SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of the Application of

VERIZON NEW YORK INC., **Index No.: 6735-13**

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 Secr-
etary to the Commission, NEW YORK STATE DEPART-
MENT OF PUBLIC SERVICE ("the Department") and DONNA M. GILBERTO, as Records Access Officer for the Department,

Respondents.

BRIEF OF AMICI CURIAE COMMUNICATION WORKERS OF AMERICA, DISTRICT 1, COMMON CAUSE, CITIZENS UNION, AND THE FIRE ISLAND ASSOCIATION

February 26, 2014

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PRELIMINARY STATEMENT

Status as Amici Curiae

The Communication Workers of America, District 1, Common Cause, Citizens Union, and the Fire Island Association (collectively "Amici Curiae") respectfully submit this brief in *Verizon New York Inc. v. Public Service Commission, Kathleen H. Burgess, and Donna M. Gilberto* ("*Verizon v. PSC*"), Index No. 6735-13. All parties have consented to Amici's Motion by signing a Stipulation Regarding Participation. *See* Exhibit 1. Amici are filing pursuant to the scheduling agreement set forth in the parties' letter to the Court of January 9, 2014. *See* Exhibit 2.

In addition to the Stipulation Regarding Participation, Amici respectfully assert additional grounds in support of its Motion. Amici are the same organizations whose Freedom of Information Law (FOIL), N.Y. Pub. Off. Law § 84 *et seq.*, request caused this litigation. We therefore have a clear interest in the outcome, can "be of assistance to the court as amic[i] curiae," and may be "allowed to introduce argument, authority or evidence to protect [our] interest[s]." *Kruger v. Bloomberg*, 768 N.Y.S.2d 76, 81 (Sup. Ct. 2003) (citations and quotation marks omitted). *Verizon v. PSC* involves "questions of important public interest . . . ." *Colmes v. Fisher*, 271 N.Y.S. 379, 381 (Sup. Ct. 1934). Amici can assist the Court in the consideration of both the private and public interests at stake in this case.

Procedural History and Statement of Facts

Amici concur in the Statement of Facts as set forth in the Memorandum of Law submitted by Respondents, with the following limited additions.

Amici's September 13, 2013 request to inspect Commission records (the "September Comments") sought specific identifiable information contained in documents in the possession of the Commission and was an assertion of Amici's rights under FOIL. *See* Exhibit 3.

The September Comments sought access to specific information contained in documents submitted to the Commission by Verizon which had been entirely redacted. These documents were submitted in response to requests from the Commission to Verizon. The information sought was, in part, "Actual costs and expenses associated with repair, upkeep and maintenance of the wire line system on Fire Island for past ten years; Projected costs and expenses of repair, and/or rebuilding of wireline system on Fire Island; Location of any planned or active offering of Voice Link service in New York, and location of actual installation of Voice Line in New York; All information on intercompany cost allocation; Source and amount of any extracompany monies or support received as a consequence of Hurricane Sandy; Marketing and training materials used on Fire Island or elsewhere in New York relating to Voice Link service; All information related to Company assertions concerning the cost of repair, replacement, rebuilding, or substitution of system service." Exhibit 3 at Section II.

The September Comments referenced FOIL as a basis for the requests. *See id.* ("This request is submitted to the Commission for decision under its policies and rules, as well as the . . . [FOIL][1] and constitutes an assertion of our rights under FOI[L]. It is submitted as a request to inspect and receive the information described above and/or as

[1] The September Comments contained an error in which FOIL was described as FOIA. The parties do not dispute that the September Comments were an assertion of Amici's rights under the state statute known as FOIL.

an appeal from any decision already made by the Commission with respect to any protective order, non-disclosure agreement or disposition under the terms of FOI[L].").

Finally, we point out that unlike Verizon and the Commission, we have not seen the documents in question and for that reason cannot effectively refer to them or their contents.

Issues Before the Court

FOIL is the statutory expression of a government policy of openness and transparency that is essential to the free and effective working of our democracy. It was enacted after growing public dissatisfaction with arbitrary and dangerous practices by New York's state and local governments that denied citizen access to information in the government's possession.

FOIL's commitment to full disclosure of public records is embedded in law and practice in unique ways, and the courts have been unequivocal about its importance and its interpretation. "The Freedom of Information Law expresses this State's strong commitment to open government and public accountability and imposes a broad standard of disclosure upon the State and its agencies." *Capital Newspapers v. Burns*, 67 N.Y.2d 562, 565 (1986) (citing *M. Farbman & Sons, Inc. v New York City Health & Hosps. Corp.*, 62 N.Y.2d 75, 79 (1984)).

Every presumption, every close call, and every rule of interpretation favors public access to documents. FOIL provides that "[a]ll government records are thus presumptively open for public inspection and copying unless they fall within one of the enumerated exemptions . . . ." *Gould v. New York City Police Dep't*, 89 N.Y.2d 267,

274–75 (1996); *see also* N.Y. Pub. Off. Law § 87(2). Exemptions are to be narrowly construed to provide maximum access, and the agency seeking to prevent disclosure carries the burden of demonstrating that the requested material falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access. *See M. Farbman & Sons*, 62 N.Y.2d at 83; *Fink v. Lefkowitz*, 47 N.Y.2d 567, 571 (1979); N.Y. Pub. Off. Law § 89(5)(e). Moreover, "[f]ull disclosure by public agencies is, under FOIL, a public right and in the public interest, irrespective of the status or need of the person making the request." *M. Farbman & Sons*, 62 N.Y.2d at 80.

The agency making the decision whether or not to deny public access to a public record is afforded very broad discretion. *See Capital Newspapers*, 67 N.Y.2d at 567 (noting that "while an agency is permitted to restrict access to those records falling within the statutory exemptions, the language of the exemption provision contains permissive rather than mandatory language, and it is within the agency's discretion to disclose such records, with or without identifying details, if it so chooses").

It is in this context that Verizon seeks to rewrite the well-settled law governing disputes over exclusions from presumptive disclosure under FOIL. Instead of offering the required "particularized and specific justification," *id.* at 566, Verizon seeks the exclusion of whole categories of documents. It failed to make such a specific showing in two distinct administrative opportunities, and now asks this Court to fundamentally change the scope and practice of FOIL. The documents and information at issue in this case are precisely the kind of records that FOIL is intended to make accessible. For the particular reasons set forth below and in order to preserve FOIL as the public's bulwark against government secrecy, Verizon's legal and factual arguments should be rejected.

Verizon's fundamental grievance involves what it perceives to be FOIL's unfair application to its appearances before the Commission. It repeatedly complains of being subject to disclosure requirements that its competitors are not, calling such universal requirements "asymmetric regulatory treatment that distorts customer choices . . . ." Taylor Declaration at ¶ 3; *see also* Petitioner's Memorandum of Law in Support of Article 78 Verified Petition and Stay ("Verizon Brief") at 3 n.1 ("FOIL therefore impose an asymmetric competitive burden upon Verizon."); Taylor Declaration at ¶ 6 ("This information asymmetry thus disadvantages Verizon in the marketplace and also may inhibit price competition, resulting in higher prices for customers."). It is on the basis of this putative "asymmetry" that Verizon seeks to undo the purposes of FOIL, decades of case law, and the specific commands of the Court of Appeals.

Verizon's complaint of unfair legal treatment is in fact not well founded. It is a regulated monopoly and the laws applying to it are the same as they have been for decades. Even if Verizon's complaint were well-founded as a policy matter, its proper remedy would be to seek relief from the legislature. Verizon does not and cannot offer a legal justification for its demand that the courts of this state relieve it of its statutory obligations and rewrite settled law in its attempt to end what it calls an "asymmetrical" regulatory policy.

Verizon's legal and factual assertions deeply impact the public interest. A judicially created exclusion from disclosure applying to Verizon's appearances before the Commission is neither grounded in law, nor in the public interest. Verizon's attempt to

have this court reduce the scope of its administrative discretion to adjudge the evidence in a FOIL appeal is similarly dangerous.[2]

FOIL applies to the Commission, and no less so when the Commission possesses documents provided to it by Verizon in the course of a regulatory proceeding. Indeed, the Commission has exercised its discretion by showing enormous sensitivity to Verizon's claims that is well beyond what the law requires of it. If Verizon wishes to keep the documents at issue in this case hidden from public view, it must either provide persuasive evidence to the Commission or seek relief from the legislature and governor. It did neither.

ARGUMENT

I. Verizon's Attempt to Exclude Categories of Documents From Disclosure Violates FOIL.

A. The Record Establishes That Verizon Is Seeking Categorical Exclusions From FOIL Requirements.

In pursuit of an end to "asymmetrical regulation," Verizon steadfastly refuses to offer evidence about specific data and specific documents, as the law requires. Rather, Verizon seeks to exclude entire categories and types of documents from FOIL disclosure. It calls these categories "Cost Data" or "Cost Information" and "M&P Information."

Verizon has always admitted that it seeks categorical exclusions. Its first submission to the Commission on this matter boldly asserted that "**EACH CATEGORY OF INFORMATION AT ISSUE HERE IS ENTITLED TO CONFIDENTIAL**

[2] An agency is entitled to deference in its decision that a third party seeking to prevent disclosure of its information is not entitled to an exemption. Accordingly, arbitrary and capricious is the appropriate standard of review in this Article 78 proceeding. *See CNA Fin. Corp. v. Donovan*, 830 F.2d 1132, 1155 (D.C. Cir. 1987).

TREATMENT UNDER THE FREEDOM OF INFORMATION LAW." Verizon New York Inc.'s Statement of Necessity Pursuant to Public Officers Law § 89(5)(b)(2) ("Verizon Statement of Necessity") at i (emphasis in original).

It persists in this theory in its Verified Petition ("Verizon Petition") and other papers submitted to this Court. Verizon repeatedly speaks in terms of broad categories and never discusses specific documents. *See* Verizon Petition at ¶ 67 ("[C]ost and pricing data, such as the Cost Information, is exempt from disclosure under Public Officer's Law § 87(2)(d)."); *see also id.* at ¶ 79 ("[A] corporation's internal and confidential policies and procedures, like the M&P Information, are commercially valuable and protectable trade secrets."); Verizon Brief at 18 ("Established economic models recognize that knowledge of a company's costs helps competitors . . . .").

Lest there be any doubt about Verizon's effort to seek categorical exclusions, all three of the Declarations submitted to the Secretary in support of its appeal of the initial decision by the Records Access Officer ("RAO") reinforced that claim. *See* Taylor Declaration at ¶ 9 ("The literature on strategic marketing emphasizes the importance of information about a competitor's costs for creating competitive advantage . . . ."); *see also id.* at ¶ 17 ("[I]f these types of data were not a substantial source of competitive advantage, there would be no market for their supply."); Wheatley Declaration at ¶ 3 ("[T]he Cost Documents thus provide information on the company's general costs associated with the provision of consumer services."); *id.* at ¶ 6 ("knowledge of Verizon's unique cost structure would provide important input to the pricing decisions of competitors."); McNabb Declaration at ¶ 5 ("Verizon's methods and procedures documents are the output of integrated product development and 'Go-to-Market'

processes that involve multiple work groups and demand significant investments of time, effort and subject matter expertise."); *id.* at ¶ 6 ("[A]ny single methods and procedures document does not stand by itself . . . .")

The Declarations contain interesting and perhaps important opinions on the generalized purpose of "M&P Information," and the generalized impact of disclosure of "Cost Information" or "Cost Data." Nevertheless, they do not contain any analysis of the documents or facts at issue in this case. Nor do any of the referenced "economic models" or " economic and marketing literature" contain anything at all about the specific data or documents at issue here.

The record herein—including of the Statement of Necessity, submissions to this Court, and the Declarations—contain evidence and admissions that Verizon is seeking impermissible categorical exclusions from FOIL disclosure.

B. FOIL Does not Permit the Commission to Grant Categorical Exclusions From FOIL.

The Court of Appeals has held that state agencies may not grant categorical exclusions from the presumptive requirements of public disclosure. This is an essential part of FOIL's purpose "to shed light on government decision making." *Encore College Bookstores, Inc. v. Auxiliary Serv. Corp.*, 87 N.Y.2d 410, 416 (1995). Verizon's demand is not only legally insufficient. It asks this Court to reverse decades of legal precedent and progress toward providing open and transparent government.

The Court of Appeals has carefully considered this legal issue and found that such "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government." *Gould*, 89 N.Y.2d at 275 (rejecting a blanket exemption for

"complaint follow-up reports" completed by law enforcement personnel); *see also Capital Newspapers*, 67 N.Y.2d at 580 (rejecting a "blanket exemption from FOIL disclosure to police personnel records"); *DJL Rest. Corp. v. Dep't of Bldgs.*, 710 N.Y.S.2d 564, 566 (App. Div. 2000) (rejecting the applicability of "blanket exemptions" to FOIL); *Brown v. Town of Amherst*, 600 N.Y.S.2d 601, 602 (App. Div. 1993). Verizon's demand that the Commission grant its "Cost Information" or "Cost Data" and "M&P Information" categorical exclusions is equally inimical to FOIL.

Categorical exclusions undermine the primary and fundamental public policy goals of FOIL. FOIL rests on the principle that the public has a right to see each and every document in the possession of a government agency, which "should not be thwarted by shrouding it with the cloak of secrecy or confidentiality." N.Y. Pub. Off. Law § 84 (emphasis added).

There are, properly, limits on that right. FOIL recognizes that documents which invade personal privacy, impair contract or labor negotiations, endanger an individual's safety, or are a trade secret that could cause competitive injury or other harmful outcomes can be excluded from disclosure. But the agency is only permitted to exclude certain individual "records or portions thereof." *Id.* § 87(2). A decision to exclude requires that each record or portion thereof be inspected and measured against the specific evidence of harm.

Judicially created categorical exclusions would wreak havoc on the intent of FOIL. They would also present overwhelming practical problems for members of the public challenging an exclusion of particular documents and for courts trying to

determine whether certain documents fall within or without a category. The law is well-settled for a good reason: FOIL works. This is not the time nor the case to re-write it.

Verizon is legally entitled to an exclusion only upon making specific evidentiary showings about specific information contained in specific documents. It may not receive categorical or blanket exemptions.

II. FOIL Requires That Verizon Establish That the Specific Information for Which an Exclusion Is Sought Be Both a Trade Secret and Be Likely to Cause It Substantial Competitive Injury.

FOIL permits an exclusion from disclosure only for specific records which are found to be both "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). In spite of this explicit language creating a two-pronged test, Verizon insists that the second part of the test does not apply to it. Verizon Brief at 2 ("Under FOIL, trade secrets are exempt from disclosure without the necessity of showing competitive injury.").

That is emphatically not the law in New York. In construing § 87(2)(d), the Court of Appeals has disposed of this question by stating "the party seeking exemption must present specific, persuasive evidence that disclosure will cause it to suffer a competitive injury . . . ." *Markowitz v. Serio*, 11 N.Y.3d 43, 51 (2008). Moreover, the Commission explicitly requires that "[*i*]*n all cases*, the [party submitting trade secret or confidential information to the agency] must show the reasons why the information, if disclosed, would be likely to cause substantial injury to the competitive position of the subject commercial enterprise." 16 N.Y.C.R.R. § 6-1.3(b)(2) (emphasis added). Verizon's

attempt to limit FOIL in its own interest is unavailing. This Court should reject Verizon's attempt to rewrite the settled case law on this point. *See, e.g.*, *Bahnken v. New York City Fire Dep't*, 794 N.Y.S.2d 312, 314 (App. Div. 2005); *Bello v. Dep't of Law*, 617 N.Y.S.2d 856, 857 (App. Div. 1994); *Sunset Energy Fleet L.L.C. v. Dep't of Envtl. Conservation*, 728 N.Y.S.2d 279, 281 (App. Div. 2001).

The Commission determined that there was some evidence establishing that specific data in specific documents could be characterized as "trade secrets." Verizon, however, failed to establish that disclosure of its data or documents would cause it competitive injury. This litigation therefore focuses on the competitive injury issue.

III. FOIL Requires That Verizon Establish its Right to an Exclusion With "Particularized And Specific" Evidence.

FOIL requires that the party seeking exclusion from disclosure meet its evidentiary burden by producing "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." *Markowitz*, 11 N.Y.3d at 51. Moreover, the party "seeking to prevent disclosure carries the burden of demonstrating that the requested material falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access." *Capital Newspapers*, 67 N.Y.2d at 567 (citing *M. Farbman & Sons*, 62 N.Y.2d at 80; *Fink*, 47 N.Y.2d at 571.).[3]

[3] An example of an adequate evidentiary showing is contained in *Saratoga Harness Racing, Inc. v. The Task Force on the Future of off-Track Betting in New York State*, No. 9740-09, 2010 WL 928700 (N.Y. Sup. Ct. 2010) ("The injuries that the disputed information would cause Saratoga are also detailed by its General Manager, along with a gaming market analysts' expert opinion affidavit. Moreover, the injury Saratoga would suffer by the dissemination of the disputed information in the labor market are detailed by its Human Resources Director and an expert in labor negotiations. From the foregoing, Saratoga

Speculative concerns about what "could" possibly result from disclosure are not sufficient. An exclusion from disclosure "cannot merely rest on a speculative conclusion that disclosure might potentially cause harm." *Markowitz*, 11 N.Y.3d at 51; *see also Capital Newspapers*, 67 N.Y.2d at 566; *M. Farbman & Sons*, 62 N.Y.2d at 80; *Verizon New York, Inc. v Bradbury*, 837 N.Y.S.2d 291, 293 (App. Div. 2007).

Verizon was legally obligated to provide to the Commission specific and persuasive evidence of likely competitive injury. The Record establishes it did not.

IV. Verizon Has Failed to Supply the "Particularized and Specific" Evidence Required to Permit an Exclusion From Disclosure.

Verizon did not provide the Commission with the required specific and persuasive evidence. The Commission's denied Verizon's request for exclusions based on the insufficient record submitted to it.

Verizon's insufficient support for its demand consists of the statutorily-required Statement of Necessity filed with the Records Access Officer on October 7, 2013 and three Declarations of November 15, 2013 submitted as part of Verizon's appeal of the RAO's decision. This was the record before the Commission, and it is the record before this court. On the basis of this record, Verizon erroneously claims that its "submissions to Respondents overwhelmingly establish that the disclosure of the Cost Information would likely cause Verizon substantial competitive injury." Verizon Brief at 17.

A. The Statement of Necessity.

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demonstrated 'specific, persuasive evidence' that Respondents' dissemination of its financial data falls "squarely within a FOIL exemption." (citation omitted)).

The Statement of Necessity has the virtue of being an explicit admission that Verizon is seeking a categorical exemption. *See* Statement of Necessity at i ("**EACH CATEGORY OF INFORMATION AT ISSUE HERE IS ENTITLED TO CONFIDENTIAL TREATMENT UNDER THE FREEDOM OF INFORMATION LAW**." (emphasis in original)). The Statement of Necessity otherwise contains repeated references to "Cost Information" or "Cost Data" and generalized categories. It contains no information on or analysis of the specific contents of specific documents.

B. The Three Declarations.

In its appeal of the RAO's decision to deny its requested exclusion from disclosure, Verizon supplemented the administrative record with three declarations. While less candid than the Statement of Necessity's bald admission of Verizon's desire to receive categorical exemptions, the Declarations did not offer the required specific and persuasive evidence.

The declarations address two categories of information, "Cost Information" or "Cost Data" and "M&P Information."

"Cost Information" or "Cost Data"

With respect to what it calls "Cost Information" or "Cost Data," Verizon offers two affidavits.

The first declaration was written by Dr. William Taylor, a Special Consultant to the National Economic Research Bureau, a private organization owned by the Marsh and McLennan Companies. Dr. Taylor qualifies himself and offers his opinion as "an economist." Taylor Declaration at ¶ 1–2.

Dr. Taylor's Declaration is 12-pages long and discusses the general economic theory and consequences of public disclosure of telecommunications information. Dr. Taylor places great weight on what he calls "information asymmetry." *Id.* at ¶ 6. According to Dr. Taylor, this "asymmetry" justifies Verizon's repeated and strenuously-argued opposition to application of FOIL to its regulated-monopoly operations. While this theory has nothing to do with the issues before this court, Dr. Taylor repeatedly returns to it, opining that "Central to these sources of competitive injury is the fact that only Verizon's costs would be made public, and not the costs of any of its competitors." *Id.* at ¶ 15; *see also id.* at ¶ 19 ("[T]he substantial competitive harm that would result from its publication — is the reluctance of unregulated telecommunications firms to reveal such information.").

Nevertheless, Dr. Taylor's declaration does not contain an analysis of the specific content of the documents in question. Nor does it explain how those contents might cause a substantial competitive injury to Verizon.

The second declaration in support of the exclusion from disclosure for "Cost Information" or "Cost Data" is that of Robert Wheatly II. Mr. Wheatley is an Executive Director of Financial Planning and Analysis at Verizon. *See* Wheatley Declaration at ¶ 1. Mr. Wheatley's declaration is two and one half pages long and is notable mainly for its endorsement of Dr. Taylors Declaration. *See id.* at ¶ 7 ("I support Dr. Taylor's conclusions."). It also devoid of any analysis of the contents of the documents at issue, the specific information to be disclosed, or the specific harm that disclosure of the specific information might cause.

Verizon's evidentiary submissions have the virtue of consistency. Verizon admitted early and often that it sought categorical exemptions and complained about the unfairness and harm caused to it by "asymmetrical regulation." Both declarations relating to "Cost Information" or "Cost Data" emphasize these two arguments. Neither declaration offers an analysis of the specific data and documents at issue in this case.

"M&P Information"

With respect to what Verizon calls the "M&P Information," Verizon offers one declaration written by Thomas McNabb, Director of Operations in the National Operations organization at Verizon. *See* McNabb Declaration at ¶ 1. It is five pages long and focuses on the difficult process of developing "M&P Information" and the general significance of such information in Verizon's business efforts.

The only discussion about likely and specific competitive injury occurs on the last page of the Declaration where Mr. McNabb speculates at length about the possible consequences of the "M&P Information" becoming public.

> The knowledge and expertise embodied in the documents at issue here could, in my judgment, be very useful to competitors who offer similar products or who are considering offering similar products. It could assist them in the development of parallel methods and procedures for similar products of their own. The documents could provide guidance on issues that they will need to consider in their own product development process, and could be a source of ideas on competitive strategies.

Id. at ¶ 11 (emphasis added). Otherwise, Mr. McNabb's declaration is devoid of any analysis of the content of the documents at issue or of how the specific information in them could cause any competitive injury.

Mr. McNabb's submission is profoundly inconsistent with Court of Appeals' precedent holding that "a speculative conclusion that disclosure might potentially cause

harm" is legally insufficient to justify an exclusion from disclosure. *Markowitz*, 11 N.Y.2d at 51. His opinion is a list of speculative outcomes or things that "could" happen. Mr. McNabb's declaration is precisely the kind of "theoretical" opinion that the Court of Appeals rejected in *Markowitz*. *See id.* ("The evidence suggesting they will suffer a competitive disadvantage is theoretical at best."); *see also supra* Note 2 (discussing *Saratoga*, 9740-09, 2010 WL 928700, and the evidentiary support necessary to justify an exclusion).

The Statement of Necessity and Declarations constitute the record before the Commission when it made its Final Determination to deny Verizon's request for exclusion from disclosure. This decision is not only well within its administrative discretion. It would have been arbitrary and capricious to find otherwise.

CONCLUSION

For the foregoing reasons, Verizon's attempt to shield documents and information from disclosure under FOIL should be rejected. Verizon has not met its burden of establishing with "specific and persuasive" evidence that these records fall within the statutory exclusions from the public's presumptive right to the information. Verizon's dissatisfaction with what it calls "asymmetric" regulation is legally insufficient as a basis for undermining well-settled law, as is its attempt to exclude what it calls "categories" of information.

Verizon's arguments strike to the core of FOIL's policy goals, which have been scrupulously protected by the courts and the legislature. Verizon's arguments and the specific remedies it seeks should be denied.

February 26, 2014

Respectfully submitted,

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