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December 30, 2015

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BOARD OF PUBLIC UTILITIES  
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**Via Hand Delivery**

Honorable Mary C. Jacobson, A.J.S.C.  
Superior Court – Law Division  
Mercer County Courthouse  
175 South Broad Street  
Trenton, New Jersey 08650

Re: **Communications Workers of America, AFL-CIO v. State of New Jersey,  
Board of Public Utilities**  
Docket No.: L- MER-L-2898

Dear Judge Jacobson:

Please accept this letter brief in lieu of a more formal brief in support of this action under the Open Public Records Act (“OPRA”), N.J.S.A. 47:1A-1, et seq., and the common law right of access. This matter has been presented to the court via an Order to Show Cause. The basis for the action is the Defendant Board of Public Utilities (“BPU”)’s redaction of information on quarterly reports filed by Verizon showing the extent of buildout of Verizon’s FIOS system in New Jersey municipalities, which buildout the Legislature mandated to occur on a specified timetable pursuant to N.J.S.A. 48:5A-25.2. Without such information being publicly available, it is impossible for Plaintiff Communication Workers of America, AFL-CIO (“CWA”) and other interested members of the public to evaluate whether FIOS is being built out in an equitable fashion to all communities, regardless of income level, as the Legislature required. Furthermore, Defendant’s sole basis for redaction of the information – the exception for proprietary

commercial information at N.J.S.A. 47:1A-1.1 -- is inapplicable under these facts given that this information, and even more detailed information than that requested by Plaintiff, has historically and routinely been made publicly available. Additionally, this exception is inapplicable to the common law right of access. Thus, this Court should require disclosure of the extent of buildout of FIOS within New Jersey's municipalities as of the first and second quarter of 2015.

### STATEMENT OF FACTS

In 2006, the Legislature amended the State Cable Act in order to enable Verizon to apply to the BPU for a System-wide Cable Television Franchise. P.L. 2006, c. 83. This legislation enabled Verizon, for the first time, to circumvent the prior municipal-specific process for receiving a cable television franchise by applying for "a single system-wide franchise across its existing telecommunications territory." Board of Public Utilities, The Effects of the System-Wide Cable Television Franchise in New Jersey, June 2010, at ii.<sup>1</sup> In enacting P.L. 2006, c. 83, the Legislature balanced the benefits to be gained by Verizon through this much simpler process with requirements that Verizon, if it chose to follow that process, provide access to lower-income communities that might otherwise be left out of state-of-the-art cable and broadband access. The Legislature required that if Verizon received a system-wide franchise, it would (a) have to make service available throughout residential areas of every county seat and every municipality with a population density greater than 7,111 persons per square mile, with limited exceptions; and (b) more generally provide service "without discrimination against any group of potential residential cable subscribers because of the income levels of the residents of the local area in which such groups reside." N.J.S.A. 48:5A-25.2(a). Furthermore, the Legislature provided that "any person

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<sup>1</sup> Available at <https://dspace.njstatelib.org/xmlui/bitstream/handle/10929/33398/t2672010d.pdf?sequence=1&isAllowed=y> (last accessed Dec. 27, 2015).

affected by” the above requirements “may seek enforcement of such requirements by initiating a proceeding with the board.” N.J.S.A. 48:5A-25.2(b). Thus, the Legislature created a system in which the BPU could grant a statewide franchise to Verizon, but Verizon in order to receive such a franchise would have to provide full buildout to densely populated areas, and not discriminate based on income.

On December 18, 2006, the BPU approved a system-wide franchise for Verizon for a seven-year term. In the Matter of the Application of Verizon New Jersey Inc. for Renewal of a System-Wide Cable Television Franchise, BPU Docket No. CE13080756 (Jan. 29, 2014) at 1. As a condition of that approval, BPU required Verizon to provide it with quarterly service activation reports of the extent of deployment of FIOS by municipality for each quarter. Id. at 4-5. Those reports, according to BPU, “are used to determine Verizon’s compliance with the deployment commitment timelines and ensure Verizon’s provision of service on a non-discriminatory basis.” Id. at 4.

As the expiration of Verizon’s initial system-wide franchise approached in 2013, Verizon applied to the BPU for a renewal of its franchise. At the time of that renewal application, the BPU found that “half of the 70 required municipalities” from the 2006 legislation had not been fully built out. Id. at 5. The BPU during the renewal process heard opposition, in part or in whole, to the renewal from a number of individuals, labor unions including Plaintiff, and municipalities. Concerns expressed included that “Verizon does not provide service or provides service to limited portions of their respective municipalities.” Id. at 2-3. Responding to both the lack of buildout in the 70 required municipalities, and concerns about buildout more generally, the BPU as a condition of approving the renewal required that “Verizon shall continue, on a quarterly basis, to provide to the Board and Rate Counsel a report of service activations for the

prior quarter. . . to serve as one element of the foundation for the Board and Rate Counsel to use to fulfill their responsibilities for ensuring the service is provided on a non-discriminatory basis and to serve as one component of the basis for Petitioner's ongoing proof of compliance with the Franchise and the Act.” Id. at 9, Approval Condition #6.

On October 27, 2015, CWA requested via OPRA “All quarterly service activation reports filed by Verizon for the first, second, and/or third quarter of 2015.” (Verified Complaint (“VC”) at ¶8). On November 6, 2015, the BPU requested an extension, through November 20, 2015, to respond, which CWA granted through counsel. On November 20, 2015, the BPU responded by providing the quarterly service activation reports for the first and second quarters of 2015, but only in a heavily redacted form, claiming that such “information has been redacted pursuant to the exception for proprietary commercial information at N.J.S.A. 47:1A-1.1. This includes customer information, information concerning Verizon employees, as well as information pertaining to service availability.” (VC at ¶10). The BPU provided a record that redacted 7 out of 9 categories for which Verizon provided the BPU with information at the municipal level as to the extent of FIOS deployment. The redacted record only provided when FIOS service’s initial availability was initially “announced via press release” and “advance notice” was provided of the start of service. The categories redacted included:

- Initial FIOS TV service availability
- Estimated full FIOS TV service availability
- Actual full FIOS TV service availability
- Total addresses validated for FIOS TV
- Number of multiple dwelling unit addresses validated for FIOS TV
- Number of single family unit addresses validated for FIOS TV

• The Video Serving Office (VSO) from which service was provided to the municipality (VC at ¶11, Ex. C).

Thus, the report provided did not allow Plaintiff to determine anything about the current extent of FIOS availability or projected completion for FIOS availability, in any municipality in the state, beyond a mere list of which municipalities Verizon had at some point in the past announced that it planned to provide FIOS. The report, for example, redacts any information that could be used to determine whether Verizon is on schedule with its statutorily required buildout in the most densely populated municipalities of New Jersey pursuant to N.J.S.A. 48:5A-25.2(a). The report also redacts any information that could be used to determine whether Verizon is discriminating on the basis of income pursuant to N.J.S.A. 48:5A-25.2(a), such as whether buildout rates are different between wealthier and poorer municipalities within the same service area, or single-family and multi-family housing. In sum, the report, as provided in redacted form, is utterly stripped of the very content that is the purpose of making the report available, in the BPU's own words: to ensure "the service is provided on a non-discriminatory basis and to serve as one component of the basis for Petitioner's ongoing proof of compliance with the Franchise and the Act." In the Matter of the Application of Verizon New Jersey Inc. for Renewal of a System-Wide Cable Television Franchise, BPU Docket No. CE13080756 at 9.

On November 30, 2015, CWA also requested the redacted information pursuant to the common law right of access to governmental records. (VC at ¶12, Ex. D). On December 22, 2015, the BPU denied the request by stating that "Your request for the redacted information is denied because you have not established an interest in the subject matter of the material you have requested." (VC at ¶13, Ex. E). The Board did not provide any reason whatsoever as to its own

interests in refusing to disclose the information in denying Plaintiff's request under the common law right of access. Ibid.

CWA represents approximately 1,400 persons employed by Verizon Communications, Inc. in New Jersey and approximately 35,000 persons employed by Verizon Communications throughout the United States. CWA also represents approximately 50,000 persons employed by the State of New Jersey and various counties, municipalities and other local government entities in New Jersey. In addition to protecting the job security and working conditions of its members at Verizon, CWA advocates, along with other organizations, on behalf of the consumers of telecommunications services to ensure that they have access to high quality services at a reasonable cost. (VC at ¶19). CWA has long promoted the buildout of high speed fiber optic networks to ensure that all persons have access to information and educational services. Indeed, on a national level, before the Federal Communications Commission, and before state regulatory bodies, such as the BPU, CWA has promoted the building of a high speed fiber optic network under the slogan "Speed Matters." Accordingly, CWA was actively involved in the legislative process that resulted in the passage of the 2006 law that enabled Verizon to apply for a system-wide cable franchise and vigorously supported those provisions of the statute that required the buildout of a high speed fiber optic network that would provide access to residents in all income brackets in the State's most populous areas. CWA and its members, many of whom live in areas of the State where Verizon agreed to build a fiber network, have a direct interest, both as employees of Verizon and as consumers of telecommunications services, in ensuring that Verizon lives up to the commitments it made in order to receive a system-wide franchise. Precisely for this reason, CWA has participated in proceedings before the BPU pertaining to

Verizon's buildout of a fiber optic network, arguing strenuously that Verizon should be required to abide by the agreement it entered into to obtain a system-wide franchise. (VC at ¶¶20-24).

Moreover, CWA has long been concerned about the quality of telecommunications services provided by Verizon in New Jersey and nationally, and has actively monitored service quality issues in a variety of ways, including requesting and obtaining information from the BPU. CWA's information request in this case was made so that CWA can independently analyze and understand whether Verizon is satisfying the conditions of its state-wide franchise and is making available fiber optic services without regard to the income levels of a community's residents. (VC at ¶¶25-26). Absent the information redacted by BPU in response to the request, CWA is denied access to information that BPU itself has previously stated is required to evaluate whether Verizon is complying with its state-wide franchise and not discriminating on the basis of income. In the Matter of the Application of Verizon New Jersey Inc. for Renewal of a System-Wide Cable Television Franchise, BPU Docket No. CE13080756 at 9.

## LEGAL ARGUMENT

### POINT I

#### **PLAINTIFFS' ACTION SHOULD PROCEED IN A SUMMARY MANNER**

Typically, actions brought pursuant to OPRA proceed in a summary manner. See N.J.S.A. 47:1A-6; Courier News v. Hunterdon County Prosecutor's Office, 358 N.J. Super. 373, 378 (App. Div. 2003). Here, in light of Plaintiffs' filing of an amended verified complaint with all relevant documents, and the expected lack of factual dispute, the order to show cause should be granted so that this matter may proceed in a summary fashion. R. 4:67-2(a).

## POINT II

### PLAINTIFFS ARE ENTITLED TO THE RECORDS SOUGHT PURSUANT TO OPRA.

The Open Public Records Act has the salutary purpose of establishing a public policy in the State that “government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions, for the protection of the public interest[.]” N.J.S.A. 47:1A-1. Further, to the extent that limitations are imposed on this public interest, such limitations “shall be construed in favor of the public’s right of access.” *Ibid.* Our Supreme Court recently reinforced that OPRA’s purpose is founded on the principle that “knowledge is power in a democracy, and that without access to information contained in records maintained by public agencies citizens cannot monitor the operation of our government or hold public officials accountable for their actions.” Fair Share Hous. Ctr., Inc. v. New Jersey State League of Municipalities, 207 N.J. 489, 502 (2011). Put simply, “society as a whole suffers when ‘governmental bodies are permitted to operate in secrecy.’” *Ibid.* (quoting Asbury Park Press v. Ocean Cnty. Prosecutor’s Office, 374 N.J. Super. 312, 329 (Ch. Div. 2004)). In congruence with the public policy favoring disclosure, the burden of proof in a denial of records action rests with the custodian of records to demonstrate that the particular records at issue are exempt or shielded from OPRA. N.J.S.A. 47:1A-6.

OPRA defines “government records” broadly, with only certain enumerated exceptions. N.J.S.A. 47:1A-1.1. The BPU in this matter relies entirely on a single statutory exception, that for “trade secrets and proprietary commercial or financial information.” *Ibid.* Extensive case law on this particular exception strongly constrains its application, recognizing that too broad an application of this exception “subverts the broad reading of OPRA as intended by the Legislature.” Trachtenberg v. Tp. Of West Orange, 416 N.J. Super. 361, 379 (App. Div. 2010)



(quoting Times of Trenton Publ'g Corp. v. Lafayette Yard Cmty. Dev. Corp., 183 N.J. 519, 535 (2005)). Trial and appellate courts have often found in favor of plaintiffs who argue against an overly expansive reading of this exception, recognizing that, if read broadly, it could be asserted to prevent disclosure of the most basic information about the government's interaction with private companies. Newark Morning Ledger Co. v. New Jersey Sports & Exposition Auth., 423 N.J. Super. 140, 161-2 (App. Div. 2011). Thus, instead of accepting an assertion of proprietary information on its face, reviewing courts have engaged in a searching analyses which places the burden on defendant to "identify the detrimental effects of disclosure" and provide "actual evidence" "that disclosure will result in a loss of bargaining power." Id. at 167 (invalidating claim of privilege based on failure to meet burden). Even in cases in which courts have upheld denial of access, they have only done so after they have determined that a defendant has made credible showings of detrimental effects resulting from disclosure. See, e.g., Communication Workers of America v. Rousseau, 417 N.J. Super. 341, 351 (App. Div. 2010) (upholding refusal to disclosure investment contracts only upon trial court finding that credible evidence suggested firms would not contract with the state if such information was disclosed).

Here, the BPU cannot meet its burden for two critical reasons. First, the records only exist for the very purpose of measuring Verizon's progress towards a statutory goal that was an explicit part of the framework Verizon agreed to in voluntarily choosing to apply for a system-wide permit. Thus, Verizon cannot choose to reap the benefits of the streamlined permit process without disclosing to the public the data needed to measure whether it has met the offsetting requirements of benefiting from that process. Second, Verizon, at least through 2014, provided essentially the same information that it now claims is proprietary to the state and federal governments under separate initiatives, the National Broadband Map and New Jersey State

Broadband Map; it is incoherent to claim that information that Verizon has regularly provided to another government agency is somehow now proprietary in the context of the BPU.

First, these records only exist to monitor compliance with the system-wide permit law, and Verizon cannot reasonably expect that the public will be effectively barred from monitoring compliance with that law. The Legislature in setting up such a system conditioned the grant of such a franchise on ensuring that such a franchise was not abused by favoring only wealthy communities over poorer communities, an analysis that necessarily requires analysis of the type of summary data that the Board refuses to release. N.J.S.A., 48:5A-25.2(a)(2) and (3) (requiring buildout by any company receiving a system-wide franchise to residential areas of certain municipalities within a certain time frame, and more broadly instituting non-discrimination requirements based on the income levels of communities served). And the Legislature explicitly established a broad right of enforcement for those in poorer communities who were impacted by any discrimination by the holder of a system-wide franchise, thus making it clear that the public, and not just the Board, should be able to evaluate whether the statutory requirements are met in Verizon's provision of broadband access. N.J.S.A., 48:5A-25.2(b) ("Any person affected by the requirements of subsection a. of this section may seek enforcement of these requirements.") BPU realized in requiring Verizon to provide this information that such information was necessary to ensure "the service is provided on a non-discriminatory basis and to serve as one component of the basis for Petitioner's ongoing proof of compliance with the Franchise and the Act." In the Matter of the Application of Verizon New Jersey Inc. for Renewal of a System-Wide Cable Television Franchise, BPU Docket No. CE13080756 at 9. Without these data, it is impossible for the public to know whether Verizon is still on track to meet statutory buildout timing requirements and whether Verizon is proceeding with buildout on a nondiscriminatory

basis. Given that the public has a right pursuant to the legislation creating the system-wide permit process to bring legal actions if Verizon is engaging in discriminatory activity, it would subvert the intent of that legislation if BPU could hide the very data it recognizes as a component of the basis for evaluation of that discrimination from the public.

Second, at least up until 2014, even more specific data than those requested here were provided by Verizon to the federal and/or state governments and posted online for the world to see. The fact that Verizon has routinely in the past made such data available to other governmental agencies who in turn make it available to the public undercuts any claim that such information is confidential and must be hidden from the public to serve Verizon's business interests.

As part of the American Recovery and Reinvestment Act of 2009, Public Law No. 111-5, the federal government established the National Broadband Map and the State Broadband Initiative. The National Broadband Map "will publicly display the following information about broadband service available from a public or private provider: (a) Geographic areas in which broadband service is available; (b) The technologies used to provide broadband service in such areas..." State Broadband Data and Development Grant Program NOFA, National Telecommunications and Information Administration, 74 Fed. Reg. 32545, 32547 (July 8, 2009). The State Broadband Initiative provides grants to states to develop "a statewide broadband map that will be separate and distinct from the national broadband map and will be tailored to suit the needs of the particular State" in addition to providing data to the national map. Ibid.

Data on the extent of Verizon's FIOS buildout is readily available from both of these maps, through 2014 for the national map and 2013 for the state map. Thus it does not make sense

that BPU now claims similar data, that are generally less detailed than the data that have been available historically, are proprietary.

The National Broadband Map enables the public to conduct a block-level search for broadband access, with data updated through June 30, 2014. <http://www.broadbandmap.gov> (last accessed Dec. 28, 2015). By searching for any address in the nation, the user is provided with a list of services available at that address, listed by carrier and technology. For example, by searching for 100 Main Street in Millburn, New Jersey, one is presented with a list of coverage of all providers, which includes Verizon providing wired service at speeds from 100 megabits per second to 1 gigabit per second, which is FIOS. (VC at ¶29, Ex. G). In contrast, searching for 100 Main Street in Newark, New Jersey produces a similar map and list, but the only wired service provided by Verizon is older technology at 6 to 10 megabits per second. *Ibid.*

Similarly, the “Connecting NJ” State Broadband Map created through a federal grant through this initiative to the State of New Jersey provides information as to FIOS availability to the street address level. [http://njgin.state.nj.us/oit/gis/OIT\\_BroadbandMapping/](http://njgin.state.nj.us/oit/gis/OIT_BroadbandMapping/) (last accessed Dec. 28, 2015). By searching for any address in the state, the user is provided with a list of services available at that address, listed by carrier and technology. For example, by searching for 100 Main Street in Millburn, New Jersey, one is presented with a map of coverage of all providers and can click on that block to see a list of the providers, which includes Verizon providing “fiber to the end user.” (VC at ¶30, Ex. H). In contrast, searching for 100 Main Street in Newark, New Jersey produces a similar map, but the only wired service provided by Verizon is the older DSL technology. *Ibid.*

These data available on both state and federal government websites are significantly more specific than the data that BPU claims is confidential. While these data are available down to the

block level, the data Plaintiff requested are only available at an aggregate municipal level.<sup>2</sup> If Verizon has regularly, as recently as 2014, allowed data as to the extent of its service availability down to the block to be available on both federal and state websites, the BPU has no legitimate claim that much more general data at the municipal level are proprietary. It would be difficult for BPU to “identify the detrimental effects of disclosure” and provide “actual evidence” “that disclosure will result in a loss of bargaining power” when disclosure at an even greater level has historically been the norm. Newark Morning Ledger Co. v. New Jersey Sports & Exposition Auth., 423 N.J. Super. 140, 167 (App. Div. 2011). This broad and recent availability of the requested information online, at even greater detail, also distinguishes this case from a case such as Rousseau in which the information requested had consistently been maintained as confidential by the business involved.

In sum, the case law establishes that agencies may not use the “proprietary commercial or financial information” exception to OPRA as a basis to refuse to disclose basic data about how a regulatory agency is ensuring compliance with state law. Absent the public having access to the quarterly report data, it is impossible for the public to monitor whether FIOS is being extended in a nondiscriminatory fashion, consistent with timeframes required by statute. Furthermore, even more specific data until less than two years ago were routinely provided online, thus differentiating this case from one genuinely involving closely held business secrets. Thus, the court should require BPU to disclose the redacted data under OPRA.

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<sup>2</sup> Note that the data can also be analyzed at the municipal level in the “Connecting NJ” map. [http://njgin.state.nj.us/oit/gis/OIT\\_BroadbandMapping/](http://njgin.state.nj.us/oit/gis/OIT_BroadbandMapping/) (last accessed Dec. 28, 2015).

### POINT III

#### PLAINTIFFS ARE ENTITLED TO THE RECORDS SOUGHT PURSUANT TO THE COMMON LAW RIGHT OF ACCESS

The right of access under the common law is in many cases broader, and not delimited by OPRA. See N.J.S.A. 47:1A-8; Higg-A-Rella, Inc. v. County of Essex, 141 N.J. 35, 46 (1995). Stated plainly, “[a] citizen has a common-law right to inspect public documents if they are public records, if the citizen has requisite interest to inspect the records, and if the interest in disclosure outweighs [the need for] confidentiality.” Home News Pub. Co. v. State, 224 N.J. Super. 7, 16 (App. Div. 1988). The documents in question here meet the common law test.

Common law right of access requests are evaluated by the courts with a two-part analysis. Higg-A-Rella, Inc., 141 N.J. at 46. First, the citizen requesting the public record must demonstrate an interest in the record’s subject matter. S. Jersey Pub. Co., Inc. v. New Jersey Expressway Auth., 124 N.J. 478, 487-88 (1991). To start, “[a] common law record is one that is made by a public official in the exercise of his or her public function, either because the record was required or directed by law to be made or kept, or because it was filed in a public office.” Keddie v. Rutgers State Univ., 148 N.J. 36, 49 (1997). A citizen’s interest in the public record may be personal or out of civic concern for “‘keep[ing] a watchful eye on the workings of public agencies.’” Red Bank Register v. Bd. of Educ., 206 N.J. Super. 1, 9 (App. Div. 1985) (quoting Nixon v. Warner Communications, Inc., 435 U.S. 589, 598 (1978)). Courts give greater scrutiny to the applicant’s interest in the face of an assertion that a particular document is confidential. Keddie, 148 N.J. at 51. “In that context, courts consider whether the claim of confidentiality is ‘premised upon a purpose which tends to advance or further a wholesome public interest or a legitimate private interest.’” Ibid. (quoting Loigman v. Kimmelman, 102 N.J. 98, 112 (1986)) (internal quotation marks omitted). A “slight or non-existent” confidentiality interest can be

countered by the legitimate private interest having been demonstrated merely by the requesting party's standing to bring the action. Loigman, 102 N.J. at 105. Put simply, there is an inverse relationship between the State's confidentiality interest and the requesting parties' burden to prove the strength of their asserted interest.

Once the citizen's interest in a public document has been established, our Supreme Court has prescribed an interest balancing test for deciding actions based on the common law right of access to government records. S. Jersey Pub. Co., Inc., 124 N.J. at 488. Courts consider:

(1) the extent to which disclosure will impede agency functions by discouraging citizens from providing information to the government; (2) the effect disclosure may have upon persons who have given such information, and whether they did so in reliance that their identities would not be disclosed; (3) the extent to which agency self-evaluation, program improvement, or other decisionmaking will be chilled by disclosure; (4) the degree to which the information sought includes factual data as opposed to evaluative reports of policymakers; (5) whether any findings of public misconduct have been insufficiently corrected by remedial measures instituted by the investigative agency; and (6) whether any agency disciplinary or investigatory proceedings have arisen that may circumscribe the individual's asserted need for the materials.

[S. Jersey Pub. Co., Inc., 124 N.J. at 488 (1991) (quoting Loigman, 102 N.J. at 112 (1986).]

Furthermore, OPRA does not preempt the common law right of access, a principle that has been applied specifically in the area of supposedly proprietary information. Bergen County Improvement Auth. v. North Jersey Medical Group, 370 N.J. Super. 504 (App. Div. 2004) (affirming trial court provision of document under common law right to access, particularly when company was "legally required to file" supposedly proprietary document pursuant to state regulation).

Applying the test here, the basic, summary information about the FIOS buildout contained in the reports are public documents.

CWA, as well as the broader public, have a strong interest in disclosure of these documents. CWA represents approximately 1,400 persons employed by Verizon Communications, Inc. in New Jersey and approximately 35,000 persons employed by Verizon Communications throughout the United States. CWA also represents approximately 50,000 persons employed by the State of New Jersey and various counties, municipalities and other local government entities in New Jersey. (VC at ¶19). CWA has long promoted the buildout of high speed fiber optic networks to ensure that all persons have access to information and educational services. (VC at ¶21). CWA was actively involved in the legislative process that led to the passage of the 2006 system-wide cable franchise law, and specifically advocated for those provisions of the statute that required the buildout of a high speed fiber optic network that would provide access to residents in all income brackets in the State's most populous areas. (VC at ¶22). CWA and its members, many of whom live in areas of the State where Verizon agreed to build a fiber network, have a direct interest, both as employees of Verizon and as consumers of telecommunications services, in ensuring that Verizon lives up to the commitments it made in order to receive a system-wide franchise. Precisely for this reason, CWA has participated in proceedings before the BPU pertaining to Verizon's buildout of a fiber optic network, arguing strenuously that Verizon should be required to abide by the agreement it entered into to obtain a system-wide franchise. (VC at ¶24).

CWA's information request in this case was made so that CWA can independently analyze and understand whether Verizon is satisfying the conditions of its state-wide franchise and is making available fiber optic services without regard to the income levels of a



community's residents. (VC at ¶26). Absent the information redacted by BPU in response to the request, CWA is denied access to information that BPU itself has previously stated is required to evaluate whether Verizon is complying with its state-wide franchise and not discriminating on the basis of income. In the Matter of the Application of Verizon New Jersey Inc. for Renewal of a System-Wide Cable Television Franchise, BPU Docket No. CE13080756 at 9.

In contrast, the Board has asserted no interest pursuant to the common law right of access. The Board simply stated that "Your request for the redacted information is denied because you have not established an interest in the subject matter of the material you have requested." (VC at ¶13). The Board did not provide any reason whatsoever as to its own interests in refusing to disclose the information in denying Plaintiff's request under the common law right of access, simply claiming that CWA had no interest in such access and summarily denying disclosure on that basis.

The Board's lack of rationale for denying access under the common law right of access is unsurprising, because pursuant to the S. Jersey Pub. Co., Inc. factors, the Board has no basis for denying access.

First, disclosure of summary information on FIOS installation at the municipal level would not have the impact of discouraging Verizon from providing this information, because providing such information is a prerequisite for Verizon to receive the public benefit of a system-wide cable television franchise, which is a privilege, and not a right. Again, the Legislature in setting up such a system conditioned the grant of such a franchise on ensuring that such a franchise was not abused by favoring only wealthy communities over poorer communities, an analysis that necessarily requires analysis of the type of summary data that the Board refuses to release. N.J.S.A. 48:5A-25.2(a)(2) and (3) (requiring buildout by any company receiving a

systemwide franchise to residential areas of certain municipalities within a certain time frame, and more broadly instituting non-discrimination requirements based on the income levels of communities served). And the Legislature explicitly established a broad right of enforcement for those in poorer communities who were impacted by any discrimination by the holder of a systemwide franchise, thus making it clear that the public, and not just the Board, should be able to evaluate whether the statutory requirements are met in Verizon's provision of broadband access. N.J.S.A. 48:5A-25.2(b) ("Any person affected by the requirements of subsection a. of this section may seek enforcement of these requirements.") Relatedly, as to the second prong of S. Jersey Pub. Co., Inc., there are no persons who have given information to the agency in this matter on the basis that their identities would not be disclosed; rather the records sought are simply aggregate, municipality-wide data that does not contain any individual person's information as to, for example, whether they subscribe to FIOS.

As to the third prong, "the extent to which agency self-evaluation, program improvement, or other decisionmaking will be chilled by disclosure," the Legislature has provided broad standing for members of the public to bring actions based upon these very data before the agency. N.J.S.A. 48:5A-25.2(b). Thus, to the degree that the agency asserts that it should be able to set up a closed internal process to evaluate this information, such an assertion transgresses the Legislature's determination that "Any person affected by the requirements of subsection a. of this section may seek enforcement of these requirements." Ibid. By refusing to disclose the very data that would be the basis of such enforcement, the BPU is making it practically impossible to carry out the Legislature's intent for BPU's decision-making to be informed by a broad public process, not a closed internal investigation.

These same facts bear on factors (5) and (6) of S. Jersey Pub. Co., Inc., “(5) whether any findings of public misconduct have been insufficiently corrected by remedial measures instituted by the investigative agency; and (6) whether any agency disciplinary or investigatory proceedings have arisen that may circumscribe the individual's asserted need for the materials.” The agency itself, in processing Verizon's system-wide franchise renewal, instituted the quarterly report process precisely because it found that such reporting was necessary to ensure “the service is provided on a non-discriminatory basis and to serve as one component of the basis for Petitioner's ongoing proof of compliance with the Franchise and the Act.” In the Matter of the Application of Verizon New Jersey Inc. for Renewal of a System-Wide Cable Television Franchise, BPU Docket No. CE13080756 at 9. The BPU thus found that Verizon needed to provide “ongoing proof of compliance” and that these reports were a crucial component of such proof. Without the public even being able to review such reports, it is impossible to ascertain whether any “remedial measures instituted by the investigative agency” have been sufficient.

Finally, as to factor (4) of S. Jersey Pub. Co., Inc., “the degree to which the information sought includes factual data as opposed to evaluative reports of policymakers,” all of the information sought is factual data as to the extent of FIOS service; none of the information concerns the “evaluative reports of policymakers.”

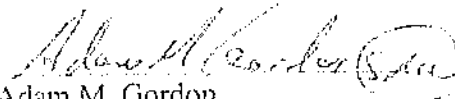
On balance, the Plaintiff's interests in accessing these required reports on the extent of FIOS buildout and whether such buildout is being done in a discriminatory manner outweigh Defendant's interest, whatever they might be given that Defendant stated no interest in denying the request. Accordingly, this court should order that Defendant provide the full unredacted quarterly reports pursuant to the common law right of access.

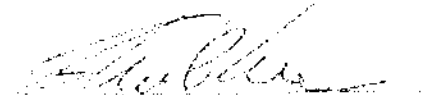
POINT IV

AWARD OF REASONABLE ATTORNEYS' FEES

If this court orders Defendant to produce any of the requested documents, the Court should find that Plaintiff(s) are the prevailing party(ies), and under OPRA's fee-shifting provision and the common law right of access, award Plaintiff reasonable attorneys' fees and costs. N.J.S.A. 47:1A-6.

Respectfully submitted,

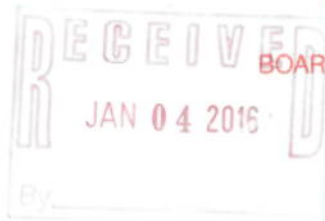
  
Adam M. Gordon

  
Steven P. Weissman

Steven Weissman, Esq. – ID # 024581978  
Adam M. Gordon, Esq. – ID #033332006  
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Somerset, New Jersey 08873  
Attorneys for Plaintiffs

RECEIVED

JAN 04 2016



BOARD OF PUBLIC UTILITIES  
MAIL ROOM

COMMUNICATIONS WORKERS OF  
AMERICA, AFL-CIO

Plaintiffs,

v.

STATE OF NEW JERSEY,  
BOARD OF PUBLIC UTILITIES,

Defendant.

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION, MERCER COUNTY

Docket No. MER-L- 2898

Civil Action

ORDER

THIS MATTER being brought before the court by Weissman and Mintz, LLC, attorneys for Plaintiff Communications Workers of America, AFL-CIO, seeking relief by Verified Complaint and Order to Show Cause for an Order requiring Defendant State of New Jersey, Board of Public Utilities to provide Plaintiffs with copies of certain public records, and the Court having considered the papers submitted by the parties, and heard oral argument on

\_\_\_\_\_, 2016; and for the reasons set forth on the record on

\_\_\_\_\_, 2016, and for the good cause shown,

IT IS on this \_\_\_\_\_ day of \_\_\_\_\_, 2016,

A. **ORDERED** that the Defendant shall within 20 days after service of this Order upon them provide Plaintiff with fully unredacted copies of the first and second quarter 2015

quarterly service activation reports requested by them in its October 27, 2015 OPRA request to Defendant; and it is further

B. **ORDERED** that Plaintiff is the prevailing party in this matter and that counsel for Plaintiff shall serve and file their motion and fee certification for reasonable attorneys' fees and costs within 20 days after service of this Order upon Plaintiff; and it is further

C. **ORDERED** that Plaintiff shall serve a copy of this Order upon Defendant within seven days of service of this Order upon Plaintiff.

\_\_\_\_\_  
HON. MARY C. JACOBSON, A.J.S.C.

This order was:

OPPOSED \_\_\_\_\_

UNOPPOSED \_\_\_\_\_

Steven Weissman, Esq. -- ID # 024581978  
Adam M. Gordon, Esq. -- ID #033332006  
WEISSMAN & MINTZ, LLC  
One Executive Drive  
Suite 200  
Somerset, New Jersey 08873  
Attorneys for Plaintiffs

COMMUNICATIONS WORKERS OF  
AMERICA, AFL-CIO

Plaintiffs,

STATE OF NEW JERSEY,  
BOARD OF PUBLIC UTILITIES,

Defendant.

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION, MERCER COUNTY

Docket No. MER-L-\_\_\_\_\_

Civil Action

**VERIFIED COMPLAINT**

By way of Verified Complaint against Defendant State of New Jersey, Board of Public Utilities, Plaintiffs Communications Workers of America, AFL-CIO say:

1. This is an action alleging violations of the Open Public Records Act, N.J.S.A. 47:1A, et seq. ("OPRA") and the New Jersey common law right of access seeking to require disclosure of documents to which the Defendant denied Plaintiffs access.

**PARTIES**

2. Plaintiff Communications Workers of America, AFL-CIO ("CWA"), with its principal place of business at 102 South Warren Street, Trenton, New Jersey 08608, is the exclusive collective negotiations representative for approximately 50,000 public employees throughout the State of New Jersey.

3. Defendant State of New Jersey, Board of Public Utilities (“BPU”), is a “public agency” within the meaning of N.J.S.A. 47:1A-1.1, with an address of 44 S. Clinton Avenue, Trenton, NJ 08625.

#### JURISDICTION AND VENUE

4. The court has subject matter jurisdiction of this action pursuant to N.J.S.A. 47:1A-6 and the common law.

5. Venue is proper in this court pursuant to R. 4:3-2(a)(2) because all of the relevant events occurred in this County, and the defendant public agency is a subdivision of the State.

#### FACTUAL ALLEGATIONS

8. On October 27, 2015, Plaintiff submitted an OPRA request to Defendant seeking “All quarterly service activation reports filed by Verizon for the first, second, and/or third quarter of 2015.” Such quarterly service activation reports are required to be filed with Defendant each quarter as part of Defendant’s grant to Verizon of a system-wide franchise for the provision of cable television and broadband Internet throughout the state. This request was given reference number W102515.

9. A true and accurate copy of Plaintiff’s OPRA request, which also included a second set of records for which the response is not being challenged in this lawsuit, is attached as Exhibit A.

10. On November 20, 2015, after requesting an extension to that date to which Plaintiff consented, Defendant provided a heavily redacted form of the quarterly service activation reports for the first and second quarters of 2015, claiming that such “information has been redacted pursuant to the exception for proprietary commercial information at N.J.S.A. 47:1A-1.1. This includes customer information, information concerning Verizon employees, as



well as information pertaining to service availability.” A true and accurate copy of Defendant’s response letter is attached as Exhibit B and the redacted quarterly service activation reports are attached as Exhibit C.

11. The BPU provided a record that redacted 7 out of 9 categories for which Verizon provided the BPU with information at the municipal level as to the extent of FIOS deployment. The redacted record only provided when FIOS service’s initial availability was initially “announced via press release” and “advance notice” was provided of the start of service. The categories redacted included:

- Initial FIOS TV service availability
- Estimated full FIOS TV service availability
- Actual full FIOS TV service availability
- Total addresses validated for FIOS TV
- Number of multiple dwelling unit addresses validated for FIOS TV
- Number of single family unit addresses validated for FIOS TV
- The Video Serving Office (VSO) from which service was provided to the municipality

See Exhibit C.

12. On November 30, 2015, Plaintiff further requested the same information pursuant to the common law right of access to governmental records via e-mail to Defendant. A true and accurate copy of Plaintiff’s request pursuant to the common law right of access is attached as Exhibit D.

13. On December 22, 2015, Defendant denied Plaintiff’s request via by stating that “Your request for the redacted information is denied because you have not established an interest in the subject matter of the material you have requested.” Defendant did not provide any

discussion as to its own interests in refusing to disclose the information in denying Plaintiff's request under the common law right of access. A true and accurate copy of Defendant's denial pursuant to the common law right of access is attached as Exhibit E.

14. According to the BPU's system-wide permit to Verizon, which was most recently renewed on January 29, 2014, the reason for providing the reports are to ensure "the service is provided on a non-discriminatory basis and to serve as one component of the basis for Petitioner's ongoing proof of compliance with the Franchise and the Act." A true and accurate copy of the BPU's decision to approve a renewed system-wide permit which contains the reporting requirement at p. 9, In the Matter of the Application of Verizon New Jersey Inc. for Renewal of a System-Wide Cable Television Franchise, BPU Docket No. CE13080756 (Jan. 29, 2014), is attached hereto as Exhibit F.

15. On information and belief, the redacted portions of the report contain data which show the extent of compliance with the requirement of N.J.S.A. 48:5A-25.2(a) that require buildout of cable service throughout residential areas of every county seat and every municipality with a population density greater than 7,111 persons per square mile, with limited specified exceptions, within six years of the beginning of service to each such county seat and municipality.

16. On information and belief, the redacted portions of the report contain data which show the extent of current FIOS service and which are in the BPU's words relevant to whether "the service is provided on a non-discriminatory basis."

17. Plaintiff has a wholesome public interest and legitimate private interest in the documents being requested.

18. Plaintiff's interest in receiving copies of the documents requested is not outweighed by Defendant's interest in secrecy.

19. Plaintiff's interest in these records is, in part, that Plaintiff represents approximately 1,400 persons employed by Verizon Communications, Inc. in New Jersey and approximately 35,000 persons employed by Verizon Communications throughout the United States. Plaintiff also represents approximately 50,000 persons employed by the State of New Jersey and various counties, municipalities and other local government entities in New Jersey.

20. Plaintiff's interest in these records also stems from the fact that, in addition to protecting the job security and working conditions of its members at Verizon, Plaintiff advocates, along with other organizations, on behalf of the consumers of telecommunications services to ensure that they have access to high quality services at a reasonable cost.

21. Plaintiff has long promoted the buildout of high speed fiber optic networks to ensure that all persons have access to information and educational services. Indeed, on a national level, before the Federal Communications Commission, and before state regulatory bodies, such as Defendant, Plaintiff has promoted the building of a high speed fiber optic network under the slogan "Speed Matters."

22. Plaintiff was actively involved in the legislative process that resulted in the passage of the 2006 law that enabled Verizon to apply for a system-wide cable franchise and vigorously supported those provisions of the statute that required the buildout of a high speed fiber optic network that would provide access to residents in all income brackets in the State's most populous areas.

23. Plaintiff and its members, many of whom live in areas of the State where Verizon agreed to build a fiber network, have a direct interest, both as employees of Verizon and as

consumers of telecommunications services, in ensuring that Verizon lives up to the commitments it made in order to receive a system-wide franchise.

24. Precisely for this reason, Plaintiff has participated in proceedings before the BPU pertaining to Verizon's buildout of a fiber optic network, including the proceedings that led to the requirements for quarterly reports, arguing strenuously that Verizon should be required to abide by the agreement it entered into to obtain a system-wide franchise.

25. Moreover, Plaintiff has long been concerned about the quality of telecommunications services provided by Verizon in New Jersey and nationally, and has actively monitored service quality issues in a variety of ways, including requesting and obtaining information from Defendant.

26. Plaintiff's information request in this case was made so that Plaintiff can independently analyze and understand whether Verizon is satisfying the conditions of its state-wide franchise and is making available fiber optic services without regard to the income levels of a community's residents.

27. Extensive information as to the buildout of Verizon's network has historically been available from both federal and state agencies mapping the extent of the nation's broadband networks.

28. This information in many cases is more detailed than the information requested, thus casting doubt on the legitimacy of Defendant's refusal to release the records on grounds that they are proprietary business information.

29. For example, the National Broadband Map enables the public to conduct a block-level search for broadband access, with data updated through June 30, 2014. <http://www.broadbandmap.gov> (last accessed Dec. 28, 2015). By searching for any address in

the nation, the user is provided with a list of services available at that address, listed by carrier and technology. For example, by searching for 100 Main Street in Millburn, New Jersey, one is presented with a list of coverage of all providers, which includes Verizon providing wired service at speeds from 100 megabits per second to 1 gigabit per second, which is FIOS. In contrast, searching for 100 Main Street in Newark, New Jersey produces a similar map and list, but the only wired service provided by Verizon is older technology at 6 to 10 megabits per second. A true and accurate printout copy of the referenced searches on <http://www.broadbandmap.gov> for 100 Main Street in Millburn and 100 Main Street in Newark is attached hereto as Exhibit G.

30. Similarly, the "Connecting NJ" State Broadband Map created through a federal grant through this initiative to the State of New Jersey provides information as to FIOS availability to the street address level. [http://njgin.state.nj.us/oit/gis/OIT\\_BroadbandMapping/](http://njgin.state.nj.us/oit/gis/OIT_BroadbandMapping/) (last accessed Dec. 28, 2015). By searching for any address in the state, the user is provided with a list of services available at that address, listed by carrier and technology. For example, by searching for 100 Main Street in Millburn, New Jersey, one is presented with a map of coverage of all providers and can click on that block to see a list of the providers, which includes Verizon providing "fiber to the end user." In contrast, searching for 100 Main Street in Newark, New Jersey produces a similar map, but the only wired service provided by Verizon is the older DSL technology. A true and accurate printout copy of the referenced searches on the "Connecting NJ" State Broadband Map for 100 Main Street in Millburn and 100 Main Street in Newark is attached hereto as Exhibit H.

31. The information, however, has not been updated since 2014 for the national map and 2013 for the state map, meaning that Plaintiff cannot access the most updated buildout information as of 2015 that it has requested from Defendant from these other public sources.

32. Defendant's denial of access to the requested public records thus has thwarted Plaintiff's attempt to analyze and understand whether Verizon is satisfying the conditions of its state-wide franchise and is making available fiber optic services without regard to the income levels of a community's residents.

#### **COUNT ONE – VIOLATION OF OPRA**

33. Plaintiff repeats and incorporates by reference each and every allegation set forth in paragraphs 1 through 32 in this Verified Complaint as though fully set forth at length herein.

34. Defendant violated OPRA by not providing Plaintiff with unredacted copies of the first and second quarter 2015 quarterly service activation reports in response to its October 27, 2015 request.

#### **COUNT TWO – VIOLATION OF COMMON LAW RIGHT OF ACCESS**

35. Plaintiff repeats and incorporates by reference each and every allegation set forth in paragraphs 1 through 34 of this Verified Complaint as though fully set forth at length herein.

36. Plaintiff has a common law right of access to receive copies of the documents sought in the October 27, 2015 records requests.

37. Plaintiff's interest in these documents is to independently analyze and understand whether Verizon is satisfying the conditions of its state-wide franchise and is making available fiber optic services without regard to the income levels of a community's residents.

38. Plaintiff's and the public's interest in acquiring the documents outweighs any interest in secrecy that Defendants may have.

WHEREFORE, Plaintiffs respectfully request that this Court enter judgment against the Defendant:

A. Ordering Defendant to disclose fully unredacted copies of the first and second quarter 2015 quarterly service activation reports in response to Plaintiff's October 27, 2015 request;

B. Awarding Plaintiff costs and reasonable attorneys' fees; and

C. Awarding Plaintiff any such other relief that this Court deems just and equitable.

#### **DESIGNATION OF TRIAL COUNSEL**

Pursuant to R. 4:25-4, Adam M. Gordon, Esq., is designated as trial counsel on behalf of Plaintiffs.

#### **CERTIFICATION PURSUANT TO R. 1:38-7(B)**

I certify that confidential personal identifiers have been redacted from documents submitted to the Court, and will be redacted from all documents submitted in the future.

#### **R. 4:5-1 CERTIFICATION**

I certify that the dispute about which I am suing is not the subject of any other action pending in any other court or a pending arbitration proceeding to the best of my knowledge and belief. Also, to the best of my knowledge and belief no other action or arbitration proceeding is contemplated. Further, other than the parties set forth in this complaint, I know of no other parties that should be made a part of this lawsuit. In addition, I recognize my continuing obligation to file and serve on all parties and the Court an amended certification if there is a change in the facts stated in this original certification.

Hetty Rosenstein, of full age, certifies as follows:

1. I am the New Jersey Area Director for the Communications Workers of America, AFL-CIO, a Plaintiff in the action captioned "Communications Workers of America, AFL-CIO v. State of New Jersey, Board of Public Utilities." All of the facts stated in the verified complaint to which this Verification is attached are true, and as to those facts that are alleged on information and belief, I believe those facts to be true.

2. I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.



Hetty Rosenstein

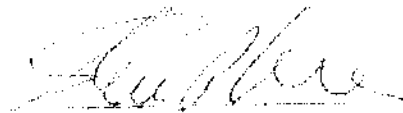
Dated: December 30, 2015



CERTIFICATION PURSUANT TO R. 1:4-4(c)

In accordance with the provisions of R. 1:4-4(c), I certify that the annexed signature page of Hetty Rosenstein is an electronic copy of her original signature. She has acknowledged the genuineness of her signature to me. I further certify that the annexed document with an original signature affixed will be filed if requested by the court or a party.

I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

  
Steven Weissman, Esq.

Dated: December 30, 2015