PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON

At a session of the PUBLIC SERVICE COMMISSION OF WEST VIRGINIA in the City of Charleston on the 14th day of August 2020.

CASE NO. 18-0291-T-P

FRONTIER WEST VIRGINIA, INC., and CITIZENS TELECOMMUNICATIONS COMPANY OF WEST VIRGINIA, dba FRONTIER COMMUNICATIONS OF WEST VIRGINIA, public utilities.
Petition to initiate a general investigation into the current status of Frontier's copper network in West Virginia and the service quality problems related to the network.

COMMISSION ORDER

The Commission grants in part and denies in part a motion for protective treatment filed by Frontier West Virginia, Inc., and Citizens Telecommunications Company of West Virginia, dba Frontier Communications of West Virginia (Frontier).

BACKGROUND

On August 30, 2018, the Commission initiated a focused management audit of Frontier.

On July 25, 2019, the Commission (i) selected Schumaker and Company, Inc. (Schumaker), to perform the focused management audit and (ii) directed that Schumaker and Frontier proceed with the focused management audit. The Commission also established the timeline for filings in this case. See also Commission Orders issued October 4, 2019, December 18, 2019 and January 15, 2020 revising timeline.


On March 25, 2020, Frontier filed a Verified Motion for Protective Order and a redacted public version of the Report.

On March 31, 2020, Staff filed a response to the Frontier Motion for Protective Order. The Consumer Advocate Division (CAD) filed a letter on April 2, 2020 agreeing with the Staff response.
On April 3, 2020, the Commission received a request from Emily Allen pursuant to the West Virginia Freedom of Information Act, W.Va. Code §§ 29B-1-1 et seq., (FOIA) asking for,

[T]he full, unredacted focused management audit on Frontier West Virginia and Citizens Telecommunications Company of West Virginia, which the Public Service Commission received on March 18.

On April 3, 2020, the Commission issued an Order providing Frontier until April 8, 2020, to file a response to the FOIA request.

On April 8, 2020, the Commission issued an Order allowing parties to file (i) responses to the Frontier Motion for Protective Order within ten days, (ii) replies to the Frontier response to the FOIA request within ten days of the Frontier response, and (iii) comments regarding the Report and the Frontier response to the Report within twenty days following the Frontier response to the Report.

On April 8, 2020, Frontier filed its response to the FOIA request.


On April 17, 2020, the Commission granted the Frontier request for additional time to file its response to the Report.

Parties to this case filed responses to the Frontier request for protective treatment and the FOIA. Communications Workers of America, AFL-CIO and CAD (April 17, 2020) and Staff (April 17, 2020).

On April 22, 2020, Frontier filed a reply to filings by the parties regarding the FOIA request.

On April 27, 2020, the Commission issued a Procedural Order noting that redacted content in the Report had been made available on the Internet. The Commission set deadlines for the filing of memoranda of law regarding the Frontier Motion for Protective Order in consideration of this change in circumstances.

On May 12, 2020, Frontier filed in response to the April 27, 2020 Order.
On June 2, 2020, CWA, CAD, and Staff filed individual responses to the Frontier’s May 12, 2020 filing.

**DISCUSSION**

This Order addresses only the Frontier Motion for Protective Order. The substance of the Report will be addressed in a separate order.

Frontier requested protected treatment of the Report. Following Emily Allen’s FOIA request to obtain the Report, the Commission’s April 8, 2020 Order, requested party positions regarding protective treatment and the FOIA. Shortly thereafter, the confidential version of the Report appeared on a publically available Internet technology media outlet web site. The web site stated that the Report had been inadequately redacted. The web site made available a copy of the redacted Report and described how to view the redacted portions. Although all of the text of the Report appeared to be available for viewing, it was not clear whether all of the charts and graphs contained in the Report were viewable. By our April 27, 2020 Order we required:

…the parties to submit memoranda of law addressing the impact of the exposure of the redacted Report on the FOIA request, including controlling and persuasive authorities on both sides of the issue. Among other things, Frontier should also describe the extent to which the redacted text, charts, and graphs of the Report were made accessible. Alternatively, Frontier may withdraw its Motion for Protective Order.

April 27, 2020 Order, at 3.

This Order will first address release on the Internet of the full text and a portion of the graphics of the Report, and whether that release effectively moots the Frontier Motion for Protective Order.

The remainder of the Order will address the graphics that were not released and whether those graphics qualify as an exemption under W. Va. Code § 29B-1-4.

Protection of the released, text-based information in the Report.

The protected version of the Report was redacted by Frontier and filed with the Commission on March 18, 2020. The redactions consisted of black boxes overlaid on the confidential text information. The Commission docketed the Report and made it available on our web site. An Internet technology media outlet obtained the Report from the Commission web site and discovered that the redactions did not obscure the confidential information. In its May 12, 2020 memorandum of law, Frontier argued:
In the present case, the disclosure of Frontier’s confidential information was patently unauthorized. Frontier did not give permission for the disclosure. In addition, Frontier actively took steps to protect the information from disclosure. Nonetheless, a third-party Internet technology media outlet maliciously extracted Frontier’s confidential trade secrets from a redacted Audit Report and illicitly exposed them to public disclosure without any prior authorization from Frontier—knowing full well that it was Frontier’s explicit intent that the redacted materials be kept confidential, and that they were subject to a motion for protective order pending before the Commission. Thereafter, another media outlet—which had initially made the FOIA request to the Commission—used this illicit means of unauthorized exposure to publicly disclose a small portion of Frontier’s confidential information.

May 12, 2020 Frontier memorandum of law, at 7-8.

We disagree with this description. It is true that Frontier did not give permission for the disclosure. But, it is an overstatement to say Frontier actively took steps to protect the information from disclosure, and that illicit means were used to expose the redacted content. By performing a “copy and paste” action on the Report, the confidential text may be copied into a document (such as Microsoft Word) and viewed. This is not a complicated technical computer manipulation of the redacted text. Nor is it malicious or illicit. “Copy and paste” is a common action used in word processing. An equivalent situation in the non-digital world would be Frontier using a Post-It Note to cover the redacted text, placing the document in a public space, and then objecting when a reader removed the Post-It Note to see the covered text. In short, the confidential information was not adequately redacted.

Generally, a party cannot rely on an otherwise valid FOIA exemption to justify withholding information that has already been released into the public domain. See, e.g., Davis v. U.S. Dep’t of Justice, 968 F.2d 1276, 1280 (D.C. Cir. 1992) (noting that “a showing of public availability renders the FOIA exemptions inapplicable”); Cottone v. Reno, 193 F.3d 550, 554 (D.C. Cir. 1999) (“materials normally immunized from disclosure under FOIA lose their protective cloak once disclosed”); and Afshar v. U.S. Dep’t of State, 702 F.2d 1125, 1130 (D.C. Cir. 1983) (concluding that a party may waive FOIA protection if the requester carries his “burden of pointing to specific information in the public domain that appears to duplicate that being withheld”).

Frontier suggested that the Report in this case should not be deemed in the public domain. Frontier cited the Fourth Circuit case in Simmons v. DOJ, 796 F.2d 709 (4th Cir. 1986), for the proposition that the Commission should not strip protective treatment from a party whose information falls victim to unauthorized public exposure by a bad actor, 796 F.2d 709, 710 (4th Cir. 1986), because doing so would set an unfair precedent.
and would effectively result in a second, Commission-sanctioned, wrongful disclosure without any legitimate justification.

In Simmons, the Fourth Circuit explained that courts are hesitant to strip FOIA protection from information released to the public without permission: “[W]here there has been less than full disclosure from an official source, courts have been reluctant to release the requested information” because a release from an authorized source “confirms the accuracy of the previously leaked information.” 796 F.2d 709, 710 (4th Cir. 1986). The plaintiff in Simmons argued that the documents he sought from the Department of Justice were no longer protected by FOIA exemptions because an FBI agent had previously disclosed them, allowing them into the public domain. Id. In concluding that the documents did not lose FOIA protection, the Court found that if the FBI agent had in fact disclosed the documents, he did not do so “in an official” capacity. Id. In other words, any disclosure was unauthorized and, therefore, unable to form a basis for a FOIA waiver.

Release of the documents in the Simmons case was through an unofficial channel and the documents were not widely disseminated. Here, the Report was obtained from the Commission web page and was disseminated to the broadest possible audience – users of the Internet.

Frontier argued that if parties with questionable intentions know they can deprive others of protective treatment by misappropriating confidential material and publishing it on the Internet, the Commission runs the risk of encouraging such behavior. As the Court in Murphy v. FBI, 490 F. Supp. 1138, 1142 (D.D.C. 1989), explained, finding a waiver of FOIA protection would only lead to “exacerbation of the harm” created by the unauthorized disclosure. 490 F. Supp. 1138, 1142.

Murphy involved an unauthorized leak of information. That is not the case here. The public version of the Report was redacted and filed by Frontier and docketed by the Commission.

Frontier asserts that like the defendants in Hersh & Hersh v. HHS, No. C 06-4234 PJH, 2008 WL 901539 (N.D. Cal. Mar. 31, 2008), Frontier’s trade secret information was unknowingly exposed to possible public disclosure after it was uploaded to the Commission’s docketing system. Frontier stated that it did not know that a third party could undo the redactions in the Report and certainly did not intend the underlying information to be available for public viewing.

In Hersh & Hersh, the plaintiff sought to obtain trade secret documents that had been inadvertently produced in separate litigation and made publicly available on an electronic docketing system. The District Court for the Northern District of California found no waiver, holding that the “documents made publicly available on the docketing
system were inadvertently produced by defendants, must be returned to them, and cannot form the basis for a waiver argument."

In this case, the Report was not inadvertently produced. It was purposely filed by Frontier without having been adequately redacted by Frontier.

Frontier asserts that like the defendant in Astley v. Lawson, No. CIV. A. 89-2806(CRR), 1991 WL 7162, at *8 (D.D.C. Jan. 11, 1991), Frontier acted immediately to maintain the information’s confidentiality to the fullest extent possible by providing a replacement Report that was not susceptible to manipulation of the redacted portions. Frontier stated that the unknowing and unintentional susceptibility of the redactions to unauthorized removal simply cannot form the basis for depriving Frontier protection under FOIA.

In Astley, the D.C. District Court ruled that a government agency did not waive a FOIA exemption after mistakenly attaching a confidential memorandum to a motion that was placed into a publicly accessible record. The Court pointed to the agency’s motion to remove the documents from the public domain after realizing the mistake as evidence “demonstra[ing] that the disclosure was indeed inadvertent, and not inconsistent with the [agency’s] intent to maintain the confidentiality of the memoranda.” Id. at 8.

In the instant case, the Report was not mistakenly filed or docketed. As in Astley, Frontier moved quickly in an attempt to limit the exposure, but it was too late. The Report was already on the Internet.

Frontier stated that in In re Tr. for Gore, No. CIVA1165-VCN, 2011 WL 13175994, at *1 (Del. Ch. Jan. 6, 2011), the Court explained the agency should mitigate the consequences by finding no waiver of FOIA protection and upholding the FOIA exemption from disclosure. The Delaware Chancery Court explained “that the better policy is to mitigate the consequences of an inadvertent disclosure, at least where the public’s interest in access is outweighed by the confidentiality interests of the parties involved.” Id. at *3

Here, again, there was no inadvertent disclosure. Moreover, there is no mitigation available at this point. The Report is, and has been, available to the public through the Internet.

Frontier makes two additional arguments. First, that the Commission should be mindful of how it would have acted had the Internet technology media outlet properly requested public disclosure of the redacted information, either as a participant in the case or as a non-party. In that instance, the Commission would have required the Internet technology media outlet to follow the appropriate channels as either an intervenor or through a FOIA request. Frontier presents a counterfactual argument that is not
applicable in this case. The information was released and the Internet media outlet did not need to intervene or file a FOIA to obtain the Report.

Second, Frontier noted that the Internet technology media outlet did not actually disclose the protected information but instead disclosed the means to obtain it. The Report was made available on the Internet technology media outlet’s post with some portions unredacted and instructions on how to reveal the remainder of the information. Frontier asserts that there have been no additional disclosures of its redacted confidential information by the FOIA requestor or anyone else.

The Report is available on the Internet with no restrictions on viewing the content of the text. It is not necessary to take a count of the number of persons who have actually read the Report. The fact remains that the Report was available on the Internet, subject to viewing and downloading by every person with an Internet connection.


The text of the Report is in the public domain. The Frontier Motion for Protective Order of the text of the Report is moot and will be denied.

Protection of exhibits (charts and graphs) released on the Internet.

The redacted information in the Report was presented in the form of text, charts, and graphs. The chart and graph portions of the Report appeared as numbered exhibits. The majority of the redacted information presented in the exhibits is not susceptible to conversion to an unredacted form. Only ten of the 89 redacted exhibits in the Report have substantive content that can be accessed by following the Internet technology media outlet’s instructions. Of those ten exhibits, eight can be read in their entirety (VI-5, IX-5, X-1, X-2, X-3, X-4, X-5, and X-6). These eight exhibits, similar to the text of the Report, are in the public domain. The Motion for a Protective Order is moot in regards to those eight exhibits.
Protective treatment of the 91 redacted and partially redacted exhibits in the Report.

The remainder of this Order will address the remaining 91 exhibits for which a protective order is sought.¹

Motions for protective order typically present as routine, non-controversial requests. One party wishes to maintain the confidentiality of certain information during a pending matter, and the other party often does not object. The parties then either enter into an agreement to treat specified information confidentially, or obtain an order from the tribunal overseeing the matter that approves the parties’ agreement. Frequently, little more, if anything, ever comes of it.

In the administrative context, however, motions for protective order can become more involved due to the nature of the agency and related open proceedings requirements. For example, as applicable here, the Report was filed with the Commission. As such, it is a “public record” within the meaning of W.Va. Code § 29B-1-2(4). It is therefor available to the public – in most cases, almost immediately through the Commission’s website – unless the filing party files a motion for protective treatment. The documents at issue are held under seal pending a ruling on the motion. In such cases, assuming the requisite standards have been satisfied, the Commission usually affords the documents interim protection, but defers ruling on permanent protective treatment unless and until the Commission receives a FOIA request for the documents.

The Commission recognizes the unique circumstances presented by the simultaneous pendency of a motion for permanent protective treatment and a FOIA request, requiring clarification of the applicable standards and corresponding showing required to protect information asserted to be a “trade secret” or subject to some other FOIA exemption.

In order to obtain permanent protective treatment on the basis that information is confidential, the moving party must make a “credible showing” that the asserted confidential information satisfies the elements of a “trade secret” under the WV FOIA, W.Va. Code § 29B-1-4(a)(1), “expansively defined.” AT&T Communications v. Public Service Commission, 188 W.Va. 250, 423 S.E.2d 859 (1992); W.Va. Code, §29B-1-4(a)(1). Further, to make a “credible showing,” the party seeking a protective order must make “a particular and specific demonstration of fact, as

¹ Of the remaining 91 exhibits that were redacted in the Report, two were partially revealed on the Internet, Exhibits III-3 IV-33. Analysis of the redacted exhibits will apply to the two partially revealed exhibits.
distinguished from stereotyped and conclusory statements,” as to how a specific
document or a part thereof meets the definition of a “trade secret.”

The purpose of an affidavit is not to present argument, but is to establish the
underlying facts that support an argument. E.g., Black’s Law Dictionary at 54 (West 5th
ed. 1979) (defining an affidavit as a “written or printed declaration or statement of
facts. . .”) (citation omitted). In the view of the Commission, to do so, the affiant should
recite the specific facts to which he or she is attesting, and should not simply incorporate
by reference some combination of fact, argument, and conclusion found in a legal brief.
Parties proffering affidavits therefore should note that the failure of an affidavit to
include sufficient, specific facts may result in the Commission according lesser or no
weight to that document, which in turn may impact the Commission’s decision on
whatever relief the proponent seeks or opposes.

The specifics of the affidavit notwithstanding, in those instances where we
determined that an exhibit constituted a “trade secrets” or entitled to protective treatment
pursuant to other exemptions, the basis likewise often was self-evident from the content
of the exhibit.

Because of the pending FOIA request, which was directed to the Commission, the
Commission has an independent obligation to review exhibits and evaluate whether they
were protected from disclosure pursuant to WV FOIA exemption(s). See Syl. pt. 7,
Queen v. West Virginia Univ. Hosp., 179 W. Va. 95, 365 S.E.2d 375 (1987). See also,

Basis for Protection as Trade Secrets

As the moving party, Frontier bears the initial burden of making a credible
showing that the information it seeks to protect from public disclosure satisfies the
elements of any applicable WV FOIA exemption(s). See West Virginia American Water
Company, Case No. 14-0872-W-G1, (Commission Order December 11, 2015),
Conclusions of Law 2-3, 9.

We agree that commercial value and competitive advantage can exist with regard
to a regulated utility. See, e.g., State ex rel. Util. Comm’n v. MCI Telecomms. Corp.,
514 S.E.2d 276, 283 (N.C. App. 1999) (rejecting the position that trade secrets exemption
“must be construed differently because it arises in the context of a regulated industry,”
and reversing order requiring utilities to disclose information that satisfied elements of
App. 1994) (cost-accounting system developed by utility was entitled to trade secret
protection and exempt from public disclosure where, inter alia, market existed for sale of
such systems, and disclosure of information could compromise utility’s ability to market
its own system). Indeed, that was implicit in the AT&T decision issued by our Supreme
Court. See AT&T, Syl. pt. 2 and 188 W.Va. at 253, 423 S.E.2d at 862 (noting that utilities were entitled to protective order upon making credible showing information is “trade secret”).

Accepting that principle, we conclude that some of the exhibits have commercial value and the opportunity for competitive advantage. The question of whether Frontier has made the requisite “credible showing” that each redacted exhibit satisfies the elements of a trade secret, or other exemption, must be determined individually.

We move, then, to the arguments advanced by Frontier.

Nonpublic, confidential data and details of Frontier’s Internet service business.

Frontier argued that, by law, the Commission has no jurisdiction over Internet service. W.Va. Code § 24-2-1(e). Thus, information regarding Internet service was not authorized by the Commission to be in the Report in the first place. The Commission did not include Internet service as a subject of the Report, and it has no jurisdiction to do so.

That Frontier provides Internet service is not a trade secret and will not be treated as such. Furthermore, the conditions of the sale in Frontier Communications Corporation, etc., Case No. 09-0871-T-PC (May 13, 2010), show how tightly Frontier’s business model tied together Internet and phone service, making investigation of Frontier’s Internet service relevant to the audit. Nevertheless, the commission will protect those exhibits that provide details regarding Frontier Internet services.

Specific, detailed, nonpublic information about Frontier’s workforce.

Frontier argued that this data would give competitors special, nonpublic insight into Frontier’s business strengths and weaknesses, thereby gaining an unfair competitive advantage to Frontier’s detriment. Some of the information includes certain employee’s ages and other personally identifiable information. The Commission has repeatedly held that the names of employees and other personal identifying information are exempt from disclosure under FOIA. Frontier argued that knowledge of the overall age of the West Virginia workforce will allow competitors to infer when Frontier might be most vulnerable due to workforce retirements and plan competitive attacks accordingly.

W. Va. Code § 29B-1-4(a)(2) protects from public disclosure “[i]nformation of a personal nature . . . if the public disclosure of the information would constitute an unreasonable invasion of privacy, unless the public interest by clear and convincing evidence requires disclosure in this particular instance . . .”. The Commission has cited this FOIA exemption in protecting employee names and other information. See, e.g., General Investigation into the Actions of WVAWC in Reacting to the Jan. 9, 2014 Chemical Spill, Case No. 14-0872-W-GI (Commission Order dated March 28, 2016)
("WVAWC GI Order") at 14 (finding that the names of current employees identified within certain policies “were an integral part of the process resulting in commercial value” and protecting such information under §29B-1-4(a)(1)).

The Commission will not exempt from disclosure exhibits containing ages of some employees where there is not individual identifying information regarding those employees. That information does not constitute a “formula, plan pattern, process, tool, mechanism, compound, procedure, production data, or compilation of information” that is being used to “fabricate, produce, or compound an article or trade or a service or to locate minerals or other substances, having commercial value” in a way “which gives its users an opportunity to obtain business advantage over competitors.” W. Va. Code § 29B-1-4(a)(1). Frontier presented nothing to support that it planned the ages of its employees in this particular configuration to achieve a business advantage.

Nonpublic data from which competitors might infer Frontier’s internal investment and operational strategies and policies.

Frontier argued that the nonpublic amounts and types of Frontier’s specific investments in its network and its internal and operational policies would provide competitors with insight into Frontier’s business and investment strategies and would aid those competitors in selecting where and how to target their own capital investments, as well as in what amounts and types, rather than do the necessary work to gather whatever information that they might be able to infer from the market. This would give Frontier’s competitors a competitively unearned advantage in the market and, conversely, would place Frontier at an undeserved competitive disadvantage.

In general, we will exempt exhibits providing insight into Frontier’s strategic and business decision processes.

Nonpublic, confidential data on Frontier’s network and systems.

Frontier argued that this category includes specific, detailed nonpublic information on the deployment, location, nature, age and amount of equipment and investment throughout the Frontier network, details of the proprietary computer and other systems that Frontier uses to manage it, and the practices, management tactics and organizations that Frontier uses.

Internal policies and practices that show internal operational procedures should be protected as trade secrets. The disclosure of this information would give competitors insight into Frontier network deployment and business strategies, organization, and system strengths and weakness, thereby resulting in likely harm to Frontier.
Protection will not be granted in instances where the information depicted in the exhibit is so imprecise as to convey only general information regarding locations. Further, as noted above, protective treatment will not be granted where the information is not part of a decision-making process but merely a collection of data points.

Subsections (15)-(17) of W. Va. Code § 29B-1-4(a) give added protection for the location of facilities. The Commission has relied on this exemption in protecting the location of facilities from public disclosure. See, e.g., Robert L. Neely, Jr. v. West Virginia-American Water Company, Case No. 14-0117-W-C (Order dated July 15, 2014) at 7 (ruling that maps depicting company facilities qualified for exemption from public disclosure under W. Va. Code § 29B-14(a)(17) and that the “plain view” exception to exemption (17) did not apply to utility plant and equipment); General Investigation into the Actions of WVAWC in Reacting to the Jan. 9, 2014 Chemical Spill, Case No. 14-0872-W-GI (Commission Order dated November 25, 2014) at 12 (protecting facility blueprints from public disclosure pursuant to W.Va. Code §29B-1-4(a)(17)).

Certain exhibits where the graphic allows the viewer to determine the location of facilities will be protected pursuant to Subsections (15)-(17) of W. Va. Code § 29B-1-4(a).

Conclusion

Frontier concludes that permitting the public disclosure of Frontier’s competitively sensitive information would further harm Frontier and amplify the competitive advantage that its competitors already enjoy, conflicting with the ability to ensure that Frontier is able to continue to provide high quality, reliable voice service in West Virginia. Frontier asked that if the Commission decides to make any of the confidential information public, that the Commission first provide Frontier with an in camera hearing so that Frontier might provide whatever additional information the Commission might require to protect the nonpublic nature of Frontier’s proprietary data and other information.

The Commission understands Frontier’s concern, but is constrained by the exemption provisions in FOIA. Furthermore, the Commission provided Frontier and the parties with two opportunities to submit arguments. Further information is not necessary.

We have granted and denied protective treatment to the individual exhibits in accord with the analysis in this Discussion. The appendix to this Order lists each exhibit, whether the exhibit is granted protective treatment, and any analysis unique to that exhibit.

Frontier will file a revised Report within ten days, limiting its redactions as directed by this Order. Specifically, the text of the Report should be fully unredacted. The exhibits should be unredacted as described in the Appendix to this Order. Frontier
should take note of any particular instructions in the Appendix regarding partial protection of exhibits.

On filing of the revised Report, the Commission will forward it in response to the FOIA request.

FINDINGS OF FACT


2. There is a FOIA request for the Report. April 3, 2020 request by Emily Allen.

3. The confidential version of the Report appeared on a publically available Internet technology media outlet web site. The web site made available a copy of the redacted Report and described how to view the redacted portions.

4. The protected version of the Report was redacted by Frontier and filed with the Commission on March 18, 2020.

5. By performing a “copy and paste” action on the Report, the confidential text may be copied into a document (such as Microsoft Word) and viewed.

6. The text of the Report is in the public domain through disclosure on the Internet.

7. Ten of the 89 redacted exhibits in the Report have substantive content that can be accessed by following the Internet technology media outlet’s instructions.

8. Eight exhibits can be read in their entirety (VI-5, IX-5, X-1, X-2, X-3, X-4, X-5, and X-6).

9. The exhibits containing ages of some employees do not provide individual identifying information regarding those employees.

10. The Commission provided Frontier and the parties with two opportunities to submit arguments regarding protective treatment.

CONCLUSIONS OF LAW

1. W. Va. Code § 29B-1-4(a)(2), “trade secret”, protects from public disclosure “[i]nformation of a personal nature...if the public disclosure of the information would constitute an unreasonable invasion of privacy, unless the public interest by clear
and convincing evidence requires disclosure in this particular instance...” The Commission has cited this FOIA exemption in protecting employee names and other information. See, e.g., WVAWC GI Order at 14 (finding that the names of current employees identified within certain policies “were an integral part of the process resulting in commercial value” and protecting such information under §29B-1-4(a)(1)).

2. Subsections (15)-(17) of W. Va. Code § 29B-1-4(a) give added protection for the location of facilities. The Commission has relied on this exemption in protecting the location of facilities from public disclosure. See, e.g., Robert L. Neely, Jr. v. West Virginia-American Water Company, Case No. 14-0117-W-C (Order dated July 15, 2014) at 7 (ruling that maps depicting company facilities qualified for exemption from public disclosure under W. Va. Code § 29B-14(a)(17) and that the “plain view” exception to exemption (17) did not apply to utility plant and equipment); General Investigation into the Actions of WVAWC in Reacting to the Jan. 9, 2014 Chemical Spill, Case No. 14-0872-W-GI (Commission Order dated November 25, 2014) at 12 (protecting facility blueprints from public disclosure pursuant to W.Va. Code § 29B-1-4(a)(17)).

3. The confidential information in the Report was not adequately redacted.

4. Generally, a party cannot rely on an otherwise valid FOIA exemption to justify withholding information that has already been released into the public domain. See, e.g., Davis v. U.S. Dep’t of Justice, 968 F.2d 1276, 1280 (D.C. Cir. 1992) (noting that “a showing of public availability renders the FOIA exemptions inapplicable”); Cottone v. Reno, 193 F.3d 550, 554 (D.C. Cir. 1999) (“materials normally immunized from disclosure under FOIA lose their protective cloak once disclosed”); and Afshar v. U.S. Dep’t of State, 702 F.2d 1125, 1130 (D.C. Cir.1983) (concluding that a party may waive FOIA protection if the requester carries his “burden of pointing to specific information in the public domain that appears to duplicate that being withheld”).

5. Release of the documents in the Simmons case is distinguishable from the disclosure in this case because there the disclosure was through an unofficial channel and the documents were not widely disseminated. Here, the Report was obtained from the Commission web page and was disseminated to the broadest possible audience – users of the Internet.

6. The disclosure of information in the Murphy case is distinguishable because it involved an unauthorized leak of information. The public version of the Report was redacted and filed by Frontier and docketed by the Commission.

7. The Report was not inadvertently produced. It was purposely filed by Frontier without having been adequately redacted. See, Hersh & Hersh.

8. The Report was not mistakenly filed or docketed. See, Astley.
9. The Report was not inadvertently disclosed and there was no opportunity for mitigation. See, Gore.


11. Because they were made available in an unredacted form on the Internet, Exhibits VI-5, IX-5, X-1, X-2, X-3, X-4, X-5, and X-6, are in the public domain.

12. The Motion for a Protective Order is moot in regards to Exhibits VI-5, IX-5, X-1, X-2, X-3, X-4, X-5, and X-6.


14. In order to obtain permanent protective treatment on the basis that information is confidential, the moving party must make a “credible showing” that the asserted confidential information satisfies the elements of a “trade secret” under the WV FOIA, W.Va. Code §29B-1-4(a)(1), “expansively defined.” AT&T Communications v. Public Service Commission, 188 W.Va. 250, 423 S.E.2d 859 (1992); W.Va. Code, §29B-1-4(a)(1). Further, to make a “credible showing,” the party seeking a protective order must make “a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements,” as to how a specific document or a part thereof meets the definition of a “trade secret.”

15. Because of the pending FOIA request, which was directed to the Commission, the Commission has an independent obligation to review exhibits and evaluate whether they were protected from disclosure pursuant to WV FOIA exemption(s). See Syl. pt. 7, Queen v. West Virginia Univ. Hosp., 179 W. Va. 95, 365 S.E.2d 375 (1987). See also, Daily Gazette Co. Inc. v. Withrow, 177 W. Va. 110; 350 S.E.2d 738 (1986).

16. As the moving party, Frontier bears the initial burden of making a credible showing that the information it seeks to protect from public disclosure satisfies the elements of any applicable WV FOIA exemption(s). See, West Virginia American Water

17. Commercial value and competitive advantage can exist with regard to a regulated utility. See, e.g., State ex rel. Util. Comm'n v. MCI Telecomms. Corp., 514 S.E.2d 276, 283 (N.C. App. 1999) (rejecting the position that trade secrets exemption “must be construed differently because it arises in the context of a regulated industry,” and reversing order requiring utilities to disclose information that satisfied elements of exemption); Citizens' Util. Bd. v. Oregon Pub. Util. Comm'n, 877 P.2d 116, 122 (Oreg. App. 1994) (cost-accounting system developed by utility was entitled to trade secret protection and exempt from public disclosure where, inter alia, market existed for sale of such systems, and disclosure of information could compromise utility’s ability to market its own system). Indeed, that was implicit in the AT&T decision issued by our Supreme Court. See AT&T, Syl. pt. 2 and 188 W.Va. at 253, 423 S.E.2d at 862 (noting that utilities were entitled to protective order upon making credible showing information is “trade secret”).


19. The fact that Frontier provides Internet service is not a trade secret and will not be treated as such.

20. Protective treatment should be granted for the exhibits that provide details regarding Frontier Internet services.

21. The exhibits containing ages of some employees do not provide individual identifying information regarding those employees. Furthermore, that information does not constitute a “formula, plan pattern, process, tool, mechanism, compound, procedure, production data, or compilation of information” that is being used to “fabricate, produce, or compound an article or trade or a service or to locate minerals or other substances, having commercial value” in a way “which gives its users an opportunity to obtain business advantage over competitors.” W.Va. Code § 29B-1-4(a)(1). Frontier has presented nothing to support that it has planned the ages of its employees in this particular configuration to achieve a business advantage.

22. Exhibits providing insight into Frontier’s strategic and business decision processes should generally be protected.

23. Internal policies and practices that show internal operational procedures should be protected as trade secrets because the disclosure of this information would give competitors insight into Frontier network deployment and business strategies,
organization, and system strengths and weakness, thereby resulting in likely harm to Frontier.

24. Protection should not be granted in instances where the information depicted in the exhibit is so imprecise as to convey only general information regarding locations.

25. Protective treatment should not be granted where the information is not part of a decision-making process but merely a collection of data points.

26. Certain exhibits where the graphic allows the viewer to determine the location of facilities should be protected pursuant to Subsections (15)-(17) of W. Va. Code § 29B-1-4(a).

27. The Commission provided Frontier and the parties with two opportunities to submit arguments regarding protective treatment. Further information is not necessary.

28. Protective treatment should be granted and denied to the individual exhibits in accord with the analysis in this Discussion. The appendix to this Order lists each exhibit, whether the exhibit will be granted protective treatment, and any analysis unique to that exhibit.

29. Frontier should file a revised Report within ten days, limiting its redactions as directed by this Order. Specifically, the text of the Report should be fully unredacted. The exhibits should be unredacted as described in the appendix to this Order.

ORDER

IT IS THEREFORE ORDERED that protective treatment of the redacted text in the Report, is denied.

IT IS FURTHER ORDERED that protective treatment of the redacted exhibits in the Report is granted and denied as detailed in the Appendix to this Order.

IT IS FURTHER ORDERED that within ten days of the date of this Order, Frontier West Virginia, Inc., and Citizens Telecommunications Company of West Virginia, dba Frontier Communications of West Virginia, shall file a revised copy of the Report, redacted in accordance with this Order and the attached Appendix.
IT IS FURTHER ORDERED that the Executive Secretary of the Commission serve a copy of this Order by electronic service on all parties of record who have filed an e-service agreement, and by United States First Class Mail on all parties of record who have not filed an e-service agreement, and on Commission Staff by hand delivery.

A True Copy, Teste,

Connie Graley, Executive Secretary

JJW/s
180291ct.docx
Each exhibit is followed by a Decision. A Decision to “Release” means protective treatment is denied and the exhibit should be unredacted in the revised Report. A Decision to “Protect” means that protective treatment is granted and the exhibit may remain redacted in the revised Report. A Decision of “Partial Protection” means protective treatment is granted in part and a portion of the exhibit may remain redacted. Frontier should follow the instructions provided for that exhibit.

The “Authority” and “Rationale” columns provide support for the Decision in regards to the specific exhibit in addition to the support contained in the Discussion section of this Order.

<table>
<thead>
<tr>
<th>Exhibit</th>
<th>Decision</th>
<th>Authority</th>
<th>Rationale</th>
</tr>
</thead>
<tbody>
<tr>
<td>I-2</td>
<td>Release</td>
<td>W.Va. Code § 24-2-1(e)</td>
<td>High-level information.²</td>
</tr>
<tr>
<td>IV-15</td>
<td>Protect</td>
<td>W.Va. Code §§ 29B-1-4(a)(15); 4(a)(15); (17).</td>
<td>Specific information about the location of telecom facilities or equipment that could pose a risk to public safety.</td>
</tr>
</tbody>
</table>

² Meaning non-granular or nonspecific information; further, this information is a complication of facts, not a process or procedure Frontier uses to facilitate its services.
<p>| | | | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>IV-18</td>
<td>Protect</td>
<td><strong>W.Va. Code</strong> §§ 29B-1-4(a)(15); (17).</td>
<td>Specific information about the location of telecom facilities or equipment that could pose a risk to public safety. Exhibit contains highly specific information, i.e., address of batteries providing backup power for phone lines.</td>
</tr>
<tr>
<td>IV-19</td>
<td>Protect</td>
<td><strong>W.Va. Code</strong> §§ 29B-1-4(a)(15); (17).</td>
<td>Specific information about the location of telecom facilities or equipment that could pose a risk to public safety. Exhibit contains highly specific information, i.e., address of batteries providing backup power for phone lines.</td>
</tr>
<tr>
<td>IV-21</td>
<td>Protect</td>
<td><strong>W.Va. Code</strong> § 29B-1-4(a)(1).</td>
<td>Contains information about the policies, practices, and procedures Frontier has developed to facilitate its services.</td>
</tr>
<tr>
<td>IV-22</td>
<td>Protect</td>
<td><strong>W.Va. Code</strong> § 29B-1-4(a)(1).</td>
<td>Contains information about the policies, practices, and procedures Frontier has developed to facilitate its services.</td>
</tr>
<tr>
<td>IV-23</td>
<td>Protect</td>
<td><strong>W.Va. Code</strong> § 29B-1-4(a)(1).</td>
<td>Contains information about the policies, practices, and procedures Frontier has developed to facilitate its services.</td>
</tr>
<tr>
<td>IV-24</td>
<td>Protect</td>
<td><strong>W.Va. Code</strong> § 29B-1-4(a)(1).</td>
<td>Contains information about the policies, practices, and procedures Frontier has developed to facilitate its services.</td>
</tr>
<tr>
<td>IV-27</td>
<td>Release</td>
<td></td>
<td>High-level information.</td>
</tr>
<tr>
<td>IV-28</td>
<td>Release</td>
<td></td>
<td>High-level information.</td>
</tr>
<tr>
<td>IV-31</td>
<td>Release</td>
<td></td>
<td>High-level information.</td>
</tr>
<tr>
<td>IV-33</td>
<td>Protect</td>
<td><strong>W.Va. Code</strong> § 29B-1-4(a)(1).</td>
<td>Contains information about the policies, practices, and procedures Frontier has developed to facilitate its services.</td>
</tr>
<tr>
<td>IV-34</td>
<td>Protect</td>
<td><strong>W.Va. Code</strong> § 29B-1-4(a)(1).</td>
<td>Developed from information derived from the process described in IV-33. Possible that it could be reverse engineered or otherwise compromise the process described in IV-33.</td>
</tr>
<tr>
<td>IV-35</td>
<td>Protect</td>
<td><strong>W.Va. Code</strong> § 29B-1-4(a)(1).</td>
<td>Contains information about the policies, practices, and procedures Frontier has developed to facilitate its services.</td>
</tr>
<tr>
<td>IV-36</td>
<td>Release</td>
<td><strong>W.Va. Code</strong> § 29B-1-4(a)(1).</td>
<td>Although this looks like a procedure, this form is publically available to any Frontier customers who are attempting to qualify for the program.</td>
</tr>
<tr>
<td>Exhibit</td>
<td>Action</td>
<td>Code</td>
<td>Details</td>
</tr>
<tr>
<td>---------</td>
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<td>---------</td>
</tr>
<tr>
<td>IV-37</td>
<td>Protect</td>
<td>W.Va. Code § 29B-1-4(a)(1).</td>
<td>Contains information about the policies, practices, and procedures Frontier has developed to facilitate its services.</td>
</tr>
<tr>
<td>IV-38</td>
<td>Protect</td>
<td>W.Va. Code § 29B-1-4(a)(1).</td>
<td>Contains information about the policies, practices, and procedures Frontier has developed to facilitate its services.</td>
</tr>
<tr>
<td>IV-39</td>
<td>Protect</td>
<td>W.Va. Code § 29B-1-4(a)(1).</td>
<td>Contains information about the policies, practices, and procedures Frontier has developed to facilitate its services.</td>
</tr>
<tr>
<td>IV-40</td>
<td>Protect</td>
<td>W.Va. Code § 29B-1-4(a)(1).</td>
<td>Contains information about the policies, practices, and procedures Frontier has developed to facilitate its services.</td>
</tr>
<tr>
<td>IV-41</td>
<td>Protect</td>
<td>W.Va. Code § 29B-1-4(a)(1).</td>
<td>Contains information about the policies, practices, and procedures Frontier has developed to facilitate its services.</td>
</tr>
<tr>
<td>IV-42</td>
<td>Release</td>
<td></td>
<td></td>
</tr>
<tr>
<td>IV-43</td>
<td>Protect</td>
<td>W.Va. Code § 29B-1-4(a)(1).</td>
<td>Contains information about the policies, practices, and procedures Frontier has developed to facilitate its services. The specificity of the locations and precise quantification of incident occurrence could be of use to competitors.</td>
</tr>
<tr>
<td>IV-44</td>
<td>Release</td>
<td>W.Va. Code § 29B-1-4(a)(1).</td>
<td>Unlike the previous exhibit, this abstracts the information into dots that signify a range of values.</td>
</tr>
<tr>
<td>IV-45</td>
<td>Protect</td>
<td>W.Va. Code § 29B-1-4(a)(1).</td>
<td>Contains information about the policies, practices, and procedures Frontier has developed to facilitate its services. The specificity of the locations and precise quantification of incident occurrence could be of use to competitors. Further, these numbers were calculated using an algorithm or formula by Frontier.</td>
</tr>
<tr>
<td>V-2</td>
<td>Release</td>
<td></td>
<td>High-level information about organizational structure.</td>
</tr>
<tr>
<td>V-3</td>
<td>Protect</td>
<td>W.Va. Code § 29B-1-4(a)(1)</td>
<td>Specific information about organization structure and location assignments.</td>
</tr>
<tr>
<td>V-5</td>
<td>Partial Protection</td>
<td>W.Va. Code § 29B-1-4(a)(2)</td>
<td>The “DOB” column may be redacted. The remainder of the exhibit will be unredacted.</td>
</tr>
<tr>
<td>V-6</td>
<td>Protect</td>
<td>W.Va. Code § 29B-1-4(a)(1)</td>
<td>Contains information about the policies, practices, and procedures Frontier has developed to facilitate its services.</td>
</tr>
<tr>
<td>V-7</td>
<td>Protect</td>
<td>W.Va. Code § 29B-1-4(a)(1)</td>
<td>Contains information about the policies, practices, and procedures Frontier has developed to facilitate its services.</td>
</tr>
<tr>
<td>V-8</td>
<td>Protect</td>
<td>W.Va. Code § 29B-1-4(a)(1)</td>
<td>Contains information about the policies, practices, and procedures Frontier has developed to facilitate its services.</td>
</tr>
<tr>
<td>V-9</td>
<td>Protect</td>
<td>W.Va. Code § 29B-1-4(a)(1)</td>
<td>Contains information about the policies, practices, and procedures Frontier has developed to facilitate its services.</td>
</tr>
<tr>
<td>V-10</td>
<td>Protect</td>
<td>W.Va. Code § 29B-1-4(a)(1)</td>
<td>Contains information about the policies, practices, and procedures Frontier has developed to facilitate its services.</td>
</tr>
<tr>
<td>V-11</td>
<td>Release</td>
<td>W.Va. Code § 29B-1-4(a)(1)</td>
<td>Contains information about the policies, practices, and procedures Frontier has developed to facilitate its services.</td>
</tr>
<tr>
<td>V-12</td>
<td>Release</td>
<td>W.Va. Code § 29B-1-4(a)(1)</td>
<td>Contains information about the policies, practices, and procedures Frontier has developed to facilitate its services.</td>
</tr>
<tr>
<td>V-13</td>
<td>Release</td>
<td>W.Va. Code § 29B-1-4(a)(1)</td>
<td>Contains information about the policies, practices, and procedures Frontier has developed to facilitate its services.</td>
</tr>
<tr>
<td>V-14</td>
<td>Release</td>
<td>W.Va. Code § 29B-1-4(a)(1)</td>
<td>Contains information about the policies, practices, and procedures Frontier has developed to facilitate its services.</td>
</tr>
<tr>
<td>V-15</td>
<td>Release</td>
<td>W.Va. Code § 29B-1-4(a)(1)</td>
<td>Contains information about the policies, practices, and procedures Frontier has developed to facilitate its services.</td>
</tr>
<tr>
<td>V-16</td>
<td>Release</td>
<td>W.Va. Code § 29B-1-4(a)(1)</td>
<td>Contains information about the policies, practices, and procedures Frontier has developed to facilitate its services.</td>
</tr>
<tr>
<td>V-17</td>
<td>Release</td>
<td>W.Va. Code § 29B-1-4(a)(1)</td>
<td>Has no commercial value and does not leverage an advantage over competitors.</td>
</tr>
<tr>
<td>V-18</td>
<td>Protect</td>
<td>W.Va. Code § 29B-1-4(a)(1).</td>
<td>Contains information about the policies, practices, and procedures Frontier has developed to facilitate its services.</td>
</tr>
<tr>
<td>------</td>
<td>---------</td>
<td>-----------------------------</td>
<td>-----------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>V-19</td>
<td>Protect</td>
<td>W.Va. Code §§ 29B-1-4(a)(4); (15); (17).</td>
<td>Contains specific information about how telecommunication equipment works regarding outage alarms. Also contains Frontier network alarm protocol.</td>
</tr>
<tr>
<td>V-20</td>
<td>Protect</td>
<td>W.Va. Code § 29B-1-4(a)(1).</td>
<td>Contains information about the policies, practices, and procedures Frontier has developed to facilitate its services.</td>
</tr>
<tr>
<td>V-21</td>
<td>Release</td>
<td></td>
<td>High-level information.</td>
</tr>
<tr>
<td>V-22</td>
<td>Release</td>
<td></td>
<td>High-level information.</td>
</tr>
<tr>
<td>V-23</td>
<td>Release</td>
<td></td>
<td>High-level information.</td>
</tr>
<tr>
<td>V-24</td>
<td>Release</td>
<td></td>
<td>High-level information.</td>
</tr>
<tr>
<td>V-25</td>
<td>Release</td>
<td></td>
<td>High-level information.</td>
</tr>
<tr>
<td>V-26</td>
<td>Protect</td>
<td>W.Va. Code § 29B-1-4(a)(1).</td>
<td>Contains information about the policies, practices, and procedures Frontier has developed to facilitate its services.</td>
</tr>
<tr>
<td>V-27</td>
<td>Protect</td>
<td>W.Va. Code § 29B-1-4(a)(1).</td>
<td>Contains information about the policies, practices, and procedures Frontier has developed to facilitate its services.</td>
</tr>
<tr>
<td>V-28</td>
<td>Protect</td>
<td>W.Va. Code § 29B-1-4(a)(1).</td>
<td>Contains information about the policies, practices, and procedures Frontier has developed to facilitate its services.</td>
</tr>
<tr>
<td>VI-2</td>
<td>Release</td>
<td></td>
<td>High-level information. Factual and general numbers.</td>
</tr>
<tr>
<td>VI-4</td>
<td>Protect</td>
<td>W.Va. Code § 29B-1-4(a)(1).</td>
<td>Contains information about the policies, practices, and procedures Frontier has developed to facilitate its services.</td>
</tr>
<tr>
<td>VI-5</td>
<td>Partial Protection</td>
<td>W.Va. Code § 29B-1-4(a)(1).</td>
<td>Contains information about the policies, practices, and procedures Frontier has developed to facilitate its services. Information revealed by the Report’s text shall be unredacted. The remainder of the exhibit is protected and may remain redacted.</td>
</tr>
<tr>
<td>VI-6</td>
<td>Protect</td>
<td>W.Va. Code § 29B-1-4(a)(1).</td>
<td>Contains information about the policies, practices, and procedures Frontier has developed to facilitate its services.</td>
</tr>
<tr>
<td>Appendix</td>
<td>Page 6 of 7</td>
<td></td>
<td></td>
</tr>
<tr>
<td>----------</td>
<td>------------</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**VI-7** Partial Protection


Contains information about the policies, practices, and procedures Frontier has developed to facilitate its services. Information revealed by the Report’s text shall be unredacted. The remainder of the exhibit is protected and may remain redacted.

### VIII-3 Release

High-level information.

### VIII-4 Release

High-level information.

### VIII-5 Release

High-level information.

### VIII-6 Release

High-level information.

### VIII-7 Release

High-level information.

### VIII-8 Release

High-level information.

### VIII-9 Release

High-level information.

### VIII-10 Release

High-level information.

### VIII-12 Release

High-level information.

### IX-1 Release

High-level information.

### IX-2 Release

High-level information.

### IX-4 Partial Protection


To the extent this information is not otherwise released publically, it is protected because release of this information could give its users a competitive advantage over Frontier. The remaining portion of the exhibit is not protected and shall be unredacted.

### IX-5 Partial Protection


To the extent this information is not otherwise released publically, it is protected because release of this information could give its users a competitive advantage over Frontier. The remaining portion of the exhibit is not protected and shall be unredacted.

### IX-6 Protect


Contains information about the policies, practices, and procedures Frontier has developed to facilitate its services.

### X-1 Release

High-level information.

### X-2 Release

High-level information.

### X-3 Release

High-level information.

### X-4 Protect


Contains information about the policies, practices, and procedures Frontier has developed to facilitate its services.

### X-5 Protect


Contains information about the policies, practices, and procedures Frontier has developed to facilitate its services.
<table>
<thead>
<tr>
<th></th>
<th>Protect/Release</th>
<th>W.Va. Code § 29B-1-4(a)(1)</th>
<th>Contains information about the policies, practices, and procedures Frontier has developed to facilitate its services.</th>
</tr>
</thead>
<tbody>
<tr>
<td>X-6</td>
<td>Protect</td>
<td>W.Va. Code § 29B-1-4(a)(1)</td>
<td>Contains information about the policies, practices, and procedures Frontier has developed to facilitate its services.</td>
</tr>
<tr>
<td>X-7</td>
<td>Release</td>
<td></td>
<td>High-level information.</td>
</tr>
<tr>
<td>X-8</td>
<td>Release</td>
<td></td>
<td>High-level information.</td>
</tr>
</tbody>
</table>