

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

RCN Corporation
Order Adopting Protective Order
File No. EB-08-SE-1076

PROTECTIVE ORDER

Adopted: November 12, 2008

Released: November 13, 2008

By the Chief, Enforcement Bureau:

1. On October 30, 2008, the Enforcement Bureau ("Bureau") sent a Letter of Inquiry ("LOI") to RCN Corporation ("RCN" or "Company") seeking information concerning potential violations of various requirements of the Communications Act of 1934, as amended ("Act") and the Commission's rules ("Rules"), including, but not limited to, 47 U.S.C. §543 and 47 C.F.R. §§76.630, 76.980, and 76.1603. The LOI sought information from Company concerning whether Company may have moved certain analog basic or expanded basic channels to a digital tier (herein referred to as an "analog-to-digital channel change"), making such channels unavailable to analog subscribers unless they obtained a Company-supplied digital set top box and/or subscribed separately to Company's digital programming tier.

2. Question 8.b. of the LOI seeks information that may contain proprietary or confidential information, and that, therefore, should be made available pursuant to a Protective Order. Specifically, Question 8.b. requires that Company provide for each channel affected by an analog-to-digital channel change, "the per-subscriber fees related to that channel paid by Company to the video programming distributor responsible for that channel." The Bureau is aware that the information requested by this inquiry may contain highly sensitive business data and has consistently recognized that disclosure of information related to programming contracts in some instances can result in substantial competitive harm to the information provider. Consequently, the Bureau hereby adopts this Protective Order to ensure that any confidential or proprietary information submitted by Company in response to Question 8.b. of the LOI is afforded adequate protection.

3. In general, the Commission will grant more limited access to those materials which, if released to competitors, would allow those competitors to gain a significant advantage in the marketplace.1 Accordingly, we will permit persons submitting documents and information in response to Question 8.b. to designate those materials as Highly Confidential and, as provided below, we will limit access to such materials. It is our intent that such materials, so long as they fall within the Categories of Highly Confidential Information Covered by This Protective Order as set forth in paragraph 5 below,

1 See, e.g., Adelphia Communications Corp., Time Warner Cable Inc. and Comcast Corp., Applications for Consent to the Assignment and/or Transfer of Control, MB Docket No. 05-192, Order, DA 05-3226 (rel. Dec. 21, 2005) (adopting a second protective order); News Corporation, General Motors Corporation, and Hughes Electronic Corporation, MB Docket No. 03-124, Order, DA 03-2376 (rel. July 22, 2003) (adopting a second protective order).

shall be protected from disclosure under FOIA.² We find that such materials are necessary to develop a more complete record on which to base the Commission's decision in this investigation and therefore require their production. This Protective Order covers only those portions of documents or data that contain Highly Confidential Information as defined in Paragraph 4 below and are responsive to Question 8.b. of the LOI.

4. *Definitions.* As used herein, the following terms shall mean:

"Stamped Highly Confidential Document" means any document, or any part thereof, that bears the legend (or which otherwise shall have had the legend recorded upon it in a way that brings its attention to a reasonable examiner) "HIGHLY CONFIDENTIAL INFORMATION – SUBJECT TO PROTECTIVE ORDER IN FILE NO. EB-08-SE-1076 before the Enforcement Bureau, Federal Communications Commission," unless the Commission determines, *sua sponte* or by request pursuant to Sections 0.459 or 0.461 of its Rules, that any such document is not entitled to such confidential treatment. The term "Document" means any written, recorded, electronically stored, or graphic material, whether produced or created by Company or another person. By designating a document a "Stamped Highly Confidential Document," Company signifies and represents that it contains information that Company believes should be subject to protection under FOIA, the Commission's implementing Rules and this Protective Order.

"Highly Confidential Information" means information contained in Stamped Highly Confidential Documents or derived therefrom that is not otherwise available from publicly available sources and that Company has kept strictly confidential.

5. *Categories of Highly Confidential Information Covered by This Protective Order.* A document or a portion of a document may be submitted under this Protective Order only if it is responsive to Question 8.b. of the LOI as covered by this Order *and* it contains Highly Confidential Information as defined above. With regard to Company's submission of Highly Confidential Information, this Protective Order covers the following documents and information: for each channel affected by an analog-to-digital channel change, the per-subscriber fees related to that channel paid by Company to the video programming distributor responsible for that channel.

6. *Submission of Stamped Highly Confidential Documents.* Two copies of each Stamped Highly Confidential Document must be delivered in person to William Davenport, Assistant Chief, Enforcement Bureau, Federal Communications Commission, 445 12th Street, S.W., Room 3-C222, Washington, D.C. 20554, or JoAnn Lucanik, Deputy Chief, Spectrum Enforcement Division, Enforcement Bureau, Federal Communications Commission, 445 12th Street, S.W., Room 3-A362, Washington, D.C. 20554. The document shall be accompanied by a cover letter stating "CONFIDENTIAL INFORMATION – SUBJECT TO PROTECTIVE ORDER IN File No. EB-08-SE-1076 before the Enforcement Bureau, Federal Communications Commission." Each page of the Highly Confidential Filing shall be stamped with this legend as well.

7. *Requests for Additional Disclosure.* If any person requests disclosure of Highly Confidential Information outside the terms of this Protective Order, such a request will be treated in accordance with Sections 0.442 and 0.461 of the Commission's Rules.

8. *No Waiver of Confidentiality.* Disclosure of Highly Confidential Information as provided herein by any person shall not be deemed a waiver by Company of any privilege or entitlement to confidential treatment of such Highly Confidential Information.

² See, e.g., 47 C.F.R. § 0.457(d)(iv)(covering programming contracts between programmers and multichannel video programming distributors).

9. *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 obtained under terms of this Protective Order, the Bureau shall promptly notify each Company 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 Company has a full opportunity to oppose such production prior to the production or disclosure of any Stamped Highly Confidential Document or Highly Confidential Information.

10. *Termination of Proceeding.* The provisions of this Protective Order shall not terminate at the conclusion of any potential future formal proceedings that may result from this investigation.

11. *Authority.* This Order is issued pursuant to Sections 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), Section 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4), and Section 0.457(d)(2) of the Commission's Rules, 47 C.F.R. § 0.457(d)(2), and is effective upon its adoption.

FEDERAL COMMUNICATIONS COMMISSION

Kris Anne Monteith
Chief, Enforcement Bureau