the commercial value of the requested information to competitors and the cost of acquiring it through other means. Because the submitting business can suffer competitive harm only if the desired material has commercial value to its competitors, courts must consider how valuable the information will be to the competing business, as well as the resultant damage to the submitting enterprise. Where FOIA disclosure is the sole means by which competitors can obtain the requested information, the inquiry ends here.

Encore, 87 N.Y.2d at 420, 663 N.E.2d at 307, 639 N.Y.S.2d at 995 (internal quotation marks omitted; citing *Worthington Compressors v. Costle,* 662 F.2d 45, 51 (D.C. Cir. 1981)).

While competitive harm is the touchstone under *Encore,* the Court specifically held that actual harm need not be shown, but only "'actual competition and the likelihood of substantial

competitive injury.'" *Id.*, 87 N.Y.2d at 421, 663 N.E.2d at 308, 639 N.Y.S.2d at 996 (quoting *Gulf & W. Indus., Inc. v. United States,* 615 F.2d 527, 530 (D.C. Cir. 1979)). Under this test, "the court need not conduct a sophisticated economic analysis of the likely effects of disclosure," *Pub. Citizen Health Research Grp.*, 704 F.2d at 1291, and courts customarily rely on a common sense approach to determining competitive harm, *Inner City Press v. Bd. of Governors*, 380 F. Supp. 2d 211, 219 (S.D.N.Y. 2005), *aff'd* 463 F.3d 239 (2d Cir. 2006); *Watkins v. U.S. Customs & Border Prot.*, 643 F.3d 1189, 1196 (9th Cir. 2011). "[E]vidence demonstrating the existence of *potential* economic harm is sufficient" to prevent disclosure. *Utah v. Dep't of the Interior*, 256 F.3d 967, 970 (10th Cir. 2001) (emphasis in original) (construing FOIA exemption 4).

When assessing whether there is a likelihood of competitive injury, it is not the magnitude of the potential harm but rather the "nature of the material sought" which guides the analysis. *Nat'l Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673, 683 (D.C. Cir. 1976). Material which would allow "competitors and customers to [gain] insight into the company's competitive strengths and weaknesses" is precisely the information protected, because its disclosure may cause "substantial competitive injury." *Timken Co. v. U.S. Customs Serv.*, 491 F. Supp. 557, 559 (D.D.C. 1980).

Applying these principles to the case at hand compels the conclusion that Verizon's Cost and M&P Information is exempt from disclosure under § 87(2)(d), either because such records constitute trade secrets, or because their disclosure would cause substantial competitive injury to Verizon.

A. Section 87(2)(d) Exempts the Cost Information

1. The Cost Information Constitutes Trade Secrets

Both the RAO and the Secretary found that the Cost Information "fits within the definition of trade secret." (Ex. I at 12; Ex. Q at 13.) Indeed, Respondents routinely treat such information as trade secrets, and any contrary conclusion is unsupportable. *See, e.g.*, Ex. G(7), Case No. 98-C-1357, "Ruling on Proprietary Status of Module 3 Testimony and Exhibits" (issued Jan. 31, 2002) at 2 (stating that documents of Verizon "involving its dealings with equipment vendors or its use of proprietary costing models . . . have previously been found to be entitled to trade secret protection"; also noting that such documents, as a general matter, fell within the Department's regulatory definition of trade secret because they were "not widely available, it would be difficult to obtain, some of it is difficult or costly to develop, and some of it would be of substantial use to a firm seeking to take account, in its own strategies, of its competitors' strengths, weaknesses, and plans"); Ex. G(5), Case No. 98-C-1357, "Ruling Concerning Proprietary Status of Exhibit 106-P" (issued Apr. 17, 2000) at 1-2 (holding that document containing "detailed cost information for components of a highly competitive retail service" was entitled to trade secrecy protection under N.Y. Pub. Off. Law § 87(2)(d)); Ex. G(6), Case No. 98-C-1357, "Ruling on Proprietary Status of Line Sharing Exhibits" (issued May 26, 2000) at 1-2 (holding that document "incorporating cost data, demand projections, and retail deployment strategies" as confidential proprietary material); *see also* Ex. G(1), Case Nos. 95-C-0657, *et al.*, "Ruling Concerning Trade Secrets and Motion to Strike Portions of a Brief" (issued Feb. 18, 1997) at 3-5 (holding that vendor discounts and network plans documents containing "detailed cost information for components of a highly competitive retail service" were entitled to trade secret protection).

Courts, too, have uniformly held that cost and pricing data, such as the Cost Information, is exempt from disclosure under Public Officer's Law § 87(2)(d). *See, e.g., Matter of Catapult Learning, LLC v. New York City Dep't of Educ.*, 109 A.D.3d 731, 731, 971 N.Y.S.2d 439, 440 (1st Dep't 2013) (upholding claim to trade-secret protection for pricing and budget information); *Matter of City of Schenectady v. O'Keeffe,* 50 A.D.3d 1384, 1385-86, 856 N.Y.S.2d 281, 282-84 (3d Dep't) (applying trade-secret exemption to information on age, cost, and extent of certain utility property, information that was used, in part, to determine the regulated rate that the utility may charge for service), *lv. denied,* 11 N.Y.3d 702, 894 N.E.2d 653, 864 N.Y.S.2d 389 (2008); *Matter of N.Y.S. Elec. & Gas Corp. v. N.Y.S. Energy Planning Bd.,* 221 A.D.2d 121, 124-25, 645 N.Y.S.2d 145, 148 (3d Dep't) (upholding confidential treatment of data on generation efficiency submitted by electric generating company on the ground that "disclosure of such data could result in competitors . . . inferring essential aspects of the [generating company's] production costs fundamental to projecting future costs . . . ."), *lv. granted,* 89 N.Y.2d 803, 675 N.E.2d 1233, 653 N.Y.S.2d 280 (1996), *withdrawn,* 89 N.Y.2d 1031, 680 N.E.2d 620, 658 N.Y.S.2d 246 (1997).

Similar conclusions have been reached under FOIA. *See, e.g., Gulf & W. Indus.*, 615 F.2d at 530 (granting trade secret protection under FOIA to information on a company's costs on the grounds that the company's "competitors would be able to accurately calculate [its] future bids and its pricing structure from the withheld information. The detailed information, if released, would likely cause substantial harm to [the company's] competitive position in that it would allow competitors to estimate, and undercut, its bids. This type of information has been held not to be of the type normally released to the public and the type that would cause substantial competitive harm if released."); *Timken Co.,* 491 F. Supp. at 559 (holding that information that would allow

company's competitors and customers "to estimate [a company's] profit margin and production costs" "would likely result in substantial competitive injury to the suppliers of that information").

Having found that the Cost Information constituted trade secrets, the Secretary erred when she determined that Verizon was obligated to establish, with "specific and sophisticated evidence," that disclosure of its trade secrets would "cause substantial competitive injury." (Ex. Q at 13-14.) Once the Cost Information was deemed trade secret material, the Secretary was required as a matter of law to exempt it from disclosure under § 87(2)(d) of FOIL, without any further inquiry. *See* N.Y. Pub. Off. Law § 87(2)(d) (exemption applies to records that "are trade secrets **or** are submitted to an agency by a commercial enterprise . . . and which if disclosed would cause substantial injury to the competitive position of the subject enterprise") (emphasis added); *see also Pub. Citizen Health Research Grp.*, 704 F.2d at 1286 (holding under FOIA that, "[i]f the requested documents constitute 'trade secrets,' they are exempt from disclosure, and no further inquiry is necessary"); *Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 93 F. Supp. 2d 1, 15 (D.D.C. 2000) (holding under FOIA that trade secrets are "categorically protected"); *cf.*, *Matter of N.Y. Tel. Co.*, 56 N.Y.2d at 219-20, 436 N.E.2d at 1283-84, 451 N.Y.S.2d at 681-82 (holding Commission has an affirmative obligation to protect a company's trade secrets, emphasizing "[t]he importance of trade secret protection and the resultant public benefit . . . .") (citing *Kewanee Oil Co.*, 41 U.S. at 481-82).

Accordingly, the Cost Information is exempt from disclosure under the first prong of FOIL § 87(2)(d).

2. Disclosure of the Cost Information Would Cause Competitive Injury

But even if the Cost Information did not constitute trade secrets, it is exempt from disclosure because it was "submitted to an agency by a commercial enterprise . . . and which if

disclosed would cause substantial injury to the competitive position of the subject enterprise." N.Y. Pub. Off. Law § 87(2)(d).

As a threshold matter, it is undisputed — and undisputable — that the Cost Information has commercial value and that FOIL disclosure is the sole means by which competitors could access it. (*See* Ex. I at 12; Ex. Q at 13-14.) Accordingly, Verizon has satisfied the core requirements for entitlement to protection under § 87(2)(d), and the inquiry should end there. *See Matter of Passino v. Jefferson-Lewis*, 277 A.D.2d 1028, 1029, 716 N.Y.S.2d 229, 230 (4th Dep't 2000) ("'Where FOI[L] disclosure is the sole means by which competitors can obtain the requested information, the inquiry ends [t]here.'") (alterations in original) (quoting *Encore,* 87 N.Y.2d at 420, 663 N.E.2d at 307, 639 N.Y.S.2d at 995), *lv. denied,* 96 N.Y.2d 709, 749 N.E.2d 208, 725 N.Y.S.2d 639 (2001).[9] This standard is particularly applicable where, as here, many of Verizon's most significant competitors are not subject to the Commission's regulatory oversight, and rarely, if ever, required to submit confidential documents to the Commission. But even if more were required, Verizon has far exceeded its burden.

Verizon's submissions to Respondents overwhelmingly establish that the disclosure of the Cost Information would likely cause Verizon substantial competitive injury. In support of non-disclosure, Verizon submitted the declaration of Dr. William E. Taylor, an eminent economist specializing in the telecommunications industry. (Pet. ¶ 40; Ex. J.) Dr. Taylor holds a B.A. in

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[9] *See also, e.g., Encore,* 87 N.Y.2d at 420, 663 N.E.2d at 307, 639 N.Y.S.2d at 995 (trade secret exemption from FOIL protects materials which are confidential and have commercial value); *O'Keeffe,* 50 A.D.3d at 1384, 856 N.Y.S.2d at 281 (affirming denial of a FOIL request for details of power company's physical assets); *Matter of Newman v. Dinallo,* 22 Misc. 3d 1134A, 881 N.Y.S.2d 365 (Sup. Ct. Nassau Cnty. 2009) (affirming Insurance Department's denial of FOIL request for documents containing details of individual insurance policies); *Belth v. Ins. Dep't,* 95 Misc. 2d 18, 406 N.Y.S.2d 649 (Sup. Ct. N.Y. Cnty. 1977) (affirming Insurance Department's denial of FOIL request for insurance policies' costs and pricing details).

Economics from Harvard College, and an M.A. in Statistics and a Ph.D. in Economics from the University of California at Berkley. Dr. Taylor has worked for over thirty years in the field of telecommunications economics, has testified in numerous regulatory proceedings, and is presently a Special Consultant at National Economic Research Associates, Inc. (Ex. J ¶¶ 1-2 & Ex 1.)

In his declaration, Dr. Taylor described in detail the resulting harm to both Verizon and telecommunications customers if Verizon's Cost Information is made public. (Ex. J ¶¶ 3-21.) He explained that knowledge of a company's costs give its rivals a competitive advantage in pricing. As a practical matter, costs establish a pricing floor for a company, below which the company cannot reduce its prices for extended periods. (*Id.* ¶ 6.) Thus, for example, if a company's costs to produce a widget are $1.00, the company cannot sell its widgets for under $1.00 for any length of time and remain in business. The company could, however, sell its widgets for $.95 for a short period. If rivals have knowledge of a company's costs, they have the advantage of knowing whether any price reductions by the company are sustainable, and they are able to distinguish short-run marketing efforts, such as discounts, rebates and promotions, from long-run price reductions. (*Id.*) In addition, knowledge of a company's costs also gives a competitive advantage to rivals that are considering market entry. If a company's costs are made public, competitors can pinpoint profitable opportunities to take business from the company without having to expend the time, costs and effort that would otherwise be necessary to make these decisions. (*Id.* ¶ 7)

Dr. Taylor explained that it is well recognized by economic and marketing literature that information about a rival's costs is valuable and a source of competitive advantage. (*Id.* ¶ 8.) Established economic models recognize that knowledge of a company's costs helps competitors in their own pricing, in identifying where entry and expansion will be profitable, and can reduce the likelihood of temporary price reductions that would benefit consumers. (*Id.*) In addition,

obtaining information about a rival's costs creates a competitive advantage through improved decision making. (*Id.*) That is, knowledge of such costs enables a company to assess its own methods and technologies, to undertake cost reduction initiatives, and to improve entry and production decisions. (*Id.* ¶¶ 8-9.)

Dr. Taylor described how these benefits to competitors translate into competitive harm to the firm whose cost information is disclosed, in this case, Verizon. (*Id.* ¶¶ 10-21.)

- First, disclosure of Verizon's cost information would give competitors the ability to distinguish Verizon's long run price reductions from short-run marketing efforts, thus giving them an advantage in formulating their own prices. On the other hand, Verizon's competitors, whose costs are not public, can lower or threaten to lower prices below their costs for short periods and Verizon would not know whether such prices could persist. Verizon would be placed in a competitive disadvantage in terms of pricing accurately in response to competitors' pricing initiatives. (*Id.* ¶ 11.)

- Second, disclosure of Verizon's cost information would allow competitors to determine expected profitability in entering new markets or providing services, and thus would give rivals a competitive advantage by reducing their risk of expansion. Verizon, on the other hand, must access its own risks without the benefit and advantage of its competitors' cost information. Ultimately, this cause Verizon to lose market share and reduce profitability. (*Id.* ¶ 12.)

- Third, disclosure of Verizon's cost information would reveal the confidential prices that Verizon pays for certain inputs, such as cable and electronics. With such information made public, suppliers would face pressure to reduce their prices for others, and would reduce the incentive to offer discounts to Verizon in the future. Thus, it is likely that Verizon would obtain fewer and smaller discounts in the prices it pays for network equipment. (*Id.* ¶ 14.)

Dr. Taylor explained that these harms are not merely theoretical. New York's market for telecommunications services, including home wireless services such as VVL service, is fiercely competitive. Dr. Taylor identified several competitors of Verizon who also offer home wireless services. (*Id.* ¶ 13.) In very specific, non-conclusory terms, he explained how disclosure of the Cost Information to these rivals would enable them to "assess Verizon's price floor for wireline voice service as an element in pricing their wireless home network services and calculating the

profitability of expanding their wireless networks to provide wireless home service on Fire Island and elsewhere." (*Id.*) In short, Dr. Taylor established that if Verizon's Cost Information is disclosed, Verizon would be at a competitive disadvantage in price competition, in market entry decisions, and in obtaining discounted prices for inputs. (*Id.* ¶¶ 10-21.)

Dr. Taylor also established that the commercial value of the Cost Information is substantial, and thus any competitive harm to Verizon from its disclosure would likewise be substantial. Specifically, he noted that even estimates of cost information are extremely expensive in the telecommunications market, demonstrating the great value of such information as a source of competitive advantage. (*Id.* ¶ 17.) Dr. Taylor also noted that telecommunications firms take significant steps to protect their cost information and that, in his experience, similar types of information are routinely treated as confidential and competitively sensitive in judicial and regulatory proceedings. (*Id.* ¶¶ 5, 19.)

Finally, Dr. Taylor explained how the disclosure of Verizon's competitively-sensitive information could harm telecommunications consumers. First, information asymmetry among competitors could inhibit price competition, thus resulting in higher prices for customers. (*Id.* ¶¶ 3, 6.) Disclosure of Verizon's confidential information would result in information asymmetry, as Verizon has no access to its competitors' confidential information, and most of its competitors are not subject to the Commission's regulatory oversight. Second, the disclosure of cost information could induce distortions in retail telecommunications markets, resulting in large and irreversible welfare effects on consumers. (*Id.* ¶¶ 3, 20-21.)

Verizon also submitted a declaration from Robert Wheatley II, who confirmed the conclusions of Dr. Taylor. (Pet. ¶ 40; Ex. K.) Mr. Wheatley is an Executive Director of Financial Planning and Analysis at Verizon, and is responsible for finance and strategic planning matters for

Verizon's Consumer and Mass Business unit, including matters related to the pricing of the unit's services. (Ex. K ¶ 1.) As such, he has first-hand knowledge of Verizon's business, the competitive pressures Verizon faces, and the competitive dynamics of pricing decisions. He explained the nature and utility of the Cost Information, and established that it contains "significant information concerning Verizon's cost structure for providing consumer service that goes well beyond high level information on aggregate costs and margins that is made available to the public." (*Id.* ¶ 3.) Consistent with the testimony of Dr. Taylor, Mr. Wheatley explained how disclosure of this information to Verizon's competitors would enable them to develop successful strategies for winning customers away from Verizon and promoting their own competitive success. (*Id.* ¶¶ 3-6.)

Far from speculative, the evidence submitted by Verizon is specific, detailed and un-rebutted, and it overwhelmingly establishes the substantial competitive harm that Verizon would suffer as a result of any disclosure of its Cost Information. Even the Secretary concluded that Verizon's evidence was sufficient to establish that disclosure of at least some of Verizon's Cost Information (i.e., specific network cost information) would result in competitive injury. (Ex. Q at 13.) Nonetheless, the Secretary ordered such information to be disclosed.

The Secretary's rationale for disclosure of certain of the Cost Information was that the materials reflected "aggregate costs." (Ex. Q at 13-14.) As an initial matter, the Secretary cites no decisional authority for her distinction between "granular" and "aggregate" costs. (*Id.*) But even assuming that highly aggregated cost data creates less of a potential for competitive harm, none of the Cost Information consists of aggregate costs, but rather of detailed breakdown of costs. In fact, Verizon disclosed its aggregate, top-level cost information in its public filings, and only sought protection for detailed cost break-outs.

By any measure, the Secretary's Determination runs afoul of the second prong of § 87(2)(d) and must be overturned.

B. Section 87(2)(d) Exempts the M&P Information

1. The M&P Information Constitutes Trade Secrets

Verizon's M&P Information similarly constitutes trade secrets and, thus, is exempt from disclosure. The M&P Information embodies the processes that Verizon developed at considerable expense and effort, which are designed to maximize customer satisfaction while minimizing the likelihood of foreseeable snags. The materials were generated as part of a single, integrated and complex process associated with the roll-out of a new product. There is no dispute that the M&P Information is confidential and commercially valuable.

Courts routinely hold that a corporation's internal and confidential policies and procedures are commercially valuable and protectable trade secrets. *See, e.g., AIN Leasing Corp. v. Peat, Marwick, Mitchell & Co.*, 166 Misc. 2d 902, 903-04, 636 N.Y.S.2d 584, 585-86 (Sup. Ct. Nassau Cnty. 1995) (holding manual consisting of audit policies and procedures met the criteria of a trade secret under New York law); *see also Castillon v. Corr. Corp. of Am., Inc.*, No. 1:12-cv-00559, 2013 WL 4039478, at *3 (D. Idaho Aug. 6, 2013) ("Businesses have legitimate interests in keeping their competitors from obtaining proprietary information such as trade secrets, as well as policies and procedures as to how they function."); *Pochat v. State Farm Mut. Auto. Ins. Co.*, No. 08-cv-5015, 2008 WL 5192427 at *9 (D.S.D. Dec. 11, 2008) (holding claims handling policies and procedures constitute trade secrets); *AdvantaCare Health Partners, LP v. Access IV, Inc.*, No. 03-cv-4496, 2003 WL 23883596, at *3 (N.D. Ca. Oct. 24, 2003) (holding that policies and procedures were trade secret information that were used by defendant to create its own policies and procedures); *Hamilton v. State Farm Mut. Auto. Ins. Co.*, 204 F.R.D. 420, 423-24 (S.D. Ind. 2001)

(holding claims handling policies and procedures constitute protectable trade secret under state law). Moreover, Respondents themselves routinely treat methods and procedure information as trade secrets. *See, e.g.*, Ex. G(9), Case 02-C-1425, "Ruling on Confidential Trade Secret Status of Testimony and Exhibits" (issued Oct. 8, 2004) at 11 (granting Verizon's methods and procedures with respect to certain systems permanent trade secret protection from disclosure); Ex. G(10), Case 03-C-0971, "Ruling on Protective Order and Access by Competitors to Allegedly Confidential Information" (issued Feb. 23, 2007) at 1, 5, 6 (holding that documents of Verizon reflecting its practices, methods and procedures and "network architecture" were entitled to trade secret protection under the Department's rules).

In light of this mountain of case law and agency authority, the Secretary's conclusions regarding the M&P information must be overturned. As noted, the Secretary found that at least three of the 13 documents constituted M&Ps, which the RAO considered to be trade secrets, yet ordered they be disclosed — a clear violation of § 87(2)(d). (Ex. Q at 15; *see also* Ex. I at 12.) Furthermore, all 13 documents contain Verizon's methods and procedures, and all constitute confidential, commercially-valuable information that is otherwise unavailable to Verizon's competitors. As such, the M&P Information is trade secret material exempt from disclosure.

2. Disclosure of the M&P Information Would Cause Substantial Competitive Injury

Additionally, the M&P Information is exempt under § 87(2)(d) because Verizon "present[ed] specific, persuasive evidence that disclosure [of the confidential M&P Information] will cause it to suffer a competitive injury." *Matter of Markowitz v. Serio,* 11 N.Y.3d 43, 51, 893 N.E.2d 110, 113-14, 862 N.Y.S.2d 833, 836 (2008). In support of non-disclosure, Verizon submitted the declaration of Thomas McNabb, Director of Operations in the National Operations organization at Verizon. (Pet. ¶¶ 30-31; Ex. L.) Mr. McNabb has over 25 years of experience with

Verizon, is the project director for VVL, and has overseen the development, design and implementation of VVL. (Ex. L ¶ 1.) As such, he has first-hand knowledge of Verizon's VVL business and of the competitive dynamics of telecommunications markets.

Mr. McNabb explained that the 13 documents that constitute the M&P Information include scripts for call-center representatives, training materials and similar documents which are used to inform, instruct and advise the company's employees on various aspects of how they should interact with current and prospective VVL customers. (*Id.* ¶ 2.) Mr. McNabb explained that although not all the documents bear the title "Methods and Procedures," all 13 documents are meant to provide binding, official guidance, at the time they are issued, as to the manner in which employees should carry out certain functions, are confidential, and are generated as part of an integrated product development process. (*Id.* ¶¶ 3-4.) Mr. McNabb made clear that, to the extent the RAO was under the impression that not all the M&P Information constituted confidential information or that Verizon did not seek confidential treatment of all such M&P Information, she was under a misimpression. (*Id.* ¶ 4.)

Mr. McNabb established that the 13 documents were the product of significant investments of time, effort and subject matter expertise, and reflect Verizon's business strategies. (*Id.* ¶¶ 5-9.) Specifically, he averred that the 13 documents are the output of an integrated product development and "Go-to-Market" process that involve multiple work groups. He explained that multiple organizations within Verizon expended considerable time, effort, expertise and coordination in order to establish the methods, procedures, process flows and scripts reflected in the 13 documents. (*Id.* ¶ 7.) In addition, these methods and procedures were then subject to extensive testing by Verizon. (*Id.* ¶ 8.) Mr. McNabb estimated that it took at least 11,900 hours of work to

develop the process flows, create the methods and procedures, and perform associated testing and validation for VVL. (*Id.* ¶ 9.)

Mr. McNabb also explained why it was necessary to view the 13 documents in their totality rather than individually. (*Id.* ¶ 6.) He pointed out that each method and procedure document is dependent on the procedures and processes implemented by upstream and downstream functions and workgroups. (*Id.*) The documents were generated as part of an integrated process in connection with the roll-out of VVL. Thus, the value of the documents cannot be determined by isolating and assessing each document on its own.

Additionally, Mr. McNabb demonstrated that the 13 documents contain confidential information that is unavailable to Verizon's competitors. Thus, Verizon's competitors have no way of obtaining complete and detailed knowledge of Verizon's methods and procedures, unless they were given the M&P Information. (*Id.* ¶ 10.) On the other hand, Verizon has no access to the methods and procedures of its competitors, many of which are not entities subject to Department or Commission oversight.

Mr. McNabb explained in detail how the M&P Information could give its rivals a competitive advantage. (*Id.* ¶ 11.) For example, Verizon's M&P Information could assist its rivals in developing parallel methods and procedures for similar products. The information could also provide guidance on issues that they would need to consider in formulating their own processes, and could also be a source of ideas for competitive strategies. For example, competitors could use the information to "immunize" potential customers against Verizon's offering or to win current customers away. (*Id.*)

Mr. McNabb further described how the disclosure of Verizon's M&P Information would harm Verizon. First, the disclosure would give Verizon's rivals a competitive advantage in that

they could "piggy-back," for free, on Verizon's own costly efforts to develop the VVL methods and procedures, thus reducing the competitors' costs as compared to Verizon's. Numerous providers offer products that are similar to VVL and compete with Verizon in the marketplace. (*Id.* ¶¶ 11-12; *see also* Ex. J at ¶ 13.) Disclosure would enable Verizon's competitors to obtain, for free, information on processes that Verizon was required to develop through a considerable expenditure of its own time, money, and effort. They would be able to use this information in support of their own products, thus lowering their cost structure relative to Verizon, while providing them with the means of enhancing the competitive success of their own products, at the expense of Verizon's. Also, disclosure would provide Verizon's rivals with guidance on how to compete against Verizon more effectively. Under either scenario, the harm to Verizon would be in terms of lost customers and lost revenues. (Ex. L at ¶ 12.)

II. THE SECRETARY'S DETERMINATION MUST BE OVERTURNED BECAUSE IT IS BASED ON ERRORS OF LAW AND IS ARBITRARY AND CAPRICIOUS

A. The Secretary's Order to Disclose Records She Found Were Trade Secrets Was Arbitrary, Capricious and Illegal

In the Secretary's Determination, she conceded that (certain unspecified) portions of both Verizon's Cost and M&P Information constitute trade secrets exempt from disclosure under § 87(2)(d). (Pet. ¶¶ 38-39, 47-48; *see, e.g.,* Ex. Q at 13 ("Verizon makes . . . a valid case that certain granular information provided, relating to network costs, might fit within the definition of trade secret."); *id.* at 15 (noting that portions of the M&P Information meet the description of trade secret material).) Nevertheless, the Secretary denied Verizon's appeal *in toto* on the ground that Verizon had failed to meet its burden of proof with respect to all of the records for which it sought an exemption. The Secretary even suggested that Verizon might have prevailed on its appeal if it had submitted "fewer redactions" to the RAO. (Ex. Q at 13 ("but for Verizon's failure to submit

documents with fewer redactions, as directed by the RAO, it might have satisfied its burden of proof"); *id.* at 15 ("I observe that the Company might well have satisfied its burden of proof had it made an effort to provide unredacted portions of the some of the network cost information"). Yet, nothing in the Secretary's Determination identifies the specific portions of the Records that the Secretary regarded as confidential, and those that she did not.

The Secretary's "all or nothing" approach is without any support in logic, law or common sense. Once the Secretary found that at least certain portions of the Records were exempt, she was prohibited from disclosing the exempt portions and obligated, at a minimum, to identify the specific portions that should be redacted. Denying Verizon's appeal without providing for the redaction of exempt information constituted a clear violation of FOIL. Time and again, the Court of Appeals has admonished agencies that when a public record is found to contain both exempt and nonexempt information, the agency must redact or otherwise separate the portion of the record that is not subject to disclosure.[10] This redact-and-release technique is required even where it may be

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[10] *See, e.g., Matter of Data Tree, LLC v. Romaine,* 9 N.Y.3d 454, 464, 880 N.E.2d 10, 16, 849 N.Y.S.2d 489, 495 (2007) ("even when a document subject to FOIL contains . . . private, protected information, agencies may be required to prepare a redacted version with the exempt material"); *Daily Gazette Co. v. Schenectady,* 93 N.Y.2d 145, 159, 710 N.E.2d 1072, 1078, 688 N.Y.S.2d 472, 478 (1999) (stating in the context of Civil Rights Law § 50-a(1), applicable to FOIL through section 87(2)(a), that "disclosure for uses that would not undermine the protective legislative objectives could be attained either by a restrictive formulation of the FOIL request itself, or through redaction by the agency having custody of the records, tailored in either case so as to preclude use in personal attacks against an officer which Civil Rights Law 50-a was enacted to preclude"); 76 C.J.S. Records § 147 (Dec. 2013) ("Where disclosure is sought under a statute of a record which is exempt in part, the agency from which disclosure is sought or the court should remove the exempt portion and disclose the remainder."); *see also Matter of Schenectady Cnty. Soc'y for the Prevention of Cruelty to Animals v. Mills,* 18 N.Y.3d 42, 46, 958 N.E.2d 1194, 1196, 935 N.Y.S.2d 279, 281 (2011) (stating that were a FOIL request seeks both exempt and nonexempt information, the proper remedy is redaction of the exempt information); *Westchester Rockland Newspapers v. Kimbal,* 50 N.Y.2d 575, 582, 408 N.E.2d 904, 908, 430 N.Y.S.2d 574, 578 (1980) ("Finally, we comment on the direction that Special Term conduct an *in camera* hearing to excise privacy impinging references to needy recipients of the lottery funds. This presents no new problem. Though the Freedom of Information Law specifies no procedures for implementing its guarantees, decision law has repeatedly acknowledged the efficacy of this technique in appropriate circumstances.").

burdensome to excise the confidential portions of a document. If redaction is truly impractical or onerous, the agency's remedy is to withhold the entire document — not disclose all of the information in it as the Secretary did here. *See Matter of Data Tree,* 9 N.Y.3d at 466, 880 N.E.2d at 17, 849 N.Y.S.2d at 496 ("[P]rivacy concerns may also exist with respect to the information contained in the electronic format requested by Data Tree. If such information cannot be reasonably redacted from the electronic records, then such records may not be subject to disclosure under FOIL.").

No decision authority from any jurisdiction comes remotely close to supporting the Secretary's position. To the contrary, FOIA requires agencies to redact exempt information,[11] as do innumerable state courts throughout the nation construing their respective disclosure statutes. [12]

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[11] *See* 5 U.S.C. § 552(b) ("Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.").

[12] *See, e.g., Schneider v. City of Jackson*, 226 S.W.3d 332, 346 (Tenn. 2007) ("An entire field interview card should not be deemed exempt simply because it contains some exempt information. Rather, redaction of the exempt information is appropriate."); *Kade v. Smith*, 904 A.2d 1080, 1086-87 (Vt. 2006) ("[S]ubstantial nonpersonal information may be contained in the performance evaluations at issue, including sections outlining . . . job duties and performance expectations. Therefore, should it determine that the balance favors nondisclosure, the court must also give careful consideration to redaction of the personal information and disclosure of the remainder."); *Blethen Maine Newspapers, Inc. v. State of Maine*, 871 A.2d 523, 535 (Me. 2005) ("[t]he degree of 'cutting and pasting' required to redact documents cannot justify bypassing redaction unless it is demonstrated to be truly impractical or onerous"); *Denver Publ'g. Co. v. Bd. of Cnty. Comm'rs*, 121 P.3d 190, 205 (Colo. 2005) (where email messages included "both public and private communications," the Court held: "We see no problem . . . requiring that such messages be redacted by the district court to exclude from disclosure those communications within the messages that do not address the performance of public functions."); *Media Gen. Operation, Inc. v. Feeney*, 849 So.2d 3, 6 (Fla. Dist. Ct. App. 2003) ("[T]he 'private' or 'personal' phone calls by these five individuals were not created or received in connection with the official business of the House. Therefore, we agree with the trial court that the personal calls fall outside the current definition of public records and were properly redacted."); *Allsop v. Cheyenne Newspapers, Inc.*, 39 P.3d 1092, 1101 (Wyo. 2002) (endorsing redactions); *Convention Ctr. v. S. Jersey Publ'g Co., Inc.*, 637 A.2d 1261, 1268-69 (N.J. 1994) ("[B]lanket access to the tapes would not be required; rather, access could be limited to those portions of the tapes necessary to vindicate the public interest. . . . [A]s in the case of documents, the court would be free to redact portions of the tapes that constitute either confidential or privileged information . . . ."); *KPNX-TV v. Super. Ct.*, 905 P.2d 598, 603 (Ariz. App. 1995) ("Good reason to deny access to part of a record is not necessarily good reason to deny access to all of it."); *Bradley v. Saranac Cmty. Sch. Bd. of Educ.*, 565 N.W.2d 650, 659 (Mich. 1997) (endorsing limited redaction); *Degordon v. Ohio State Med. Bd.*, 609 N.E.2d 247, 248 (Ohio

If condoned, the Secretary's "all-or-nothing" approach would leave regulated entities in the untenable position of having to assess with perfection — and without any adequate prior guidance — the proper level of redaction or risk disclosure of trade secrets and other commercially-sensitive information. This approach is certainly antithetical to "the policy behind subdivision (2)(d) — to protect businesses from the deleterious consequences of disclosing confidential commercial information, so as to further the State's economic development efforts and attract business to New York." *Encore,* 87 N.Y.2d at 420, 663 N.E.2d at 307, 639 N.Y.S.2d at 995. It is also contrary to the teachings of *Matter of New York Telephone Co. v. Public Service Commission*, where the Court of Appeals held that the Commission has an affirmative obligation to protect a company's trade secrets. 56 N.Y.2d at 219-20, 436 N.E.2d at 1283-84, 451 N.Y.S.2d at 681-82.

Accordingly, the Secretary's Determination must be vacated at least to the extent that it orders disclosure of concededly exempt materials.

B. The Secretary's Ruling Misstated Applicable Law

The Secretary' Determination is premised on several significant errors of law.

As an initial matter, the Secretary's Determination sets the bar impossibly high for a company to establish entitlement to exemption under FOIL § 87(2)(d). Here, both the RAO and the Secretary conceded that at least some, if not all, of the information contained in the Records consists of commercially-valuable, confidential trade secrets. Having concluded that the Records contained trade secrets, no further analysis was required under § 87(2)(d). *See, e.g., Pub. Citizen Health Research Grp.*, 704 F.2d at 1286 (holding under FOIA that, "[i]f the requested documents constitute 'trade secrets,' they are exempt from disclosure, and no further inquiry is necessary").

Ct. of Common Pleas 1992) ("Ordinarily, the court *must* conduct an independent *in camera* inspection in order to determine if the records at issue contain any non-public information that should be severed through redaction," unless "the matters are *entirely* public or *entirely* confidential.").

The Secretary also erred when she concluded that asymmetrical access to competitively valuable information is insufficient to establish competitive injury. The Court of Appeals in *Encore* noted with approval the well-settled principle that an entity is harmed where its competitors have free access to its commercially-valuable information.

> "Because competition in business turns on the relative costs and opportunities faced by members of the same industry, there is a potential windfall for competitors to whom valuable information is released under FOIA. If those competitors are charged only minimal FOIA retrieval costs for the information, rather than the considerable costs of private reproduction, they may be getting quite a bargain. Such bargains could easily have competitive consequences not contemplated as part of FOIA's principal aim of promoting openness in government."

Encore, 87 N.Y.2d at 415-16, 663 N.E.2 at 304-05, 639 N.Y.S.2d at 992-93 (quoting *Worthington Compressors*, 662 F.2d at 51). Thus where, as here, the records at issue consist of commercially-valuable, confidential trade secrets, no further showing of competitive harm need be shown.

But even if more were required, Verizon submitted cogent arguments, as well as detailed factual allegations from an industry expert and company representatives that established that disclosure of the Records would result in a competitive advantage to Verizon's rivals and a substantial competitive injury to Verizon. Nonetheless, the Secretary concluded that Verizon's submissions were somehow not sufficiently sophisticated or detailed. (Ex. Q. at 15, 16.) Other than proof of actual harm (which would be impossible to provide where, as here, substantially similar information has invariably been protected in the past), it is unclear the type or quantum of evidence the Secretary would deem sufficient under the circumstances. The exemption for commercial information would have little meaning if a leading expert's meticulous assessment of likely harm could be dismissed as mere speculation.

The Secretary further erred when she concluded that the Court of Appeals, in *Matter of Markowitz v. Serio,* 11 N.Y.3d 43, 893 N.E.2d 110, 862 N.Y.S.2d 833 (2008), had "raised the bar"

in terms of the quantum of evidence which must be adduced by a party seeking to invoke trade secret protection pursuant to § 87(2)(d). (Ex. Q at 12.) The Court of Appeals in that case merely repeated the oft-quoted refrain that a party cannot establish entitlement of an exemption under FOIL with conclusory assertions or speculation. But Verizon did not submit or rely on any conclusory or speculative assertions. Rather, Verizon's detailed submissions overwhelmingly establish that the Records contain precisely the type of non-public, competitively-sensitive information that has consistently been found by New York courts to cause competitive harm if disclosed.[13] No court has interpreted *Markowitz* to effect a change in the law; to the contrary, it is typically treated as narrowly limited to its specific facts. *See, e.g., Aurelius,* 2009 WL 367770, at *4 (distinguishing *Markowitz,* upholding the Insurance Department's denial of FOIL request, finding that regulated entity would be damaged by disclosure of competitive information that was

[13] *See, e.g., Catapult Learning,* 109 A.D.3d at 731, 971 N.Y.S.2d at 439 (upholding claim to trade-secret protection for pricing and budget information); *N.Y.S. Elec. & Gas Corp.,* 221 A.D.2d at 124-25, 645 N.Y.S.2d at 147 (upholding confidential treatment of data on generation efficiency submitted by electric generating company on the ground that "disclosure of such data could result in competitors . . . inferring essential aspects of the [generating company's] production costs fundamental to projecting future costs . . . ."); *Matter of Troy Sand & Gravel Co., Inc. v. N.Y.S. Dep't of Transp.,* 277 A.D.2d 782, 784-86, 716 N.Y.S.2d 772, 774-76 (3d Dep't 2000) (test results concerning vendors' materials held exempt from disclosure under § 87(2)(d)), *lv. denied,* 96 N.Y.2d 708, 749 N.E.2d 207, 725 N.Y.S.2d 638 (2001); *Matter of Glens Falls Newspapers, Inc. v. Cntys. of Warren & Washington Indus. Dev. Agency,* 257 A.D.2d 948, 950, 684 N.Y.S.2d 321, 323 (3d Dep't 1999) (power purchase agreement with public agency held exempt from disclosure); *Matter of James, Hoyer, Newcomer, Smiljanich & Yanchunis, P.A. v. State of New York,* 27 Misc. 3d 1223(A), 2010 WL 1949120, at *8-10 (Sup. Ct. N.Y. Cnty. Mar. 31, 2010) (records associated with Attorney General's investigation of student loan industry, as they relate to Sallie Mae, held exempt from disclosure under § 87(2)(d)); *Matter of Aurelius Capital Mgmt. v. Dinallo,* 22 Misc.3d 1122(A), 2009 WL 367770, at *2-4 (Sup. Ct. N.Y. Cnty. Jan. 13, 2009) (spreadsheets detailing nearly 3,000 transactions held exempt from disclosure under § 87(2)(d)), *aff'd,* 70 A.D.3d 467, 898 N.Y.S.2d 498 (1st Dep't 2010); *Matter of N.Y. Racing Ass'n, Inc.,* 21 Misc. 3d at 385, 863 N.Y.S.2d at 544-45 (bidding correspondence between parties held exempt from disclosure under § 87(2)(d)).

not otherwise available to entity's competitors).[14] Surely if the *Markowitz* Court intended to effect a change in the law, it would have said so expressly.

The Secretary also erred as a matter of law when she held that Verizon was obligated to establish, on an individual basis, a likelihood of substantial competitive injury from the disclosure of each cost item and each of the 13 documents that constitute the M&P Information. (Ex. Q at 14-16.) For example, according to the Secretary, Verizon was obligated "to parse out each of the 13 documents and demonstrate[] how each, if disclosed, would competitively injure it." (*Id.* at 16.) This approach ignores the fact that the value of the information at issue derives from its totality. Verizon's submissions establish that the M&P Information was generated as part of an integrated product development process, and reflect a complete and detailed account of Verizon's business strategies. (Ex. L ¶¶ 3-10.) Contrary to the Secretary's suggestion, Verizon is not seeking a "blanket exemption" for particular types of documents. (Ex. Q at 15.) Rather, Verizon has set forth a detailed explanation as to why the information contained in the Records is exempt. Moreover, taken to its logical conclusion, the Secretary's approach would regularly require regulated entities to submit affidavits hundreds, if not thousands, of pages in length, carefully "parsing" out each bit of confidential information for which it seeks protection. This approach is absurd and must be rejected.

[14] The Secretary also suggested that the quality of evidence now required to sustain a finding of competitive injury was "exemplified" in *Matter of Saratoga Harness Racing, Inc. v. Task Force on the Future of Off-Track Betting in New York State*, No. 9740/09, 2010 N.Y. Misc. LEXIS 2531 (Sup. Ct. Alb. Cnty. Mar. 9, 2010). But the "quality" of evidence in that case is really no different than that submitted by Verizon below. Moreover, the court in that case neither stated nor suggested that *Markowitz* had "raised the bar" with respect to the burden of establishing an exemption under FOIL.

C. The Secretary's Determination Improperly Overruled Department Precedent Concerning the Types of Information at Issue Here

Both before the RAO and Secretary, Verizon invoked numerous prior rulings by ALJs in Commission proceedings that recognized the two precise categories of information at issue in this matter — Cost[15] and M&P Information[16] — were entitled to protection under § 87(2)(d) of FOIL. (Ex. F at 7 & nn.13-14; *id.* at 10 & n.19; Ex. O, at 12-16.) This body of agency jurisprudence flows from the Commission's recognition that a narrow construction of § 87(2)(d) — one which would "require [the Commission] . . . to obtain competitively sensitive information" and then "release . . . that information to competitors of the firm providing it" — "would frustrate [the Commission's] . . . efforts to promote competition" in the telecommunications industry. Case 99-C-0529, "Ruling Concerning Proprietary Material (issued Dec. 13, 1999) at 2 (Ex. G(3)).

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[15] *See, e.g.,* Ex. G(7), Case 98-C-1357, *Ruling on Proprietary Status of Module 3 Testimony and Exhibits* (issued Jan. 31, 2002) at 2 (stating that documents of Verizon "involving its dealings with equipment vendors or its use of proprietary costing models . . . have previously been found to be entitled to trade secret protection"; also noting that such documents, as a general matter, fell within the Department's regulatory definition of trade secret because they were not widely available, it would be difficult to obtain, some of it is difficult or costly to develop, and some of it would be of substantial use to a firm seeking to take account, ion its own strategies, of its competitors' strengths, weaknesses, and plans"); Ex. G(5), Case 98-C-1357, "Ruling Concerning Proprietary Status of Exhibit 106-P" (issued April 17, 2000) at 1-2 (holding that document containing "detailed cost information for components of a highly competitive retail service" was entitled to trade secrecy protection under FOIL); Ex. G(6), Case No. 98-C-1357, "Ruling on Proprietary Status of Line Sharing Exhibits" (issued May 26, 2000) at 1-2 (holding that document "incorporating cost data, demand projections, and retail deployment strategies" as confidential proprietary material); Ex. G(9), Case 02-C-1425, "Ruling on Confidential Trade Secret Status of Testimony and Exhibits" (issued Oct. 8, 2004) (upholding Verizon's claim to trade secret protection for certain cost data relevant to its retail operations); *see also* Ex. G(1), Case Nos. 95-C-0657, 94-C-0095 & 91-C-1174, "Ruling Concerning Trade Secrets and Motion to Strike Portions of a Brief" (issued Feb. 18, 1997) at 3-5 (holding that vendor discounts and network plans document containing "detailed cost information for components of a highly competitive retail service" were entitled to trade secret protection).

[16] *See, e.g.,* Ex. G(9), Case 02-C-1425, "Ruling on Confidential Trade Secret Status of Testimony and Exhibits" (issued Oct. 8, 2004) at 11 (granting Verizon's methods and procedures with respect to certain systems permanent trade secret protection from disclosure); Ex. G(10), Case 03-C-0971, "Ruling on Protective Order and Access by Competitors to Allegedly Confidential Information" (issued Feb. 23, 2007) at 1, 5, 6 (holding that documents of Verizon reflecting its practices, methods and procedures and "network architecture" were entitled to trade secret protection under the Department's rules).

Notwithstanding the Commission's vast body of precedent in this area, the RAO and Secretary expressly refused to follow it here. (Ex. I at 15; Ex. Q at 18-20.) Instead, they applied to Verizon a far more exacting burden of proof than has ever been applied by the Commission's ALJs. This failure to follow past agency policy and practice was not based on any claimed difference between the information at issue in the ALJ rulings and the information at issue here, as no material distinction exists. In fact, the RAO acknowledged that the ALJ's rulings "demonstrate . . . support for [Verizon's] assertions." (Ex. I at 15.) Nor was Respondents' refusal to apply the ALJ rulings prompted by any change in governing statutes or regulations, any material changes in case law, or the result of a rulemaking.

It is a bedrock principle of administrative law that State agencies "must adopt policies in a coherent and consistent manner with appropriate regard for those previously taken or must explain the reasons for variations among policies." *Royal Bank & Trust Co. v. Superintendent of Ins. of State of N.Y.*, 92 N.Y.2d 107, 122, 699 N.E.2d 852, 860, 677 N.Y.S.2d 228, 236 (1998) (internal citation omitted). Agencies are obliged to follow their own precedent unless they provide a sufficient explanation to justify their actions. *See, e.g., Concord Assocs., LP v. Town of Thompson*, 44 Misc. 3d 1208(A), 2013 WL 5525675, at *3 (Sup. Ct. Sullivan Cnty. Oct. 2, 2013) ("While the agency does not have the obligation of articulating all of its reasons for its decision, the absence of rational basis to distinguish one decision of the agency from the other gives rise to suspicions of capricious behavior.").

Here, the Secretary identified no legitimate reason to deviate from the ALJ precedents in this case, or for the application of a higher standard under FOIL outside the administrative hearing context. First, the Secretary claimed that the ALJ's role in administrative proceedings is "narrower" than the role of the RAO, in that the ALJ "is limited to questions regarding discovery by

parties in an administrative proceeding that is finite in duration." (Ex. Q at 18.) Even if true, the Secretary did not attempt to explain why this allegedly more "narrow" role makes any difference. Indeed, the ALJs and RAO apply the same law and regulations regardless of their role,[17] and the Secretary failed to articulate any reason that the law should be applied differently depending on the context. Second, the Secretary claimed that, while the substantive law to be applied in either context is the same, the "applicable procedures or burdens" are not identical. (*Id.*) Again, even assuming this statement is correct — and there is no basis for the claim of differential "burdens" — the Secretary failed to explain why this should make any difference. Third, the Secretary claims that since she is the "definitive agency decision-maker on FOIL matters," then the decisions of RAOs need not be consistent with those of ALJs. (*Id.*) This justification flouts the important policy reasons for agency consistency identified by the Court of Appeals, including "to provide guidance for those governed by the determination made; to deal impartially with litigants; to promote stability in the law; to allow for efficient use of the adjudicatory process, and to maintain the appearance of justice." *Matter of Charles A. Field Delivery Serv., Inc.*, 66 N.Y.2d 516, 519, 488 N.E.2d 1223, 1126, 498 N.Y.S.2d 111, 114 (1985) (internal citations omitted).[18]

At bottom, the Secretary contends that the Commission's ALJs may interpret FOIL and the Commission's implementing regulations one way, while the RAO is free to construe them a markedly different way. This position has no support in either law or logic. It would lead to

[17] The Commission's regulations require an ALJ in the administrative hearing context to address a trade secret claim under § 87(2)(d) pursuant to the same standards utilized by the RAO when responding to a FOIL request. *See* 16 N.Y.C.R.R. § 6-1.4(a)(2) (providing that "[t]he party submitting confidential information to the [ALJ] . . . shall also submit a comprehensive brief specifying in detail the reasons why such information should be accorded confidential status as provided for in § 6-1.3(b)(2) of this Subpart," which is the Rule setting forth the Commission's standards for determining whether information is entitled to protection under FOIL § 87(2)(d)).

[18] ALJs are in no sense subordinate to the RAO in making determinations under FOIL. Such determinations are, like those of the RAO herself, appealable to the Secretary under the Commission's regulations, and not to the RAO. *Compare* 16 N.Y.C.R.R. § 6-1.3(g) *with* 16 N.Y.C.R.R. § 6-1.4(d).

nonsensical results. For instance, in the Secretary's view, a company that has received trade secret protection of information in an adversary proceeding would very likely be denied such protection if that same information is requested under FOIL, notwithstanding the application of the very same substantive law. But this approach would effectively render the Commission's regulations governing discovery in an adversary proceeding a nullity, while increasing the number of FOIL requests to the Commission exponentially.

Thus, Respondents' utter disregard and divergence from the ALJ rulings was an abuse of discretion and arbitrary and capricious. *See, e.g., Matter of Lafayette Storage & Moving Corp.*, 77 N.Y.2d 823, 826, 567 N.E.2d 240, 241, 566 N.Y.S.2d 198, 199 (1991) (decision of agency that "neither adheres to its own prior precedent nor indicates its reason for reaching a different result" on same facts is arbitrary and capricious) (internal quotation marks and citation omitted); *Matter of Martin*, 70 N.Y.2d 679, 681, 512 N.E.2d 310, 310, 518 N.Y.S.2d 789, 789 (1987) ("Here, the Board failed to distinguish or explain its departure from its prior determination . . . . Therefore, its determination is arbitrary and capricious and should have been annulled by the Appellate Division on appeal.") (internal citation omitted); *Matter of Charles A. Field Delivery Serv., Inc.*, 66 N.Y.2d at 520, 488 N.E.2d at 1227, 498 N.Y.S.2d at 115 (holding that agencies must act consistently or explain inconsistencies in reaching decisions); *see also Frank Lomangino & Sons, Inc. v. City of New York*, 980 F. Supp. 676, 681-82 (E.D.N.Y. 1997) (remanding matters to agency for reevaluation where regulatory agency decisions were inconsistent).

Furthermore, it is well settled that agency rules and regulations are to be applied prospectively, unless there is a clear indication of contrary intent. An agency may not typically give retroactive effect to a new interpretation (or reinterpretation) of the law. *See, e.g., Matter of Sabole v. Perales*, 82 N.Y.2d 685, 687, 619 N.E.2d 405, 406, 601 N.Y.S.2d 468, 469 (1993)

(vacating agency action because agency ignored its own published interpretation of such regulations); *Matter of Mut. Redevelopment Houses, Inc. v. New York City Water Bd.*, 279 A.D.2d 300, 301, 720 N.Y.S.2d 7, 8 (1st Dep't 2001) ("Such restriction of the regulation's evidently intended protective scope required and eventually was accomplished through promulgation of a new, prospectively applicable regulation; it was not properly achieved by means of a retroactively applicable agency gloss"); *Matter of Hilton Hotels Corp. v. Comm'r of Fin.*, 219 A.D.2d 470, 477-78, 632 N.Y.S.2d 56, 61-62 (1st Dept. 1995) (no retroactive application where the petitioner could not have foreseen the change in the law); *Matter of Good Samaritan Hosp. v. Axelrod*, 150 A.D.2d 775, 777, 542 N.Y.S.2d 28, 30-31 (2d Dept. 1989), *lv. denied,* 75 N.Y.2d 703, 551 N.E.2d 602, 552 N.Y.S.2d 109 (1990) ("administrative rules will not be construed to have retroactive effect unless their language requires this result") (internal quotation marks and citation omitted).

Here, in submitting its confidential information to Department staff, Verizon reasonably relied on the Commission's and Department's longstanding interpretation of FOIL, their implementing regulations and relevant case law. While Respondents may prospectively construe trade secret issues differently than they have in the past, it was fundamentally unfair and a violation of due process for them to apply here a new construction retroactively. U.S. Const. amend. XIV, § 1 and N.Y. Const. art. 1, § 6.

III. ABSENT A STAY, PETITIONER WILL SUFFER IRREPARABLE HARM

This Court should grant a stay of the Secretary's Determination. Rule 7805 of the CPLR empowers the Court to stay enforcement of any determination under review. Here, a stay is appropriate because Verizon has established a likelihood of success on the merits, it will suffer immediate and irreparable injury if the stay is not granted, and the balance of equities favor the issuance of a stay under these circumstances. *See, e.g., Matter of Town of E. Hampton v. Jorling*,

181 A.D.2d 781, 782, 581 N.Y.S.2d 95, 96 (2d Dep't 1992) (affirming issuance of stay where petitioners established that they would be irreparably harmed if stay not granted).

As discussed above, Verizon is likely to succeed on the merits of its claims. At the very least, the Secretary's Determination must be overturned to the extent it authorizes the disclosure of trade secret and commercially-sensitive materials that are concededly exempt under FOIL.

Irreparable harm from the public disclosure of the Records is manifest. Once a document is released publicly, it cannot be recalled. Thus, irreparable injury is shown where there is a risk that trade secret and confidential and commercially-sensitive information will be disclosed absent the injunctive relief. *See, e.g., E. Bus. Sys. v. Specialty Bus. Solutions*, 292 A.D.2d 336, 338, 739 N.Y.S.2d 177, 178-79 (2d Dep't 2002) (holding that plaintiff demonstrated irreparable harm where injunctive relief was necessary to stop disclosure of a trade secret); *Garvin Guybutler Corp. v. Cowen & Co.*, 155 Misc. 2d 39, 45, 588 N.Y.S.2d 56, 60-61 (1st Dep't 1992) (granting temporary restraining order to prevent the use of confidential and proprietary information).

Lastly, absent a stay, disclosure of the Records will cause Verizon serious competitive harm, as discussed above. By contrast, Respondents will not suffer any harm from the issuance of a stay. Indeed, Respondents have consented to a stay pending resolution of this proceeding. Because the irreparable harm to Verizon is more burdensome than any conceivable harm to Respondents from the stay, the balance of the equities weighs in favor of granting a stay.

CONCLUSION

For the foregoing reasons, Petitioner Verizon New York Inc. respectfully requests that the Court stay the RAO's and the Secretary's Determinations pending this proceeding, grant the Petition in its entirety, and permanently enjoin Respondents from enforcing the RAO's and Secretary's Determinations and from disclosing the Records, and grant Verizon such other and further relief as the Court deems appropriate.

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Respectfully submitted,

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