

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

In the Matter of)
)
Request for Confidentiality for Information)
Submitted on Forms 325 for the Year 2004)
)
Adelphia Communications Corporation;)
Cable Services, Inc.;)
Charter Communications;)
Comcast Cable Communications, Inc.;)
Time Warner Cable)
Cox Communications, Inc.)

ORDER

Adopted: March 7, 2006

Released: March 8, 2006

By the Chief, Media Bureau:

I. INTRODUCTION

1. We have before us Requests for Confidentiality (“Requests”) from Adelphia Communications Corporation (“Adelphia”), Charter Communications (“Charter”), Comcast Communications, Inc (“Comcast”), Cox Communications, Inc (“Cox”), Cable Services, Inc (“CSi”), and Time Warner Communications (“Time Warner”) (collectively, “Captioned Parties”). Captioned Parties seek protection from disclosure to the public for information submitted for each company’s systems in 2004 in various fields of FCC Form 325, the Annual Report of Cable Systems. We grant in part and deny in part the requests of Adelphia and Charter. We grant the requests of Comcast and Time Warner. We deny the request of CSi.

II. BACKGROUND

2. Cable television system operators are required to submit a completed Form 325 within 60 days of being notified that the form is due.¹ Submitted Forms 325 are routinely available to the public via the Cable Operations and Licensing System (COALS) on the Internet and in the Commission’s Reference Information Center.² Cognizant of potentially sensitive information, cable operators, however, may request that the information, or portions of the information, submitted on Form 325 not be made routinely available to the public.³ A request for confidentiality must specify the reasons the information

¹ 47 C.F.R. § 76.403. The notifications are sent annually to all systems that have 20,000 or more subscribers and a sample of systems that have fewer than 20,000 subscribers.

² *Id.* § 0.453(a)(2)(v)(C).

³ *Id.* § 0.459.

should be withheld and address nine specific issues.⁴ Six of these issues are most relevant to the cases at hand: 1) the degree to which the information is financial or commercial or is privileged, 2) the degree to which the information concerns a service that is subject to competition, 3) how disclosure of the information would result in substantial competitive harm, 4) measures taken by the submitting party to prevent unauthorized disclosure to third parties, and 6) justification for the period during which the submitting party asserts disclosure should be withheld.⁵ Should the request be granted, the status of the materials becomes the same as materials not routinely available to the public. A person seeking access to such information must file a request for inspection pursuant to the FOIA procedures.⁶

3. In 2003, Comcast, Cox, CSi, and Time Warner submitted requests for confidentiality.⁷ Comcast, Time Warner, and Cox were granted confidential treatment for 3 years on fields II.2.c, II.2.d, II.4.a, II.4.b, and II.4.c.⁸ Cox filed a Petition for Partial Reconsideration as to field II.3.a and III.2.b and in an order released concurrently with this one, we granted confidential treatment for those fields to Cox.⁹ The 2003 confidentiality request submitted by CSi was found deficient and confidential treatment was not granted.¹⁰ Each captioned party submitted Requests with its Forms 325 filed in 2004, identifying the portion of the submitted materials to which the request applies.¹¹

III. DISCUSSION

A. Data Collected

4. Under Exemption 4 of the FOIA, financial or commercial information may be withheld from disclosure if disclosure is likely to cause substantial harm to the competitive position of the party from whom it was obtained.¹² The information on Form 325 is commercial in nature. To determine whether this commercial information should be kept confidential, we must determine whether there is preponderance of the evidence that shows that disclosure of the information will cause the parties substantial competitive harm. We accept that cable operators are subject to competition from two DBS providers in most markets, and that in certain markets operators face additional competition from competitive multi-channel video programming distributors such as telephone companies and

⁴ *Id.* § 0.459(b).

⁵ *Id.* § 0.459(b)(3)-(8).

⁶ *Id.* § 0.459(h). FOIA procedures are in Section 0.461 of the Commission's Rules. *Id.* § 0.461.

⁷ See *Cox Communications, Inc. Request for Confidentiality for Information Submitted on Forms 325 for the Year 2003*, 19 FCC Rcd 12160 (MB 2004) ("*Cox Confidentiality Order*"); *Comcast Cable Communications, Inc. Request for Confidentiality for Information Submitted on Forms 325 for the Year 2003*, 19 FCC Rcd 12165 (MB 2004) ("*Comcast Confidentiality Order*"); *Time Warner Cable Request for Confidentiality for Information Submitted on Forms 325 for the Year 2003*, 19 FCC Rcd 12170 (MB 2004) ("*Time Warner Confidentiality Order*"); *Cable Services, Inc. Request for Confidentiality for Information Submitted on Forms 325 for the Year 2003*, 19 FCC Rcd 12174 (MB 2004) ("*CSi Confidentiality Order*").

⁸ See *Comcast Confidentiality Order*; *Time Warner Confidentiality Order*; *Cox Confidentiality Order*.

⁹ *Cox Communications, Inc. Request for Confidentiality for Information Submitted on Forms 325 for the Year 2003*, DA 06-547 (rel. March 8, 2006) (*Cox Reconsideration Order*).

¹⁰ See *CSi Confidentiality Order*.

¹¹ See *Id.* § 0.459(a).

¹² *Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, 13 FCC Rcd 24816, 24819 (1998) (citing *National Parks and Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974)).

overbuilders.¹³ Whether disclosure of the information will result in substantial competitive injury focuses on two considerations: “(1) the commercial value of the requested information, and (2) the cost of acquiring the information through other means.”¹⁴

5. In 2003, the Bureau decided not to publish information regarding the number of Internet subscribers (II.2.c), telephony subscribers (II.2.d), length of coaxial cable (II.4.a), length of fiber optic cable (II.4.b), and number of fiber optic nodes (II.4.c).¹⁵ At that time, the Commission declined to extend confidentiality to equipment information (II.3), cluster information (II.4.d), technical configuration (Section III), and channel line-up data including must-carry status of broadcast stations (Section IV).¹⁶ These determinations were made on the basis of the commercial value of the requested information and the cost of acquiring the information through other means.¹⁷ On reconsideration of the Cox Order, confidentiality was extended to the number of leased cable modems (II.3.a) and upstream spectrum (III.1).¹⁸

B. Analysis of Operators’ Requests

6. *Cox*. Cox submitted a request for confidentiality in 2003, which was granted in part and denied in part.¹⁹ Cox filed a Petition for Partial Reconsideration, which was granted.²⁰ For 2004, Cox seeks confidentiality for the same fields for which confidentiality was granted in 2003 and those fields for which it sought confidential treatment in its Petition for Partial Reconsideration. Cox asserts that this information is proprietary and commercially sensitive and that its business practices ensure that this information is not disclosed without a non-disclosure agreement.²¹ As the circumstances are substantially the same as in 2003, we find that Cox makes a sufficient showing to warrant confidential treatment for those fields.

7. *Comcast*. Comcast submitted a request for confidentiality in 2003, which was granted in part and denied in part.²² For 2004, Comcast seeks confidentiality for the same fields for which confidentiality was granted in 2003, fields II.2.c, II.2.d, II.4.a, II.4.b, and II.4.c. Additionally, in 2003 Comcast sought confidential treatment for fields II.3.a and III.1. Comcast asserts that this information is proprietary and commercially sensitive and that its business practices ensure that this information is not disclosed without a non-disclosure agreement.²³ As the circumstances are substantially the same as in 2003, we find that Comcast makes a sufficient showing to warrant confidential treatment for those fields.

¹³ *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 20 FCC Rcd 2755, 2757 (2005).

¹⁴ *Worthington Compressors, Inc. v. Costle*, 662 F.2d 45, 51 (D.C. Cir. 1981).

¹⁵ See generally, *Cox Confidentiality Order*, *Comcast Confidentiality Order*, *Cox Confidentiality Order*.

¹⁶ *Id.*

¹⁷ For a detailed discussion of the issues addressed under the Commission’s rules, see *Id.*

¹⁸ *Cox Reconsideration Order*.

¹⁹ *Cox Confidentiality Order*.

²⁰ *Cox Reconsideration Order*.

²¹ Cox Request.

²² *Comcast Confidentiality Order*.

²³ Comcast Request at 2.

8. *Time Warner*. Time Warner submitted a request for confidentiality in 2003, which was granted in part and denied in part.²⁴ For 2004, Time Warner seeks confidentiality for the same fields for which confidentiality was granted in 2003, fields II.2.c, II.2.d, II.4.a, II.4.b, and II.4.c. Additionally, in 2003 Time Warner sought confidential treatment for fields II.3.a and III.1. Time Warner asserts that the circumstances this year are identical to those in 2003 and requests the same level of confidential treatment, incorporating its arguments and assertions from last year.²⁵ As the circumstances are substantially the same as in 2003, we find that Time Warner makes a sufficient showing to warrant confidential treatment for those fields.

9. *Adelphia*. Adelphia did not submit a request for confidentiality in 2003. For 2004, Adelphia requests confidentiality for fields II.2.c, II.2.d, II.3, II.4, Section III, and the disclosure of must-carry/retransmission consent status in Section IV.²⁶ As to fields II.2.c, II.2.d, II.3.a, II.4.a, II.4.b, II.4.c, and III.1, Adelphia makes a sufficient showing, in conjunction with the reasoning above, to warrant confidential treatment.²⁷ Adelphia asserts that this information is proprietary and commercially sensitive and that its business practices ensure that proprietary, commercially sensitive information is not disclosed to any third party that does not first sign a non-disclosure agreement.²⁸ As to fields II.3.b, the remainder of section III, and IV, Adelphia does not make any additional showing that would warrant confidential treatment contrary to the reasoning above and our confidentiality decisions for 2003 Form 325 data.²⁹

10. *Charter*. Charter did not submit a request for confidentiality in 2003. This year, Charter requests confidentiality for fields II.2.c, II.2.d, II.3, II.4, Section III, and the disclosure of must-carry/retransmission consent status in Section IV.³⁰ As to fields II.2.c, II.2.d, II.3.a, II.4.a, II.4.b, II.4.c, and III.1, Charter makes a sufficient showing, in conjunction with the reasoning above, to warrant confidential treatment.³¹ Charter asserts that this information is proprietary and commercially sensitive and that its business practices ensure that proprietary, commercially sensitive information is not disclosed to any third party that does not first sign a non-disclosure agreement.³² As to fields II.3.b, the remainder of section III, and IV, Charter does not make any additional showing that would warrant confidential treatment contrary to the reasoning above and our confidentiality decisions for 2003 Form 325 data.³³

11. *Cable Services, Inc*. In 2003, CSi submitted a request for confidentiality. It was denied due to deficiencies in the submission, specifically that it did not address any of the issues or provide supporting justification.³⁴ CSi submitted its 2004 Request with its completed Forms 325 on March 30,

²⁴ *Time Warner Confidentiality Order*.

²⁵ Time Warner Request.

²⁶ Adelphia Request.

²⁷ *Id.* at 1-2.

²⁸ *Id.* at 3.

²⁹ *Id.* at 2-3.

³⁰ Charter Request.

³¹ *Id.* at 1-2.

³² *Id.* at 3.

³³ *Id.* at 2-3.

³⁴ *Cable Services, Inc Request for Confidentiality for Information Submitted on Forms 325 for the Year 2003*, 19 FCC Rcd 12174, 12175 (MB 2004).

2005, wherein it asks for confidential treatment for the entirety of Section II.³⁵ CSi asserts that FCC Form 477 requests some of the same information and gives filers an easy option to redact their submissions.³⁶ While this is true, Form 477 does not make a final determination of confidentiality until information marked as confidential is requested.³⁷ CSi does not meet the requirements of the FOIA in its 2004 request; while CSi asserts that it is subject to competition, CSi does not make any showing that this information is not otherwise publicly available, nor that it goes to any measures to keep this information proprietary.³⁸

IV. CONCLUSION

12. The requests of Cox, Comcast, Time Warner, Adelphia, and Charter have met the burden of persuasion to establish confidentiality for three years with respect to the following fields: Cable Modem Subscribers (II.2.c), Telephony Subscribers (II.2.d), Leased Cable Modems (II.3.a), Coaxial Cable (II.4.a), Fiber Optic Cable (II.4.b), Number of Fiber Optic Nodes and Subscribers per node (II.4.c), and Upstream Spectrum (III.1) on Form 325. As to the additional fields for which Adelphia and Charter have sought confidentiality, neither party has established that information would be of use to its competitors or how substantial harm to its competitive position would occur by disclosure. We, therefore, deny Adelphia and Charter the confidentiality each requests, except to the fields above. We will treat the above fields as confidential for a period of three years from the date it was collected, December 31, 2004.

13. CSi has not shown by a preponderance of the evidence that non-disclosure is consistent with the FOIA or the Commission's Rules.

V. ORDERING CLAUSES

14. Accordingly, IT IS ORDERED, pursuant to Sections 0.459(d)(2) of the Commission's Rules, 47 C.F.R. § 0.459(d)(2), that the Requests for CONFIDENTIALITY by Adelphia, Charter, Comcast, Cox, and Time Warner ARE GRANTED TO THE EXTENT DISCUSSED ABOVE.

15. Additionally, IT IS ORDERED, pursuant to Sections 0.459(d)(2) of the Commission's Rules, 47 C.F.R. § 0.459(d)(2), that the request for CONFIDENTIALITY by Cable Services, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna C. Gregg
Chief, Media Bureau

³⁵ CSi Request.

³⁶ *Id.*

³⁷ *Local Competition and Broadband Reporting*, 65 FCC Rcd 7758 (2000). While Form 477 provides a check-box on the first page for indicating that confidential treatment is requested, a full showing under the Commission's rules is required to maintain confidentiality in the event that information is requested of the commission.

³⁸ 47 C.F.R. § 0.459(b)(6)-(7).