

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of:)	
)	
EchoStar Satellite L.L.C.)	
)	CSR- 7070-P
v.)	
)	
Home Box Office, Inc.)	
)	
Request for Enhanced Confidential Treatment)	

ORDER

Adopted: December 7, 2006

Released: December 7, 2006

By the Chief, Media Bureau:

1. On November 29, 2006, Home Box Office (“HBO”) submitted a request for confidential treatment for what it terms as a very narrow category of materials to be submitted with or referenced in HBO’s Answer and Motion to Dismiss (“Answer”) or in any other HBO pleadings to be filed in response to the program access complaint filed by EchoStar Satellite L.L.C. (“EchoStar”) on November 15, 2006.¹ For the reasons set forth below, we adopt a Protective Order, attached as Appendix A, to ensure that certain highly confidential and competitively sensitive documents and information that may be submitted by the parties are afforded adequate protection.

2. We note that HBO submitted its own proposed model of a Protective Order for the Commission to use in this proceeding.² This submission, according to HBO, was based on the model protective order the Commission adopted for program access cases, with modifications to implement the requested enhanced confidentiality protection for its program carriage contracts.³ HBO subsequently informed the Commission that EchoStar’s outside counsel does not object to HBO’s proposed Protective Order.

¹ Letter Request for Enhanced Confidential Treatment to Donna C. Gregg, Chief, Media Bureau from Michael H. Hammer, Esq., Counsel for HBO at 1 (November 29, 2006).

² See Example Protective Order submitted as attachment to Letter Request for Enhanced Confidential Treatment.

³ Letter Request for Confidential Treatment at 6; see also *Petition for Rulemaking of Ameritech New Media, Inc. Regarding Development of Competition and Diversity in Video Programming Distribution and Carriage*, 13 FCC Rcd 15822 and App. B (1998). HBO also relied on other recent Commission precedent in order to craft a proposed Protective Order to justify the higher level of protection it seeks. See *Applications for the Consent to the Assignment and/or Transfer of Control of Licenses from Adelphia Communications Corporation and its Subsidiaries to Time Warner, Comcast, et al. – Order Adopting Second Protective Order*, 20 FCC Rcd 20073 (2005).

3. HBO seeks enhanced protection that would limit distribution to outside counsel and their consultants/employees for HBO's program carriage contracts or program carriage offers (including all or parts of such contracts/offers, quotations of contractual language, descriptions of particular provisions, or specific information derived from these documents) with entities other than EchoStar.⁴ HBO submits that the vast majority of the information to be included in HBO's Answer will be submitted without request for such enhanced confidential treatment.⁵

4. HBO asserts that program carriage contracts are its most sensitive documents. According to HBO, these contracts, which contain information that is at the very heart of how HBO conducts its business, are highly proprietary and are maintained in the strictest confidence. Accordingly, HBO contends that even inadvertent disclosure of such contracts would harm HBO and place it at a significant competitive disadvantage.⁶ HBO states that the Commission has consistently recognized, "disclosure of programming contracts between multichannel video program distributors and programmers can result in substantial competitive harm to the information provider."⁷

5. HBO contends that access to its program carriage contracts by competing programmers and/or HBO's distributors would have a severe negative impact on HBO because entities could use this information to HBO's disadvantage.⁸ As an example, HBO submits that any programmer that gained access to some or all of this information would be able to determine the terms, conditions, and pricing structure by which HBO sells its programming to distributors.⁹ HBO asserts that this would enable such programmer to act strategically to price and market its own services in a way that could cause significant harm to HBO's business and the competitive process generally.¹⁰

6. Similarly, HBO contends that any distributor that could access some or all of the information contained in its program carriage contracts would have an enormous advantage over HBO in future contract negotiations. As an example, HBO states that if a distributor knew the terms of HBO's carriage agreements with other distributors, it would have extraordinary leverage against HBO when negotiating its own carriage agreement and this would be highly prejudicial to HBO and destructive of the competitive process.¹¹

7. HBO further asserts that its program carriage contracts contain strict confidentiality provisions that prohibit the parties to the contract, including HBO, from divulging the specific contents of the contracts. Thus, even where narrow exceptions are provided for (such as for disclosures required by law or a governmental agency), they are accompanied by strict requirements to obtain the highest possible level of confidentiality. HBO states that the purpose of these confidentiality provisions is to protect all parties to the contract. HBO contends that it is therefore necessary that the Commission grant a higher

⁴ Letter Request for Enhanced Confidential Treatment at 1.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* citing *Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, 13 FCC Rcd. 24816, ¶ 61 (1998) ("Confidential Information Order").

⁸ Letter Request for Enhanced Confidential Treatment at 2.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

level of confidentiality to protect these third parties as well, and to avoid inadvertently abrogating their contract rights.¹²

8. HBO states that providing enhanced protection for such program carriage contract information will not prevent EchoStar from using the information to reply to HBO's Answer or to otherwise defend the positions it has taken in its Complaint. HBO asserts that providing this protection means only that EchoStar must do so through outside counsel and consultants.¹³

9. We believe that HBO has justified its request for a higher level of protection for its documents than that afforded in the model provided by the Commission in the past for its program access cases and that enhanced confidential treatment is necessary to protect certain highly sensitive material. Applicants have provided adequate justification for their request, explaining with particularity why the information sought to be protected is so competitively sensitive that additional protection is warranted and maintaining that such information is closely guarded and is not made available publicly. The information sought to be protected is necessary to the development of a more complete record on which the Commission can base its decision in this proceeding. The Protective Order we adopt herein while based, in part, on HBO's proposed submission has been modified as necessary to better serve the public interest. Any party seeking access to highly confidential documents subject to the Protective Order shall request access pursuant to the terms of the Protective Order and must sign a Declaration (attached as Appendix B).

10. The attached Protective Order reflects HBO's desire, given the highly confidential nature of the information at issue, to preclude employees of HBO and EchoStar from access to such information. This is consistent with past Commission action involving protective orders relating to highly confidential information.¹⁴ In this regard, we note that EchoStar has not filed a response to HBO's request for enhanced confidential treatment, but has communicated through HBO's counsel that it does not object to HBO's proposed Protective Order. Nevertheless, we do not intend by this Order to prejudge this issue. If either party believes that it is necessary for purposes of effectively adjudicating this proceeding that specific employees be granted access to the highly confidential information subject to the Protective Order, it may file a motion to amend the Protective Order.¹⁵ At a minimum, such motion should include: (i) the title, name, and job description for each employee for which access to the highly confidential information is sought; (ii) the reason why that employee's access to the highly confidential information is necessary to the effective adjudication of this proceeding; and (iii) why experts and consultants outside of that party's employ cannot perform the same function. In no event will access be granted to employees in a position to use the highly confidential information for competitive commercial or business purposes.

11. Under the Protective Order, one copy of each document that a Submitting Party claims is highly confidential or competitively sensitive must be delivered in person to both Steven Broeckaert and

¹² *Id.* at 3.

¹³ *Id.* at 4.

¹⁴ See *Applications for the Consent to the Assignment and/or Transfer of Control of Licenses from Adelphia Communications Corporation and its Subsidiaries to Time Warner, Comcast, et al. – Order Adopting Second Protective Order*, 20 FCC Rcd 20073 (2005).

¹⁵ HBO has indicated its willingness, subject to certain conditions, to permit access to the highly confidential information to EchoStar's in-house counsel of record, provided that EchoStar agrees to permit similar access to a designated HBO in-house counsel. Letter Request for Enhanced Confidential Treatment at 5-6.

Karen Kosar, Policy Division, Media Bureau, Federal Communications Commission, 445 12th Street, S.W., Washington, D.C. 20554 (the “Highly Confidential Filing”). The documents should be accompanied by a cover letter stating “HIGHLY CONFIDENTIAL INFORMATION – SUBJECT TO PROTECTIVE ORDER IN ECHOSTAR SATELLITE L.L.C. v. HOME BOX OFFICE, INC. (CSR-7070-P.) before the Federal Communications Commission. Each page of the confidential or competitively sensitive document should be stamped “HIGHLY CONFIDENTIAL INFORMATION – SUBJECT TO PROTECTIVE ORDER IN ECHOSTAR SATELLITE L.L.C. v. HOME BOX OFFICE, INC. (CSR-7070-P) before the Federal Communications Commission.” In addition, a Submitting Party must file with the Secretary’s Office one copy of the Highly Confidential Filing and two copies of the Highly Confidential Filing in redacted form (the “Redacted Highly Confidential Filing”). The two copies of the Redacted Highly Confidential Filing and their accompanying cover letters should be stamped “REDACTED – FOR PUBLIC INSPECTION.” The cover letter accompanying the Redacted Highly Confidential Filing should state that the Submitting Party is also filing an unredacted version of such documents.

12. *Authority.* This Order is issued pursuant to Sections 4(i) and 628 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and §548, Section 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4), and authority delegated under Section 0.283 of the Commission’s rules, 47 C.F.R. § 0.283, and is effective upon its adoption.

FEDERAL COMMUNICATIONS COMMISSION

Donna C. Gregg
Chief, Media Bureau

protection under FOIA, the Commission's implementing rules, this Protective Order, and the accompanying Order.

f. Submitting Party. "Submitting Party" means Home Box Office, Inc. or EchoStar Satellite L.L.C. to the extent they seek confidential treatment of Highly Confidential Information pursuant to this Protective Order.

2. Claim of Confidentiality. The Commission may, *sua sponte* or upon petition, pursuant to 47 C.F.R. §§ 0.459 & 0.461, determine that all or part of the information claimed as "Highly Confidential Information" pursuant to the definitions in paragraph 1 of this Protective Order is not entitled to such treatment, but prior to making such a determination, the Commission shall afford the Submitting Party notice and opportunity to comment. Any party that did not file the Highly Confidential Information but that has completed the attached Declaration shall have three (3) business days from the date it receives notice that such Highly Confidential Information has been filed to file a petition opposing such Highly Confidential treatment. The Submitting Party shall have three (3) business days from the date it receives the other party's opposition to file its reply to such opposition.

3. Storage of Highly Confidential Information at the Commission. The Secretary of the Commission or other Commission staff to whom Highly Confidential Information is submitted shall place the Highly Confidential Information in a non-public file. Highly Confidential Information shall be segregated in the files of the Commission, and shall be withheld from inspection by any person not bound by the terms of this Protective Order, unless such Highly Confidential Information is released from the restrictions of this Order either through agreement of the parties, or pursuant to the order of the Commission or a court having jurisdiction.

4. Permissible Disclosure. Subject to the requirements of paragraph 7, Stamped Highly Confidential Documents may be reviewed by Outside Counsel of Record. Subject to the requirements of paragraph 7, Outside Counsel of Record may disclose Stamped Highly Confidential Documents and other Highly Confidential Information to: (1) outside consultants or experts retained for the purpose of assisting Outside Counsel of Record in this proceeding, *provided that* such outside consultants or experts are not employees of Home Box Office, Inc. or EchoStar Satellite L.L.C. and are not involved in the analysis underlying the business decisions of any competitor of the Submitting Party nor participate directly in those business decisions; (2) paralegals or other employees of such Outside Counsel of Record not described in clause 3 of this paragraph 4 assisting Outside Counsel of Record in this proceeding; and (3) employees of such Outside Counsel of Record involved solely in one or more aspects of organizing, filing, coding, converting, storing, or retrieving documents or data or designing programs for handling data connected with this proceeding, or performing other clerical or ministerial functions with regard to documents connected with this proceeding. Individuals who have obtained access to Stamped Highly Confidential Documents and Highly Confidential Information in accordance with the provisions of this paragraph 4 and paragraph 7 may discuss and share the contents of such Stamped Highly Confidential Documents and Highly Confidential Information with any other person who has also obtained access in accordance with the provisions of this paragraph 4 and paragraph 7, and with the Commission and its staff. Except with the prior written consent of the relevant Submitting Party, or as otherwise provided under this Protective Order, neither a Stamped Highly Confidential Document nor any Highly Confidential Information may be disclosed by parties executing the attached Declaration to any person other than the Commission and its staff.

5. Protection of Stamped Highly Confidential Documents and Highly Confidential Information. Persons described in paragraph 4 shall have the obligation to ensure that access to Stamped Highly Confidential Documents and Highly Confidential Information is strictly limited as prescribed in this Protective Order. Such persons shall further have the obligation to ensure that: (1) Stamped Highly Confidential Documents and Highly Confidential Information are used only as provided in this Protective Order; and (2)

Stamped Highly Confidential Documents are not duplicated except as necessary for filing at the Commission under seal as provided in paragraph 10 below.

6. Prohibited Copying. If, in the judgment of a Submitting Party, a document contains information so sensitive that it should not be copied by anyone, even given its designation as Highly Confidential Information, it shall bear the additional legend “Copying Prohibited,” and no copies of such document, in any form, shall be made. Application for relief from this restriction against copying may be made to the Commission, with notice to Outside Counsel of Record for the Submitting Party.

7. Procedures for Obtaining Access to Stamped Highly Confidential Documents and Highly Confidential Information. In all cases where access to Stamped Highly Confidential Documents and Highly Confidential Information is permitted pursuant to paragraph 4, before reviewing or having access to any Stamped Highly Confidential Documents or Highly Confidential Information, each person seeking such access shall execute the Declaration in Attachment A and file it with the Commission and serve it upon the Submitting Party through their Outside Counsel of Record, so that the Declaration is received by the Submitting Party at least five (5) business days prior to such person’s reviewing or having access to such Submitting Party’s Stamped Highly Confidential Documents or Highly Confidential Information. Each Submitting Party shall have an opportunity to object to the disclosure of Stamped Highly Confidential Documents or Highly Confidential Information to any such persons. Any objection must be filed at the Commission and served on Outside Counsel of Record representing, retaining, or employing such person as promptly as practicable after receipt of the relevant Declaration. Until any such objection is resolved by the Commission and, if appropriate, any court of competent jurisdiction prior to any disclosure, and unless such objection is resolved in favor of the person seeking access, persons subject to an objection from a Submitting Party shall not have access to Stamped Highly Confidential Documents or Highly Confidential Information. A Submitting Party shall make available for review the Stamped Highly Confidential Documents of such party at the offices of such party’s Outside Counsel of Record.

8. Requests for Additional Disclosure. If any person requests disclosure of Highly Confidential Information outside the terms of this Protective Order, that request will be treated in accordance with Sections 0.442 and 0.461 of the Commission’s rules, 47 C.F.R. §§ 0.442, 0.461.

9. Use of Highly Confidential Information. Highly Confidential Information (including Stamped Highly Confidential Documents under this Protective Order) shall be used solely for the preparation and conduct of this proceeding as delimited in this paragraph and paragraphs 4, 10, and 11 herein, and any subsequent judicial proceeding arising directly from this proceeding and, except as provided herein, shall not be used by any person granted access under this Protective Order for any other purpose, including without limitation business, governmental, or commercial purposes, or in other administrative, regulatory, or judicial proceedings. This shall not preclude the use of any material or information that is in the public domain or has been developed independently by any other person who has not had access to the Highly Confidential Information nor otherwise learned of its contents. Should the Commission rely upon or otherwise make reference to the contents of any of the Stamped Highly Confidential Documents or Highly Confidential Information in its decision in this proceeding, it will do so by redacting any Highly Confidential Information from the public version of the decision and by making the unredacted version of the decision available only to a court and to those persons entitled to access to Highly Confidential Information under this Protective Order.

10. Pleadings Using Highly Confidential Information. Persons described in paragraph 4 may, in any pleadings that they file in this proceeding, reference the Highly Confidential Information, but only if they comply with the following procedures:

a. Any portions of the pleadings that contain or disclose Highly Confidential Information must be physically segregated from the remainder of the pleadings and filed under seal; to the extent a document contains both Highly Confidential Information and non-Highly Confidential Information,

the Submitting Party shall designate the specific portions of the document claimed to contain Highly Confidential Information and shall also submit a redacted version not containing Highly Confidential Information.

b. The portions of pleadings containing or disclosing Highly Confidential Information must be covered by a separate letter to the Secretary of the Commission referencing this Protective Order;

c. Each page of any party's filing that contains or discloses Highly Confidential Information subject to this Order must be clearly marked: **"HIGHLY CONFIDENTIAL INFORMATION – SUBJECT TO PROTECTIVE ORDER IN ECHOSTAR SATELLITE L.L.C. v. HOME BOX OFFICE, INC., CSR-7070-P before the Federal Communications Commission.**

d. The confidential portion(s) of the pleading, shall be served upon the Secretary of the Commission, the Media Bureau, and the Submitting Party. Such confidential portions shall be served under seal, and shall not be placed in the Commission's Public File unless the Commission directs otherwise (with notice to the Submitting Party as set forth in paragraph 2). A Submitting Party filing a pleading containing Highly Confidential Information shall also file two redacted copies of the pleading containing no Highly Confidential Information, which copy shall be placed in the Commission's public files. Parties should not provide courtesy copies of pleadings containing Highly Confidential Information to Commission staff unless the Media Bureau so requests. Any courtesy copies shall be submitted under seal.

11. Client Consultation. Nothing in this Protective Order shall prevent or otherwise restrict Outside Counsel of Record from rendering advice to their clients relating to the conduct of this proceeding and any subsequent judicial proceeding arising therefrom and, in the course thereof, relying generally on examination of Stamped Highly Confidential Documents or Highly Confidential Information; *provided, however,* that in rendering such advice and otherwise communicating with such client, Outside Counsel of Record shall not disclose Stamped Highly Confidential Documents or Highly Confidential Information.

12. Violations of Protective Order. Should a person that has properly obtained access to Highly Confidential Information under this Protective Order violate any of its terms, that person shall immediately convey that fact to the Commission and to the Submitting Party. Further, should such violation consist of improper disclosure or use of Highly Confidential Information, the violating party shall take all necessary steps to remedy the improper disclosure or use. The violating party shall also immediately notify the Commission and the Submitting Party, in writing, of the identity of each party known or reasonably suspected to have obtained the Highly Confidential Information through any such disclosure. The Commission retains its full authority to fashion appropriate sanctions for violations of this Protective Order, including but not limited to suspension or disbarment of Outside Counsel of Record from practice before the Commission, forfeitures, cease and desist orders, and denial of further access to Highly Confidential Information or other information subject to a protective order in this or any other Commission proceeding. Nothing in this Protective Order shall limit any other rights and remedies available to the Submitting Party at law or equity against any person using Highly Confidential Information in a manner not authorized by this Protective Order.

13. Termination of Proceeding. The provisions of this Protective Order shall not terminate at the conclusion of this proceeding. Within two weeks after final resolution of this proceeding (which includes any administrative or judicial appeals), persons described in paragraph 4 shall destroy or return to the Submitting Party the relevant Stamped Highly Confidential Documents as well as all copies and derivative materials made, and shall certify in a writing served on the Commission and the Submitting Party that no material whatsoever derived from such Stamped Highly Confidential Documents have been retained by any person having access thereto, except that Outside Counsel of Record may retain, under the continuing strictures of this Protective Order, two copies of pleadings (one of which may be in electronic format) submitted on behalf of a party. Any Highly Confidential Information contained in any copies of pleadings retained by Outside Counsel of Record to a party or in materials that have been destroyed pursuant to this paragraph shall be protected from

disclosure or use indefinitely in accordance with this Protective Order unless such Highly Confidential Information is released from the restrictions of this Protective Order either through agreement of the parties, or pursuant to the order of the Commission or a court having jurisdiction. The provisions of this paragraph 13 regarding the retention of Stamped Highly Confidential Documents and copies of same shall not be construed to apply to the Commission or its staff.

14. No Waiver of Confidentiality. Disclosure of Highly Confidential Information as provided herein by any person shall not be deemed a waiver by the Submitting Party of any privilege or entitlement to confidential treatment of such Highly Confidential Information. Reviewing parties, by viewing these materials: (a) agree not to assert any such waiver; (b) agree not to use Highly Confidential Information to seek disclosure in any other proceeding; and (c) agree that accidental disclosure of Highly Confidential Information shall not be deemed a waiver of any privilege or entitlement as long as the Submitting Party takes prompt remedial action.

15. Subpoena by Courts, Departments, or Agencies. If a court or a federal or state department or agency issues a subpoena or orders production of Stamped Highly Confidential Documents or Highly Confidential Information that a party has obtained under terms of this Protective Order, such party shall promptly notify each Submitting Party of the pendency of such subpoena or order. Consistent with the independent authority of any court, department, or agency, such notification must be accomplished such that the Submitting Party has a full opportunity to oppose such production prior to the production or disclosure of any Stamped Highly Confidential Document or Highly Confidential Information.

16. Additional Rights Preserved. The entry of this Protective Order is without prejudice to the rights of the Submitting Party to apply for additional or different protection where it is deemed necessary or to the rights of parties executing the attached Declaration to request further or renewed disclosure of Highly Confidential Information.

17. Effect of Protective Order. This Protective Order constitutes an Order of the Commission and an agreement between the party executing the attached Declaration and the Submitting Party.

18. Authority. This Protective Order is issued pursuant to Sections 4(i) and 4(j) of the Communications Act as amended, 47 U.S.C. §§ 154(i), (j) and 47 C.F.R. § 0.457(d) and Section 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4).

APPENDIX B
ATTACHMENT A
DECLARATION

In the Matter of:

EchoStar Satellite L.L.C.)
Complainant) File No. CSR-7070-P
v.)
Home Box Office, Inc.)
Defendant)

Program Access Complaint

I, _____, hereby declare under penalty of perjury that I have read the Protective Order that has been entered by the Commission in this proceeding, and I understand it. I agree to be bound by its terms pertaining to the treatment of Highly Confidential Information submitted by parties to this proceeding and that I shall not disclose or use Stamped Highly Confidential Documents or Highly Confidential Information except as allowed by the Protective Order.

Without limiting the foregoing, to the extent that I have any employment, affiliation, or role with any person or entity other than a conventional private law firm (such as, but not limited to, a lobbying or public interest organization), I acknowledge specifically that my access to any Highly Confidential Information obtained as a result of the Protective Order is due solely to my capacity as (1) Outside Counsel of Record or (2) other person described in paragraph 4 of the foregoing Protective Order, and that I will not use such Highly Confidential Information in any other capacity; nor will I disclose such Highly Confidential Information except as specifically provided in the Protective Order.

I acknowledge that it is my obligation to ensure that: (1) Stamped Highly Confidential Documents and Highly Confidential Information are used only as provided in the Protective Order; and (2) Stamped Highly Confidential Documents are not duplicated except as specifically permitted by the terms of the Protective Order, and I certify that I have verified that there are in place procedures, at my firm or office, to prevent unauthorized disclosure of Stamped Highly Confidential Documents or Highly Confidential Information.

I acknowledge that a violation of the Protective Order is a violation of an order of the Federal Communications Commission. I acknowledge that this Protective Order is also a binding agreement between the undersigned and the Submitting Party.

Capitalized terms used herein and not otherwise defined shall have the meanings ascribed to them in the Protective Order.

(signed) _____
(printed name) _____
(representing) _____
(title) _____
(employer) _____

(address) _____

(phone) _____

(email) _____

(date) _____