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

In the Matter of

LIBERTY CABLE COMPANY, INC. File Nos. 709426 *et al.*

On Request for Confidentiality

MEMORANDUM OPINION AND ORDER

Adopted: January 24, 1996; Released: January 26, 1996

By the Commission:

I. INTRODUCTION

1. Before the Commission is an Application for Review filed by Liberty Cable Company, Inc. ("Liberty") on September 20, 1995, seeking review of a ruling by the Wireless Telecommunications Bureau ("WTB"), which denied Liberty's request for confidential treatment of information concerning certain of Liberty's applications for operational fixed microwave service ("OFS"). Liberty claims that Exemptions 4 and 6 of the Freedom of Information Act ("FOIA"), 5 U.S.C. §§ 552(b)(4) and (6), and the attorney-client privilege and attorney work product doctrine, support its request for confidentiality. Time Warner Cable of New York City and Paragon Cable Manhattan (collectively "Time Warner") filed an opposition to Liberty's Application for Review on October 5, 1995, and Liberty filed its reply on October 18, 1995. For the reasons set forth below, we deny Liberty's Application for Review and affirm the decision of the WTB.

II. BACKGROUND

2. Liberty seeks confidential treatment of an internal audit report and its attachments (collectively "the audit report"), that relate to certain OFS applications for which Liberty has requested Special Temporary Authority ("STA") to operate in New York City. Time Warner filed petitions to deny those applications. As a result of issues of unauthorized operation that have arisen in these licensing proceedings, the Microwave and Enforcement Branches of the WTB requested in letters dated June 9 and August 4, 1995, that Liberty submit certain information to the Commission, including the results of an internal audit concerning Liberty's licensing activities. The WTB further directed that the submissions should be served on Time Warner. On August 14, 1995, Liberty submitted this information, but only to the Commission. *See* Letter from Henry M. Rivera, *et al.*, counsel for Liberty, to Regina Keeney, Chief, WTB, dated August 14, 1995 (hereinafter "Request for Confidentiality"). Liberty claimed that the audit report should be treated confidentially and not disclosed to the Petitioner, Time Warner, nor to the general public.

3. By letter dated September 13, 1995, the WTB informed Liberty that its Request for Confidentiality was denied for the following reasons. *See* Letter from Ralph A. Haller, Deputy Chief, WTB, to counsel for Liberty dated September 13, 1995 (hereinafter "Letter Ruling"). First, there was no basis to withhold the information from Time Warner. Rather, Time Warner was entitled to access to all materials filed by Liberty with its August 14, 1995, submission in order to allow it to effectively participate as a party to the licensing proceedings. *See Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC,* 595 F.2d 621 (D.C. Cir. 1978). Second, there was no basis to withhold the information from the public. In that regard, the WTB found that: (1) under the "competitive harm" prong of FOIA Exemption 4, Liberty had failed to demonstrate that it would likely suffer substantial injury from disclosure, *see National Parks and Conservation Ass'n. v. Morton,* 498 F.2d 765 (D.C. Cir. 1974); (2) even if Liberty's arguments might be a sufficient basis to conclude that mandatory public disclosure is not required under FOIA Exemption 4 under either the "impairment" prong test of *National Parks, supra,* or the "voluntary" disclosure test of *Critical Mass Energy Project v. Nuclear Regulatory Com 'n,* 975 F.2d 871 (D.C. Cir. 1992), *cert. denied,* 113 S. Ct. 1579 (1993), the public interest in disclosure of the materials justified release as a matter of the Commission's discretion; and (3) Liberty's claims of privilege and privacy were wholly unsubstantiated and inadequate to sustain a request for confidentiality. We affirm the WTB's decision in all of these respects.

III. DISCUSSION

4. The primary focus of Liberty's Application for Review rests on its claim that disclosure will advance Time Warner's alleged anti-competitive activities. In this regard, Liberty claims that the issue at stake in these proceedings "is the Commission's policy of encouraging competition to entrenched monopoly cable providers like Time Warner." *See* Application for Review of Liberty Cable Company, Inc., dated September 20, 1995, at 2. Our task here, however, is confined to determining whether the information contained in the audit report is protected from disclosure under FOIA Exemptions 4 and 6 and, if so, whether public interest considerations outweigh the interests fostered by withholding these materials. *See* 47 C.F.R. § 0.457(d)(2)(i). As explained below, we conclude that the records should be publicly disclosed.

FOIA Exemption 4

5. Under the "competitive prong" test of FOIA Exemption 4, an agency may withhold from disclosure "commercial or financial information obtained from a person [that is] privileged or confidential," 5 U.S.C. § 552(b)(4), if the party seeking confidentiality demonstrates both actual competition and the likelihood of substantial competitive injury if disclosure is made. *See CNA Financial Corp. v. Donovan,* 830 F.2d 1132, 1152 (D.C. Cir 1987), *cert. denied,* 485 U.S. 977 (1988). Liberty claims that the audit report is protected from disclosure under this prong of Exemption 4 because it contains "extensive proprietary information," the disclosure of which will advance Time Warner's anti-competitive practices. *See* Application for Review at 5.

6. When initially raising this claim in its Request for Confidentiality, Liberty alleged that the audit report contained "detailed internal operating, sales, marketing, and

administrative information" protected from disclosure. *See* Liberty's Request for Confidentiality at 3. The WTB's Letter Ruling found that the audit report did not contain the type of data Liberty claimed and that Liberty failed to show how disclosure would likely cause competitive injury. In its Application for Review, Liberty now describes in more detail the types of information for which it seeks confidential treatment and provides specific examples of how disclosure will cause it injury. Upon examination, however, we do not believe that any of the scenarios advanced by Liberty support its request for confidentiality.

7. Liberty generally claims that in light of Time Warner's history of making "false, deceptive, and disparaging statements about Liberty," the information at issue "undoubtedly will be used in Time Warner's campaign to keep buildings from accepting Liberty service and to keep Time Warner customers from switching to Liberty." *See* Application for Review at 10. While we recognize that disclosure of such information may reflect adversely upon Liberty, that is not a legitimate basis for prohibiting release. As we have stated before, "public embarrassment, unfavorable publicity, or customer disgruntlement are not generally considered to constitute substantial competitive harm." *New York Telephone Co., et al.*, 5 FCC Rcd 874 (1990), *citing CNA Financial Corp. v. Donovan*, 830 F.2d 1132, 1154 (D.C. Cir. 1987); *General Electric Co. v. Nuclear Regulatory Com'n*, 750 F.2d 1394, 1402 (7th Cir. 1984).

8. Liberty also claims that the audit report contains "information regarding customers and potential customers that Time Warner does not possess and cannot otherwise obtain," including all of its service contracts and "start dates." *See* Application for Review at 10, 13.[1] Our review of the materials does not support Liberty's claim for confidential treatment. First, while there is an attachment to the audit report that sets forth the locations, various application dates, etc., for Liberty's OFS operations, much of this information is already publicly available. *See, e.g.*, Time Warner's Reply to Liberty's Opposition to Petition to Deny, dated May 5, 1995. Exemption 4 is not available to protect information already in the public domain. *See Anderson v.U.S. Dept. Health & Human Services*, 907 F.2d 936, 952 (10th Cir. 1990); *CNA Financial Corp.*, 830 F.2d at 1154. Second, given the fact that Liberty has previously disclosed, without objection, the same type of information (*i.e.*,receive site addresses, service commencement dates, and number of subscribers) regarding 15 OFS applications, we are unconvinced that disclosure of the same type of data for the four remaining applications will cause it substantial injury. *See, e.g.*, Letter from Howard J. Barr, counsel for Liberty, to Michael B. Hayden, Chief, Microwave Branch, WTB, dated June 16, 1995.

9. In any event, merely because the audit report may contain some information that has not been previously disclosed does not transform it into confidential commercial data for Exemption 4 purposes. The customer information for which Liberty claims confidentiality is routinely disclosed, or can be discerned, in the license authorization process. For example, we do not consider the date that a building first receives service to warrant confidential protection. Although the date of first service is not normally provided in the application process (because transmission may not begin prior to grant of a license), the date of first service can readily be inferred from the grant date of the license. Similarly, as Time Warner points out, because the application requires Liberty to identify the receiver location, such information already is available to Liberty's competitors. *See* Time Warner's Opposition to Application for Review, dated October 5, 1995, at 13. Contrary to Liberty's suggestion, therefore, we will not now treat such "customer information" as confidential.

10. Liberty also claims that the audit report "contains a complete description of the company's internal operating procedures, including the identities and functions of key persons." *See* Application for Review at 12. Liberty states that this information, particularly with respect to the identity of its employees, is "closely guard[ed]" since Time Warner has hired Liberty personnel in the past and "will attempt to steal Liberty personnel again." *Id.* at 12-13. Our examination does not indicate that this information is of the proprietary nature Liberty claims. For example, the identity of some of the Liberty employees which the company now seeks to suppress has already been disclosed by Liberty in its public filings. *See, e.g.*, Liberty Surreply in Support of Opposition to Petition to Deny, dated May 17, 1995, at 3. Furthermore, our review of the audit report indicates that only three individuals not previously identified in public records could conceivably fall within the group Liberty seeks to keep confidential. As to one of these individuals, however, it is not clear whether he or she: (a) is a current or former Liberty employee, (b) served in a "key" personnel capacity, or for that matter, (c) was ever employed by Liberty. In any event, we do not believe that the audit report reveals the "roster" of personnel Liberty suggests will be raided by Time Warner. *See* Application for Review at 13. As such, we do not consider this justification adequate for Exemption 4 confidentiality purposes.

11. For the above stated reasons, therefore, we find that the audit report is not shielded from protection pursuant to the "competitive harm" prong of FOIA Exemption 4. Liberty also claims, however, that its request for confidentiality satisfies Exemption 4's "impairment" prong test, *see National Parks, supra*, and the "voluntary" disclosure test, *see Critical Mass, supra*. *See* Application for Review at 6. These tests permit an agency to withhold commercial information when disclosure would impair the Government's ability to obtain such information in the future or when such information has been voluntarily submitted. For the same reasons set forth in the decision of the WTB, we find that, even if Liberty's arguments were sufficient to demonstrate that mandatory disclosure is not required under

[1] In its Reply to Time Warner's Opposition, Liberty argues for the first time that the "length of service contracts" is proprietary information and protected from disclosure. *See* Reply to Opposition to Application for Review of Liberty Cable Company, Inc., dated October 18, 1995, at 3 fn.7. Previously in its Application, Liberty had only alleged that information about service contract "operation dates" or "start dates" was protected. *See* Application for Review at 8 and 13. Moreover, Liberty's Request for Confidentiality made no reference to these aspects of its service contracts. As Liberty failed to raise this claim before, we will not consider it here. In any event, we note that Liberty has previously publicly disclosed full information concerning the length of its service contracts, including an executed copy of a "Private Cable Agreement" with one of its customers. *See* Letter from Howard J. Barr, counsel for Liberty, to Michael B. Hayden, Chief, Microwave Branch, WTB, dated June 16, 1995 at 11 and Exhibit 2 thereto.

either of these aspects of Exemption 4, public interest considerations favoring openness in our licensing proceedings outweigh any potential difficulty that the Government might experience in obtaining access to information in similar circumstances. *See* WTB Letter Ruling at 3-4. In this regard, the audit report contains information that is directly relevant to Liberty's OFS applications and its STA requests. Release of the audit report will thus serve to inform interested parties and the public about the implications of Liberty's licensing activities. We also note, as did the WTB, that Liberty was expressly directed to provide the documents at issue pursuant to the Commission's authority under 47 U.S.C. § 308(b). *Id.* at 4. For these reasons, therefore, we find that public interest considerations outweigh any need to protect the audit report from disclosure under these Exemption 4 provisions.

FOIA Exemption 6

12. Liberty claims that, contrary to FOIA Exemption 6, disclosure of the audit report "would violate the privacy interests of the current and former Liberty employees and consultants who [sic] actions are evaluated therein." *See* Application for Review at 13. Without elaboration, Liberty also claims that the audit report contains employee evaluations and "other types of information generally maintained in personnel files." *Id.* For the following reasons, we are unpersuaded that Exemption 6 can protect these materials from disclosure.[2]

13. Exemption 6 of the FOIA permits the withholding of "personal and medical files and similar files" where the disclosure of such information "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). The threshold requirement for determining Exemption 6 applicability is whether the materials at issue fall within the category of "medical," "personnel," or "similar" files.

14. The documents at issue are not medical files nor do we find them to be the type of records typically found in personnel files as Liberty claims. Thus, to qualify for Exemption 6 protection, Liberty must demonstrate that these materials relate to a protected privacy interest contained in this third category of information. When a protected privacy interest is established, we are required to balance the privacy interests served by withholding the records at issue and the public interest that would be furthered by disclosing them. *See Leila C. Brown,* 8 FCC Rcd 4368 (1993), *citing U.S. Dept. of Justice v. Reporters Committee for Freedom of the Press,* 489 U.S. 749, 762-764 (1989).

15. Liberty's audit report seeks to explain how the many instances of its unauthorized OFS activities occurred. Liberty's explanation required it to identify individuals and other entities who were involved in those licensing operations.[3] We do not believe that the audit report necessarily falls within the "similar" files provision of Exemption 6 simply because the report contains such references, nor, if it did, that we would be justified in withholding the report in its entirely. We need not decide those issues here, however. Rather, even assuming a protectable privacy interest[4] does exist, we find that significant public policy considerations warrant disclosure. The privacy interests identified by Liberty clearly are minor and are so intertwined with the facts of the underlying proceedings that the public's interest in openness in our licensing proceedings outweighs any privacy interests. For these reasons, therefore, we reject Liberty's Exemption 6 claim.

Attorney-Client Privilege and Attorney Work Product Doctrine

16. In its Request for Confidentiality, Liberty alleged that the audit report "is protected by the attorney-client privilege and the attorney work product privilege and is material that would not be customarily released." *See* Liberty's Request for Confidentiality at 4.[5] This statement constituted the entire justification for Liberty's privilege claims.

17. The WTB denied Liberty's privilege claims, finding that "[n]o specific information or explanation is provided to support any of these assertions" and that "[u]nsubstantiated claims of privilege . . . are wholly inadequate to sustain a request for confidentiality." *See* WTB Letter Ruling at 4.

18. No further support for Liberty's privilege claims is found in its Application for Review. In fact, the Application for Review does not even mention, let alone discuss, these privileges. The only reference to these claims is contained in an affidavit from one of Liberty's attorneys that is attached to the Application. *See* Application for Review, Affidavit of Lloyd Constantine. Therein, Mr. Constantine opines that the audit report "contains extensive information, material and documentation which are clearly privileged under the Attorney-Client and Attorney Work-Product privileges and manifestly contains numerous mental impressions and opinions of the attorneys . . . ." *Id.* at 3. Once again, Liberty fails to provide any specific information or explanation to substantiate its generalized claims of privilege. The opinions of its counsel, which are just as vague, are similarly inadequate to warrant confiden-

[2] The WTB Letter Ruling did not address the requirements of Exemption 6 because it was never specifically invoked in Liberty's Request for Confidentiality. Liberty did raise general privacy concerns, however, and we will consider those passing references to individual privacy as an Exemption 6 claim.

[3] While Liberty now attempts to conceal their identity, it has previously revealed information about them in public filings. For example, Liberty contends that part of its application problems are attributable to the mistakes of one of its employees, whom Liberty names, *see* Liberty Surreply in Support of Opposition to Petition to Deny dated May 17, 1995, at 3, and most recently, Liberty revealed the audit report's "harsh criticism" for one of its law firms, also specifically named by Liberty, *see* Application for Review, Affidavit of Lloyd Constantine dated September 20, 1995, at 3.

[4] Generally, only individuals can possess protected privacy interests. In that regard, the courts have found that Exemption 6 is not available to corporations, business associations, etc. *See Sims v. Central Intelligence Agency,* 642 F.2d 562, 572 n.47 (D.C. Cir. 1980); *see also National Parks & Conservation Ass'n v. Kleppe,* 547 F.2d 673, 685 n.44 (D.C. Cir. 1976); *Ivanhoe Citrus Ass'n v. Handley,* 612 F. Supp. 1560, 1567 (D.D.C. 1985). Thus, to the extent Liberty or its law firm invokes Exemption 6 protection, *see, e.g.,* Affidavit of Lloyd Constantine, that claim is rejected.

[5] Although Liberty did not cite FOIA Exemption 4 in support of its privilege claims, courts have recognized both the attorney-client and attorney work product privileges in the Exemption 4 context. *See, e.g., Indian Law Resource Ctr. v. U.S. Dept. of Interior,* 477 F. Supp. 144, 148 (D.D.C. 1979); *Miller, Anderson, Nash, Yerke & Wiener v. U.S. Dept. of Energy,* 499 F. Supp. 767, 771 (D. Or. 1980).

tial treatment.[6] As such, Liberty's assertion of the attorney-client privilege and attorney work product doctrine is rejected.

Alleged Ex Parte Violation

19. In its Opposition to Liberty's Application for Review, Time Warner asserts that Liberty's failure to serve Time Warner with the audit report is a violation of the Commission's *ex parte* rules. We note, however, that the *ex parte* rules contain an exemption for presentations that are authorized by the Commission's rules. *See* 47 C.F.R. § 1.1204(b)(1). The Commission's rules expressly permit the submission of data and information that is accompanied by a request for confidentiality. *See* 47 C.F.R. §§ 0.459, 0.457(a)(2)(i). Accordingly, we do not construe the *ex parte* rules as prohibiting the submission of information for which confidentiality has been requested in accordance with these rules. In this regard, we also note that Time Warner was served with both a copy of Liberty's Request for Confidentiality and the instant Application for Review. Thus, it has been able to participate fairly and fully in the resolution of the issues relating to confidential treatment.

IV. CONCLUSION AND ORDERING CLAUSES

20. For the reasons stated above, Liberty has failed to demonstrate that the documents at issue are entitled to confidential treatment. Accordingly, IT IS ORDERED that Liberty's Application for Review is DENIED. Pursuant to Section 0.459(g) of the Commission's rules, 47 C.F.R. § 0.459(g), Liberty will be afforded five (5) working days in which to seek a judicial stay of this Commission ruling. We direct the Chief, Wireless Telecommunications Bureau, immediately upon Commission adoption of this Order, to furnish by telephone to Liberty notice of our determination and of the time for seeking a judicial stay, as well as follow-up notice in writing.

21. The Officials responsible for this action are the following Commissioners: Reed E. Hundt, Chairman, James H. Quello, Andrew C. Barrett, Rachelle B. Chong, Susan Ness.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[6] In light of the fact that Liberty's privilege claims are rejected on this basis, we need not address the waiver issue raised by Time Warner.