

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

In the Matter of
Applications for Consent to the Assignment
and/or Transfer of Control of Licenses
Adelphia Communications Corporation,
(assignors, debtors-in-possession),
Assignors,
to
Time Warner Cable Inc. (subsidiaries),
Assignees;
Adelphia Communications Corporation,
(assignors, debtors-in-possession),
Assignors and Transferors,
to
Comcast Corporation (subsidiaries),
Assignees and Transferees;
Comcast Corporation, Transferor,
to
Time Warner Inc., Transferee;
Time Warner Inc., Transferor,
to
Comcast Corporation, Transferee.

MB Docket No. 05-192

ORDER

Adopted: February 8, 2006

Released: February 8, 2006

By the Chief, Media Bureau:

1. On January 10, 2006, DIRECTV, Inc. filed a request for relief from certain restrictions on access to documents submitted by the Applicants to the Commission pursuant to the First and Second Protective Orders in this proceeding. Specifically, DIRECTV requests that it be provided an electronic

1 Letter to Marlene H. Dortch, Secretary, Federal Communications Commission from William M. Wiltshire, Harris, Wiltshire & Grannis, LLP, Counsel for DIRECTV (January 10, 2006) ("DIRECTV's Request"). The Media Bureau ("Bureau") adopted the "First Protective Order" to ensure that confidential or proprietary documents submitted by Time Warner, Inc. ("Time Warner"), Comcast Corporation ("Comcast"), and Adelphia Communications Corporation ("Adelphia") (each an "Applicant" and together the "Applicants") and others that have or may become parties to this proceeding (individually, each a "Submitting Party," and collectively "Submitting Parties") are given adequate protection. Applications of Adelphia Communications Corporation, Time Warner Inc., and Comcast

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copy of some of the Confidential and Highly Confidential spreadsheets, submitted in response to the Information and Document Request (“Information and Document Request”) in this proceeding,² as well as confidential data submitted in electronic format on December 12, 2005,³ so that the material may be analyzed by its outside economic consultants, Lexecon. The Applicants oppose DIRECTV’s Request, asserting that the data are competitively sensitive.⁴ For the reasons set forth below, we grant in part and deny in part DIRECTV’s Request.

2. *Background.* DIRECTV’s Request concerns data in electronic spreadsheets that the Applicants submitted in response to the Information and Document Request and designated as “Copying Prohibited,” as well as confidential data submitted in electronic format on December 12, 2005.⁵ The First and Second Protective Orders provide that if, in the judgment of a Submitting Party, a document contains information so sensitive that it should not be copied by anyone, the document shall bear the additional legend “Copying Prohibited,” and no copies of such document, in any form, may be made. The First and Second Protective Orders also allow parties to apply to the Commission for relief from the copying restriction, with notice to Outside Counsel of Record for the Submitting Party.⁶ The Applicants claim that the materials marked “Copying Prohibited” contain the companies’ most sensitive business data, which is maintained in the strictest confidence, and that unauthorized disclosure to competitors of such data would cause the companies substantial harm because competitors could use it to determine the companies’ negotiating strategies. The Applicants have offered to allow DIRECTV’s outside consultants to view the documents on networked computers at the offices of the Applicants’ respective outside counsel, to analyze

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Corporation, *Order Adopting Protective Order*, 20 FCC Rcd 10751 (MB 2005). The Bureau later adopted the “Second Protective Order” to protect certain highly confidential and competitively sensitive documents and information. Applications of Adelphia Communications Corporation, Time Warner Inc., and Comcast Corporation, *Order Adopting Second Protective Order* (DA 05-3226), adopted December 20, 2005.

² Letter to Steven N. Teplitz, Time Warner, Inc., and Aaron I. Fleischman, Fleischman and Walsh, LLP, Counsel for Time Warner, from Donna C. Gregg, Chief, Media Bureau (December 5, 2005); Letter to Joseph W. Waz, Jr. and James R. Coltharp, Comcast Corp., Counsel to Comcast Corp., from Donna C. Gregg, Chief, Media Bureau (December 5, 2005); Letter to Brad Sonnenberg, Adelphia Communications Corp. and Philip L. Verveer, Willkie, Farr & Gallagher, LLP, Counsel to Adelphia Communications Corp., from Donna C. Gregg, Chief, Media Bureau (December 5, 2005).

³ See Letter from Arthur H. Harding to Marlene H. Dortch, dated December 12, 2005; Letter from Wayne D. Johnsen to Marlene H. Dortch, dated December 12, 2005.

⁴ Letter to Marlene H. Dortch, Secretary, Federal Communications Commission from James R. Coltharp, Counsel for Comcast and Steven N. Teplitz, Counsel for Time Warner (January 12, 2006) (“Applicants’ Jan. 12, 2006 Letter”). Comcast indicates that a majority of the material included on the spreadsheets is subject to the Second Protective Order. See Letter to Michael Nilsson, Harris, Wiltshire & Grannis, LLP, Counsel to DIRECTV from Martha E. Heller, Wiley, Rein & Fielding, LLP, Counsel to Comcast at 2, attached to DIRECTV’s Request as Exhibit C; see also Letter to Marlene H. Dortch, Secretary, Federal Communications Commission from James R. Coltharp, Counsel for Comcast and Steven N. Teplitz, Counsel for Time Warner at 1 (January 26, 2006) (“Applicants’ Jan. 26, 2006 Letter”).

⁵ Specifically, DIRECTV requests access to the information submitted pursuant to items II.A, II.B, II.C, III.B, and III.C of the Information and Document Request, as well as confidential data submitted in electronic format on December 12, 2005. See Letter to Marlene H. Dortch, Secretary, Federal Communications Commission from William M. Wiltshire, Harris, Wiltshire & Grannis, LLP, Counsel to DIRECTV at 1-2 n.3 (January 24, 2006) (“DIRECTV’s Jan. 24, 2006 Letter”). Initially, DIRECTV sought access to a broader range of materials, but it subsequently narrowed its request to materials responsive to those item numbers of the Information and Document Request. *Id.*

⁶ First Protective Order at ¶ 6; Second Protective Order at ¶ 7.

the data with their own software, and to take notes of their analyses.⁷ The Applicants have agreed to allow Lexecon to analyze Comcast's and Time Warner's spreadsheets simultaneously, as DIRECTV requested,⁸ and to print the analysis for purposes of examining the data and taking notes.⁹ The Applicants would allow the consultants to take their notes with them, but would not allow them to copy any of the data onto their own computers or to make paper copies of the data.¹⁰

3. DIRECTV asserts that its consultants need electronic access to the spreadsheets to analyze and test Applicants' claims in this proceeding, including the alleged benefits resulting from additional clustering of the cable systems. DIRECTV also requests the data to compare service innovation, customer satisfaction, and operational performance metrics between clustered and non-clustered systems. In addition, DIRECTV plans to analyze the data to test whether the transactions would harm competition by enabling Comcast or Time Warner to engage in foreclosure strategies with respect to regional sports network programming.¹¹ DIRECTV states that the Applicants' proposed conditions on its use of the data would create unworkable procedures for handling the data and "would frustrate the search for the public interest in this proceeding."¹² First, DIRECTV contends that it is nearly impossible technically and legally to transport, install, and run the required statistical software and internal proprietary data sets on computers set up at the counsels' offices. DIRECTV states that Lexecon requires the use of its mainframe computer located in its Chicago office to perform meaningful econometric analysis.¹³ Second, DIRECTV states that the Applicants' prohibition on removing from the premises any copies of the data or their consultants' analysis is unworkable. DIRECTV argues that its consultants must be allowed to print out and preserve their work product, which will involve complex econometric analysis that cannot be performed properly without examination of a substantial number of sizable charts and graphs created as intermediate steps.¹⁴

4. The Applicants contend that turning the data over to third parties would create an unacceptably high risk for manipulation, unrestricted distribution, and disclosure of highly sensitive data to competitors. Applicants also express concern that the electronic documents would not be completely destroyed or returned after use. Applicants assert that electronic documents copied to another party's computer are nearly impossible to delete fully, and Applicants contend that they would be "vulnerable to dissemination of their confidential information" if they were to permit DIRECTV's consultants to copy the documents onto their computers.¹⁵

5. *Discussion.* In deciding this dispute, the Bureau must balance the public interest in conducting a fair and full exploration of the issues in this proceeding and in allowing parties to participate fully to that end with the Applicants' strong interest in preserving the confidentiality of their sensitive competitive

⁷ Applicants' Jan 12, 2006 Letter at 2-3; Letter to Marlene H. Dortch, Secretary, Federal Communications Commission from James R. Coltharp, Counsel for Comcast and Steven N. Teplitz, Counsel for Time Warner at 2-3 (January 19, 2006) ("Applicants' Jan. 19, 2006 Letter").

⁸ Letter to Marlene H. Dortch, Secretary, Federal Communications Commission from William M. Wiltshire, Harris, Wiltshire & Grannis, LLP, Counsel to DIRECTV at 2 (January 17, 2006) ("DIRECTV's Jan. 17, 2006 Letter").

⁹ Applicants' Jan. 19, 2006 Letter at 3; Applicants' Jan. 26, 2006 Letter at 2.

¹⁰ Applicants' Jan. 12, 2006 Letter at 2; Applicants' Jan. 19, 2006 Letter at 3 n.10.

¹¹ Letter to Marlene H. Dortch, Secretary, Federal Communications Commission from William M. Wiltshire, Harris, Wiltshire & Grannis, LLP, Counsel to DIRECTV at 2-3 (January 24, 2006) ("DIRECTV's Jan. 24, 2006 Letter")

¹² DIRECTV's Jan. 24, 2006 Letter at 3; *see also* DIRECTV's Request at 2.

¹³ DIRECTV's Jan. 17, 2006 Letter at 1-2.

¹⁴ DIRECTV's Request at 2; DIRECTV's Jan. 24, 2006 Letter at 3.

¹⁵ Applicants' Jan. 12, 2006 Letter at 5.

data.¹⁶ We appreciate that the parties have tried to effect a compromise, with DIRECTV narrowing its request and Comcast and Time Warner attempting to accommodate DIRECTV. Nonetheless, the parties have been unable to arrive at a mutually satisfactory resolution. Accordingly, we have applied our discretion in the conduct of these proceedings.¹⁷ Based on the facts of this case and a balancing of the equities, we conclude that it will serve the public interest to grant DIRECTV's Request, in part, as explained below. We note that the relief granted herein is specific to DIRECTV because it has demonstrated both a need for access to the data and an inability to use the data under the terms provided by the Applicants.

6. We will require Applicants to afford DIRECTV's outside counsel and consultants access to the spreadsheets submitted in electronic format in response to items II.A, II.B, II.C, III.B, and III.C of the Information and Document Request, as well as confidential data submitted in electronic format on December 12, 2005, according to the conditions set forth herein. First, we will require DIRECTV's outside counsel and consultants to review and analyze the data at the Applicants' outside counsels' offices. As Applicants proposed, they must provide DIRECTV's outside counsel and consultants adequate and secure computer capacity to load and run their software and must assist in obtaining any off-site software licenses that may be required.¹⁸ The Applicants' outside counsel must afford DIRECTV's outside counsel

¹⁶ *Application of EchoStar Communications Corp., General Motors Corp., and Hughes Electronics Corp. (Transferors) and EchoStar Communications Corp. (Transferee), Order Adopting Second Protective Order*, 17 FCC Rcd 7415, 7416 § 3 (MB 2002). We note that the Commission has generally expressed the view that "a prohibition on copying might lead to a less thorough review of the confidential documents and accordingly to less useful public comment." *Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, 13 FCC Rcd 24816, 24835 ¶ 27 (1998). Applicants have stated that neither Protective Order placed limits on the sound discretion of Submitting Parties to mark materials copying prohibited. *See, e.g.*, Applicants' Jan. 26, 2006 Letter at 1; Applicants' Jan. 19, 2006 Letter at 4. We expect, however, that discretion to be exercised responsibly and that Submitting Parties will make a reasonable effort to mark only those documents that are the most sensitive as copying prohibited. Moreover, we emphasize that the Protective Orders expressly provide for parties to petition for relief from such copying prohibited restrictions, as stated above.

¹⁷ For example, in Commission hearings, the presiding officer has broad discretion in the discovery area. *See* 47 C.F.R. § 1.313; *see also Ronald Sorenson, et. al.*, 3 FCC Rcd 5022 (Rev. Bd. 1988). In *Verizon Communications Inc. and MCI, Inc., Applications for Approval of Transfer of Control, Memorandum Opinion and Order*, FCC 05-184, n. 54 (2005), cited by Applicants, the Commission declined to interfere with the judgment of Applicants with respect to the manner in which information was provided, but it did so based on the facts of that case, and the merits of the complaints, including potential alternative mechanisms to balance the risks of granting access to certain highly confidential sensitive competitive information in electronic form against the additional benefit of such access in providing material support on issues of real controversy. Based on the facts of that case, including the apparent success of opponents in obtaining sufficient information on key points, either from Applicants or other sources, the Commission chose not to intervene. Our exercise of discretion in this case, based on its own unique facts, leads us in a different direction.

¹⁸ Applicants' Jan. 26, 2006 Letter at 2. The Applicants must provide DIRECTV's outside counsel and consultants with the following hardware and software capabilities: (1) Operating System: Windows XP with Service Pack 1 or later; (2) Software: PC SAS 9.1 or later with all components installed, including PC SAS Enhanced Editor; (3) Processor: Minimum Pentium 4 (Not Celeron) 1.8GHz or higher; (4) Memory: Minimum 1GB RAM; (5) Disk Space: 80 GB; (6) Monitor: SVGA (resolution of 800x600 or higher); (7) Printer: Laser printer to use for both workstations that prints at 20 pages per minute or faster; and (8) Private Network Sharing only between the two computers: 1 Gigabit Ethernet Controller. If Applicants' outside counsel are unable to provide networking sharing between two computers, the PC should have USB 2.0 built-in controller (or USB 2.0 controller with powered bus) and an external USB 2.0 Hard Drive with ample space for sharing of data. *See* Letter to Marlene H. Dortch, Secretary, Federal Communications Commission from William M. Wiltshire, Harris, Wiltshire & Grannis, LLP, Counsel to DIRECTV at 1-2 (February 7, 2006). We believe that these specifications should allow DIRECTV's outside counsel and consultants to perform their analysis at the offices of Applicants' outside counsel.

and consultants a private and secure workplace, including private and secured storage and adequate shredding and disposal arrangements, where DIRECTV's outside counsel and consultants may review and analyze the data and prepare their analysis. DIRECTV's outside counsel and consultants may use the secure workplace 24 hours a day, seven days a week, until their analysis is complete and ready to be submitted to the Commission, and thereafter on an as needed basis until this proceeding, including any appeal, is final and no longer subject to judicial review.

7. Second, as the Applicants have already offered, they must allow DIRECTV's outside counsel and consultants to perform an integrated analysis of the companies' data at a single location. Third, the Applicants must allow DIRECTV's outside counsel and consultants to print two copies of their analysis, one that is to be submitted to the Commission for purposes of this proceeding and one, identical to the analysis submitted to the Commission, which they may retain and use solely in accordance with the provisions of the First and Second Protective Orders.¹⁹ We note that if DIRECTV intends to submit its findings in the record, we would have difficulty evaluating them without also having in the record a copy of the underlying analysis DIRECTV's outside counsel and consultants used to reach their conclusions. DIRECTV's outside counsel and consultants may also print any intermediate steps or work product necessary to perform their analysis, including charts and graphs, etc., and they may keep any printouts of that intermediate work product at the private, secured workplace at the offices of Applicants' outside counsel until this proceeding, including any appeal, is final and no longer subject to judicial review. DIRECTV's outside counsel and its consultants, however, are prohibited from removing any intermediate work product from the secured workplace. As Applicants proposed, DIRECTV's outside counsel and consultants may take notes necessary to perform their analysis, and they may retain such notes until this proceeding, including any appeal, is final and no longer subject to judicial review.²⁰ They may, at their discretion, retain their notes at the secured workplace or remove them. Thus, DIRECTV's outside counsel and consultants are allowed to remove from the outside counsels' offices only their notes and two copies of the final work product that DIRECTV will submit to the Commission. They may remove the materials that are used in the filing in one step: they may not make a series of removals, except that they may remove their notes on an on-going basis in the course of their analysis.

8. Fourth, if DIRECTV's outside counsel or consultants submit in the record any analysis that uses protected data,²¹ DIRECTV must comply with the terms and conditions set forth in the First and Second Protective Orders.²²

¹⁹ See First Protective Order at ¶¶ 2-5; Second Protective Order at ¶¶ 3-6.

²⁰ Applicants' Jan. 19, 2006 Letter at 3; Applicants' Jan. 12, 2006 Letter at 3.

²¹ We expect DIRECTV to abide by both the letter and spirit of this Order as part of their overall obligation to safeguard the confidential nature of the data. For example, while we do not bar DIRECTV's outside counsel or consultants from including any confidential data in the analysis they submit into the record of this proceeding where the data are necessary to make their case, we expect DIRECTV not to include a wholesale reproduction of the Applicants' confidential data in its filing.

²² Any documents filed with the Commission that reference Confidential or Highly Confidential Information must comply with the following procedures: (a) any portions of the pleadings that contain or disclose Confidential or Highly Confidential Information must be physically segregated from the remainder of the pleadings; (b) the portions of any pleading containing or disclosing Confidential or Highly Confidential Information must be covered by a separate letter to the Secretary of the Commission referencing the First or Second Protective Orders; (c) each page of any party's filing that contains or discloses Confidential or Highly Confidential Information must be clearly marked as specified into the First and Second Protective Orders; and (d) the confidential portions of the pleadings shall be filed with the Secretary of the Commission and served on the Bureau, and the Submitting Party. Such confidential portions shall be filed and served under seal, and shall not be placed in the Commission's public file. They may not be filed electronically. Parties should not provide courtesy copies of pleadings containing Confidential or Highly Confidential Information to Commission staff unless the Bureau so requests. Any courtesy
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9. Fifth, after their analysis is completed, DIRECTV's outside counsel and consultants may retain the data and analysis at the offices of Applicants' outside counsel, maintained in a private, secure location, where they may have access, on an as needed basis, until this proceeding, including any appeal, is final and no longer subject to judicial review. We will require DIRECTV to submit an affidavit in the record of this proceeding, at the time it submits its filing, certifying that its outside counsel and consultants have removed from the outside counsels' offices only their notes and two copies of the final work product that will be submitted to the Commission, that they have not removed any intermediate work product, and that they have filed everything (other than their notes) that they have removed.

10. We expect that any analysis that DIRECTV's outside counsel and consultants submit to the Commission will be submitted reasonably promptly. So that the analysis by DIRECTV's outside counsel and consultants can be expedited, we remind Applicants of their commitment to work "cooperatively to achieve a satisfactory solution" to logistical issues that may arise in the course of DIRECTV's data analysis.²³

11. Finally, we remind DIRECTV and its outside counsel and consultants that they are bound by the clauses set forth in the First and Second Protective Orders regarding disclosure, confidentiality, and destruction or return of the Confidential Information and Highly Confidential Information and derivative materials.²⁴ Further, the provisions of this Order and the First and Second Protective Orders shall not terminate at the conclusion of this proceeding.

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copies shall be submitted under seal. First Protective Order at ¶ 9; Second Protective Order at ¶ 10. A party filing a pleading containing Confidential or Highly Confidential Information shall also file redacted copies of the pleadings containing no Confidential or Highly Confidential Information, which copies shall be placed in the Commission's public files.

²³ Applicants' Jan. 26, 2006 Letter at 2.

²⁴ First Protective Order at ¶¶ 3-5, 14; Second Protective Order at ¶¶ 4-6, 15. Applicants refer to a past inadvertent breach of confidentiality involving Time Warner as a reason for opposing DIRECTV's Request. However, since that incident, we have taken steps to minimize this risk. In response to the breach of confidentiality that occurred, the Commission adopted higher levels of protection that did not exist at the time. Notably, the additional protections formed the basis for the type of Second Protective Order that exists today. Even the first level protective orders contain additional safeguards that were not required at the time of the breach. For instance, reviewing parties must certify that they have procedures in place to assure that all who review the information will abide by the terms of the protective order. Further, as we have stated previously, and as both Protective Orders in this proceeding clearly declare, the Commission retains its full authority to fashion appropriate sanctions for violations of the First and Second Protective Orders, "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 in this or any other Commission proceeding." In addition, all rights and remedies are available to the Applicants at law or in equity against any person using highly confidential or confidential information in an unauthorized manner. First Protective Order at ¶ 13; Second Protective Order at ¶ 14.

12. *Authority.* This Order is issued pursuant to Sections 4(i) and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 310(d) 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