



PUBLIC NOTICE

Federal Communications Commission
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NOTICE OF REQUEST FOR ACCESS TO CONFIDENTIAL INFORMATION IN THE BUSINESS DATA SERVICES AND CENTURYLINK/LEVEL 3 PROCEEDINGS

PLEADING CYCLE ESTABLISHED

WC Docket No. 16-403
WC Docket Nos. 16-143, 15-247, and 05-25; RM-10593

Comment Date: May 30, 2017

The United States Department of Justice, Antitrust Division (the Department), is investigating the proposed acquisition by CenturyLink, Inc. of Level 3 Communications, Inc.¹ For the purpose of assisting in that investigation, the Department has requested access to the confidential and highly confidential information submitted in WC Docket No. 05-25, RM-10593, WC Docket No. 15-247, WC Docket No. 16-143 and WC Docket No. 16-403, as well as access to any related material or analyses, including the highly confidential version of the Commission's 2017 BDS Order, plus any confidential and highly confidential information that is further submitted in those dockets during the pendency of the Department's investigation of the proposed acquisition.²

In general, the Commission may share information it has collected with another government agency pursuant to 44 U.S.C. § 3510. Section 3510 provides that all provisions of law that relate to the unlawful disclosure of information apply to the employees of the agency to which the information is shared. Although the Commission's regulations provide that proprietary and commercially sensitive information will be withheld from public disclosure, subject to the public's right to seek disclosure under the Freedom of Information Act and implementing regulations, 5 U.S.C. § 552 and 47 CFR §§ 0.457(d), 0.459(d), the Commission may disclose to other federal agencies records that have been submitted to the Commission in confidence upon another agency's request pursuant to 47 CFR § 0.442(d).

¹ Letter from Scott Scheele, Chief, Telecommunications & Media Enforcement Section, Antitrust Division, U.S. Department of Justice, to Kris Monteith, Acting Chief, Wireline Competition Bureau, FCC, WC Docket Nos. 16-403, 16-143, 15-247, and 05-25, RM-10593, at 1 (filed May 11, 2017), <https://ecfsapi.fcc.gov/file/10516029325579/DOJ%20Request%20for%20Access%20to%20Confidential%20Docs%205-11-17%20Docket%2016-403.pdf> (DOJ Request); *Applications Filed for the Transfer of Control of Level 3 Communications, Inc. to CenturyLink, Inc.*, WC Docket No. 16-403, Public Notice, 31 FCC Rcd 13408 (WCB Dec. 21, 2016).

² DOJ Request at 1; see *Business Data Services in an Internet Protocol Environment et al.*, WC Docket No. 16-143 et al., Report and Order, FCC 17-43 (Apr. 28, 2017) (2017 BDS Order).

The Department states in its Request that its policy is to protect the confidentiality of sensitive information and to prevent competitively sensitive information from being shared among competitors. As stated in the DOJ Request, sensitive information includes “confidential business information,” which means trade secrets or other commercial or financial information (1) in which a company has a proprietary interest or which a company received from another entity under an obligation to maintain the confidentiality of such information, and (2) which a company has in good faith designated as confidential.³ The Department further states that sensitive information will be used by it only for a legitimate law enforcement purpose and that it is the Department’s policy not to disclose sensitive information unless it is required by law or is necessary to further a legitimate law enforcement purpose.⁴ The Department maintains that, although its policy is not to use sensitive information in complaints or accompanying court papers unnecessarily, it cannot provide an absolute assurance that sensitive information will not be included in such documents. The Department states, however, that if it is necessary to disclose any confidential business information in court filings, then its policy is to notify the affected party as soon as is reasonably practicable, to file such information under seal, to advise the court that the information has been designated as confidential, and to make reasonable efforts to limit disclosure of the information to the court and to outside counsel for the other parties to the litigation until the affected party has had a reasonable opportunity to appear before the court and the court has ruled on any request by the affected party.⁵

The Department further states that, if a request is made under the Freedom of Information Act or any other provision of law for the disclosure of confidential business information, it is the Department’s policy to assert all applicable exemptions from disclosure, including those exemptions set forth in 5 U.S.C. §§ 552(b)(4), (b)(7)(A), and (b)(7)(D) (to the extent applicable).⁶ The Department also states that its policy is to use its best efforts to provide concerned parties with such notice as is practicable prior to the release of any confidential business information to any third party who requests it under any provision of law other than the Freedom of Information Act. The Department states that, if confidential business information becomes the subject of discovery in any litigation to which the Department is a party, then it is the Department’s policy to use its best efforts to ensure that a protective order applicable to the information is entered and to not voluntarily provide the information until concerned parties have had a reasonable opportunity to review and comment on the protective order and to apply to the court for further protection. The Department states that its policy is to not oppose a court appearance by concerned parties for this purpose.⁷

Pursuant to the Commission’s regulations in 47 CFR § 0.442, affected parties have ten days from the date of this public notice to oppose the Department’s request for access to confidential and highly confidential information submitted in the above-referenced dockets. If the Commission receives no opposition from affected parties within ten days of this public notice, then the Commission will disclose the information requested above to the Department. If disclosure is opposed, then the procedures set forth in 47 CFR § 0.442 will apply.

³ DOJ Request at 1.

⁴ *Id.* (the Department states that in its experience, the need to disclose sensitive material occurs rarely).

⁵ *Id.* at 2.

⁶ *Id.* See also *Critical Mass Energy Project v. NRC*, 975 F.2d 871, 880 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 1579 (1992) (protection of voluntarily provided information).

⁷ DOJ Request at 2.

Pursuant to 47 CFR §§ 1.415, 1.419, interested parties may file comments on or before the date specified above. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS). *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: <http://apps.fcc.gov/ecfs/>.
- Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to Commission Headquarters at 445 12th St., SW, Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington DC 20554.

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Parties also must send a courtesy copy of their filing to Michael Ray, Competition Policy Division, Wireline Competition Bureau, Federal Communications Commission, 445 12th Street, S.W., Room 5-C235, Washington, D.C. 2055 or via e-mail at michael.ray@fcc.gov.

For further information, please contact Michael Ray at michael.ray@fcc.gov or at (202) 418-0357.

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