



## COMMONWEALTH OF MASSACHUSETTS DEPARTMENT OF TELECOMMUNICATIONS AND CABLE

D.T.C. 13-5

February 14, 2014

Petition of Comcast Cable Communications, LLC to establish and adjust the basic service tier programming, equipment, and installation rates for the communities in Massachusetts served by Comcast Cable Communications, LLC that are currently subject to rate regulation.

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### **HEARING OFFICER RULING ON MOTION FOR PROTECTIVE TREATMENT OF CONFIDENTIAL INFORMATION**

#### I. INTRODUCTION

In this ruling, the Department of Telecommunications and Cable (“Department”) addresses a motion by Comcast Cable Communications, LLC (“Comcast”) requesting confidential treatment of its responses to the Department’s first set of Information Requests (“IRs”) 1-6, 1-7, and 1-8, and to the Department’s Record Request (“RR”) 13. The responses provide detailed information regarding Comcast’s programming and retransmission consent fees and certain terms of retransmission agreements in its regulated Massachusetts franchise areas. For the reasons set forth below, the Department grants Comcast’s request for confidential treatment of its responses to IRs 1-6, 1-7, and 1-8 and RR 13.

#### II. PROCEDURAL HISTORY

On April 1, 2013, Comcast filed FCC Forms 1240 and FCC Form 1205 proposing basic service tier programming, equipment, and installation rates for the communities in Massachusetts served by Comcast currently subject to rate regulation. Pursuant to G. L. c. 166A, § 15, and 207 C.M.R. § 6.03, the Department of Telecommunications and Cable investigates proposed basic

service tier programming, equipment, and installation rates. This proceeding has been docketed as D.T.C. 13-5, and is a formal adjudicatory proceeding conducted under G. L. c. 30A and 801 C.M.R. § 1.00, *et seq.* of the Standard Adjudicatory Rules of Practice and Procedure.

The Department issued its first set of IRs to Comcast on August 26, 2013. On September 11, 2013, Comcast responded to the Department's IRs and concurrently filed a motion for confidential treatment to portions of its responses to IRs 1-6, 1-7, and 1-8 ("Motion").<sup>1</sup> During the public and evidentiary hearing held on October 16, 2013, the Department issued 15 RRs.<sup>2</sup> On November 13, 2013, Comcast responded to the Department's RRs, as well as, RRs from the Towns of Weymouth and Somerset. Comcast concurrently filed a supplemental motion for protective treatment of Exhibit RR-13B to its response to RR 13 ("Supplemental Motion").

### III. ANALYSIS

All documents and data received by the Department are generally considered public records and, therefore, are to be made available for public review under a general statutory mandate. *See* G. L. c. 66, § 10; G. L. c. 4, § 7(26). "Public records" include "all books, papers, maps, photographs, recorded tapes, financial statements, statistical tabulations, or other documentary materials or data, regardless of physical form or characteristics, made or received by any officer or employee of any agency, executive office, department, board, commission, bureau, division or authority of the [C]ommonwealth, or of any political subdivision thereof, or of any authority established by the general court to serve a public purpose unless such materials or data fall within [certain enumerated] exemptions." G. L. c. 4, § 7(26). Materials that are

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<sup>1</sup> Comcast filed its response to Information Request 1-8 under separate cover on September 12, 2013 because of contractual obligations with various broadcasters.

<sup>2</sup> The Towns of Weymouth and Somerset also submitted RRs at the evidentiary hearing.

“specifically or by necessary implication exempted from disclosure by statute” are excluded from the definition of “public records.” G. L. c. 4, § 7(26)(a).

G. L. c. 25C, § 5 permits the Department, in certain narrowly defined circumstances, to grant exemptions from the general statutory mandate that all documents and data received by an agency of the Commonwealth are to be viewed as public records and, therefore, are to be made available for public review. *See* G. L. c. 66, § 10; G. L. c. 4, § 7(26). Specifically, G. L. c. 25C, § 5 is an exemption recognized by G. L. c. 4, § 7(26)(a) (“specifically or by necessary implication exempted from disclosure by statute”).

Information filed with the Department may be protected from public disclosure pursuant to G. L. c. 25C, § 5, which states in part that:

The [D]epartment may protect from public disclosure, trade secrets, confidential, competitively sensitive or other proprietary information provided in the course of proceedings conducted pursuant to this chapter. There shall be a presumption that the information for which such protection is sought is public information and the burden shall be upon the proponent of such protection to prove the need for such protection. Where such a need has been found to exist, the [D]epartment shall protect only so much of the information as is necessary to meet such need.

G. L. c. 25C, § 5 establishes a three-prong standard for determining whether, and to what extent, information filed by a party in the course of a Department proceeding may be granted confidential treatment. First, the information for which confidential treatment is sought must constitute “trade secrets, [or] confidential, competitively sensitive or other proprietary information.” Second, the party seeking confidential treatment must overcome the G. L. c. 66, § 10 statutory presumption that all such information is public information by “proving” the need for its non-disclosure. Third, even where a party proves such need, the Department may grant confidential treatment to only so much of that information as is necessary to meet the established

need and may limit the term or length of time such protection will be in effect. *See* G. L. c. 25C, § 5.<sup>3</sup>

A. Comcast Must Demonstrate that the Information for which Confidential Treatment is Sought Constitutes Trade Secrets, Confidential, Competitively Sensitive, or Other Proprietary Information.

With regard to the first requirement of G. L. c. 25C, § 5, the Department finds Comcast has demonstrated that the information for which confidential treatment is sought constitutes confidential, competitively sensitive, or proprietary information. Comcast asserts that the programming, retransmission consent fees, and retransmission consent agreement information requested by the Department is proprietary and commercially sensitive; is not publicly available to Comcast's competitors; the disclosure of which would provide competitors access to cost informative giving them an unfair competitive advantage; and could form the basis of pricing and marketing strategies for competitors. Motion at 2; Supplemental Motion at 2. In addition, Comcast asserts that the release of the information could disadvantage the parties to the contract in their pricing negotiations and that the Department has previously ruled that these types of programming costs and retransmission consent fees are entitled to confidential treatment. Motion at 2 (citing *Pet. of Comcast Cable Commc'ns, LLC to Establish & Adjust the Basic Serv. Tier Programming, Equip., & Installation Rates for the Cmtys. in Mass. Served by Comcast Cable Commc'ns, LLC that are Subject to Rate Regulation* ("Comcast Rate Case"), D.T.C. 12-2, *Hearing Officer Ruling on Motion for Confidential Treatment* at 5-6 (Nov. 27, 2012); *Comcast Rate Case*, D.T.C. 10-8, Tr. at 8 (Aug. 3, 2011); *Cox Rate Case*, D.T.C. 08-8, *Hr'g Officer's*

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<sup>3</sup> Information filed with the Department contemporaneously with a motion for confidential treatment is treated confidentially pending a final determination on the motion. *See Pet. of Cox Com, Inc. d/b/a Cox Commc'ns New England to Establish & Adjust the Basic Serv. Tier* ("Cox Rate Case"), D.T.C. 10-10, *Rate Order* at n.4 (Oct. 12, 2011).

*Ruling on Motion of Cox Commc 'ns New England for Protective Order* at 3 (June 23, 2009)); Supplemental Motion at 2.

The Department agrees that disclosure of channel or broadcaster specific programming costs could unfairly put Comcast in a precarious competitive position. Comcast's competitors could exploit Comcast's candor by generating advantageous market strategies and price offerings. *See, e.g., Comcast Rate Case*, D.T.C. 12-2, *Hearing Officer Ruling on Motion for Confidential Treatment* at 5-6 (Nov. 27, 2012); *Comcast Rate Case*, D.T.C. 10-8, *Tr.* at 8, (Aug. 3, 2011); *Cox Rate Case*, D.T.C. 08-8, *Hr'g Officer's Ruling on Motion of Cox Commc 'ns New England for Protective Order* at 3 (June 23, 2009) (channel specific programming costs are competitively sensitive); *Cox Rate Case*, D.T.C. 07-10, *Hr'g Officer's Ruling on Second Motion of Cox Commc 'ns New England for Protective Order* at 5 (May 30, 2008) (channel specific programming costs are competitively sensitive); *Review by the Cable Television Div. of the Dept. of Telecomms. & Energy of FCC Forms 1240 and 1205 filed by Time Warner Cable, Inc., C.T.V. 04-5 Phase II, Rate Order* at 6-7 (Nov. 30, 2005) (channel specific programming costs are competitively sensitive). The Department has also specifically protected channel or broadcaster-specific breakdown of retransmission costs and fees provided by Comcast in previous proceedings. *See, e.g., Comcast Rate Case*, D.T.C. 10-8, *Tr.* at 8, (Aug. 3, 2011). As the Department has recognized programming costs, retransmission consent fees, and portions of retransmission consent agreements in the past as being competitively sensitive, the Department finds that Comcast has satisfied the first prong of the analysis.

B. Comcast Must Prove the Need for Non-Disclosure

Turning to the second prong of its analysis, the Department is statutorily required to disclose information in its possession unless the moving party demonstrates the need for

protection from public disclosure. G. L. c. 25C, § 5; *Investigation by the Dept. of Telecomms. & Energy on its own Motion into the Appropriate Regulatory Plan to Succeed Price Cap Regulation for Verizon New England, Inc. d/b/a Verizon Mass.’ Intrastate Retail Telecomms. Servs. in the Commw. of Mass.*, D.T.E. 01-31 Phase I, *Interlocutory Order* at 7 (Aug. 29, 2001) (“*D.T.E. 01-31, Phase I, Interlocutory Order*”). “[T]he proponent of a request for confidential treatment has the burden to prove why confidential treatment is warranted. Although the Department does not seek to put parties at a competitive disadvantage by disclosing information that is truly competitively sensitive, we are constrained by the statute requiring public disclosure, upon receipt of a proper G. L. c. 66, [§] 10 request, absent the proper showing of compliance with [G. L. c. 25C, § 5].”<sup>4</sup> *Pets. of MediaOne Telecomms. of Mass. Inc. & New England Tel. & Tel. Co. d/b/a Bell Atlantic-Mass. for arbitration, pursuant to § 252(b) of the Telecomms. Act of 1996 to establish an interconnection agreement; Pet. of Greater One Media Mass. for arbitration, pursuant to § 252(b) of the Telecomms. Act of 1996 to establish an interconnection agreement with New England Tel. & Tel. Co. d/b/a Bell Atlantic-Mass.* (“*AT&T Broadband/Verizon Interconnect Agreement*”), D.T.E. 99-42/43, D.T.E. 99-52, *Order*, at 52 n.31 (2000).

In determining the need for confidential treatment, the Department has long held it will not automatically grant requests for confidential treatment stating, “[c]laims of competitive harm resulting from public disclosure, without further explanation, have never satisfied the Department’s statutory requirement of proof of harm.” *See Cox Rate Case*, D.T.C. 08-8, *Hr’g Officer’s Ruling on Motion of Cox Commc’ns New England for Protective Order* at 3 (June 23, 2009) (citing *AT&T Broadband/Verizon Interconnect Agreement*, D.T.E. 99-42/43, 99-52, at 52

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<sup>4</sup> G. L. c. 25C, § 5 is identical to the statute applicable to the D.T.C. predecessor agency, the D.T.E. *See* G. L. c. 25, § 5D. Accordingly, the precedent and standard of review, under G. L. c. 25, § 5D, developed by the former D.T.E. and applied on motions for confidentiality are applicable here.

n.31 (2000) and *D.T.E. 01-31 Phase I, Interlocutory Order* at 7). The Department must balance the moving party's proof against the presumption in favor of disclosure and the specific reasons that disclosure of the information benefits the public interest. *Mot. for Protective Treatment by Verizon Mass. Regarding Customer Specific Pricing Contracts*, D.T.C. 08-11, *Order* at 8 (2009); *Tracfone Wireless Inc., Annual Verification of Safelink Wireless Lifeline Subscribers*, D.T.C. 09-9, *Order* at 10-11 (2010).

In considering whether a moving party has met its statutory burden, the Department couples its finding as to whether the information constitutes trade secrets, confidential, competitive sensitive, or other proprietary information, with an evaluation of the measures the moving party has taken to protect the confidentiality of the information for which it seeks protection. *See Pet. of YourTel Am., Inc. for Designation as Eligible Telecomms. Carrier*, D.T.C. 11-1, *Hearing Officer Ruling on Motion for Protection from Pub. Disclosure*, at 5 (July 6, 2011); *Cox Rate Case*, D.T.C. 08-8, *Hr'g Officer's Ruling on Motion of Cox Commc'ns New England for Protective Order* at 5 (June 23, 2009); *Complaint of Choice One Commc'ns of Mass. Inc., Conversent Commc'ns of Mass., LLC, CTC Commc'ns Corp., & Lightship Telecom, LLC (collectively, "One Commc'ns"), Concerning Alleged Unlawful Charges Imposed by Verizon New England Inc., d/b/a Verizon Mass. for Access Toll Connecting Trunk Ports & E911/911 Dedicated End Office Trunk Ports*, D.T.C. 08-3, *Order* at 10 (Apr. 9, 2009); *D.T.E. 01-31, Phase I, Interlocutory Order* at 9; *Application of BLC Mgmt., LLC d/b/a Angles Commc'n Solutions for Certification as an Eligible Telecomms. Carrier*, D.T.C. 09-2, *Order* at 7 (Aug. 23, 2010); *Pet. of Time Warner Cable for Renewal of FCC Forms 1240 & Form 1205 for the Great Barrington, North Adams, & Pittsfield Systems*, D.T.C. 08-14, *Hr'g Officer's Ruling on Mot. for Protective Order* at 5-6 (July 10, 2010). The Department will also consider the extent to which it

has previously protected similar information. *Investigation by the Dept. of Telecomms. & Energy on its own Mot., pursuant to G. L. c. 159, §§ 12, 16, into the collocation security policies of Verizon New England Inc. d/b/a Verizon Mass., D.T.E. 02-8, Order at 10-11 (May 25, 2005).*

Comcast asserts that it is contractually prohibited from publicly disclosing the terms and conditions including the fees paid; that Comcast, cable programmers, and broadcasters treat this type of cost material as confidential and materially sensitive; and that it is Comcast's business practice to ensure that information of this nature is not disclosed to any third party in the ordinary course of business. Motion at 2; Supplemental Motion at 2. Although a party's willingness to enter into a non-disclosure agreement with other parties does not resolve conclusively the question of whether asserted confidential information should be granted protective treatment by the Department (*see Investigation by the Dept. of Telecomms. & Energy, on its own motion, into Boston Elec. Co.'s Compliance with the Dept.'s Order in D.P.U. 93-37, D.T.E. 97-95, Interlocutory Order at 15 (July 2, 1998)*), the Department accepts Comcast's assertion that it, cable programmers, and broadcasters treat this information as confidential and that Comcast engages in business practices to prevent disclosure of the information to third party. Furthermore, the Department regularly accords confidential treatment to this type of information. *See, e.g., Comcast Rate Case, D.T.C. 12-2, Hearing Officer Ruling on Motion for Confidential Treatment at 13 (Nov. 27, 2012); Pet. of Time Warner Cable for Review of FCC Forms 1240 & Form 1205 for the Great Barrington, North Adams, and Pittsfield Systems, D.T.C. 11-15, Rate Order at 12-13 (Oct. 31, 2012); Comcast Rate Case, D.T.C. 10-8, Tr. at 8, (Aug. 3, 2011); Cox Rate Case, D.T.C. 08-8, Hr'g Officer's Ruling on Motion of Cox Commc'ns New England for Protective Order at 3 (June 23, 2009); Cox Rate Case, D.T.C. 07-10, Hr'g Officer's Ruling on Second Motion of Cox Commc'ns New England for Protective Order at 5*

(May 30, 2008); *Review by the Cable Television Div. of the Dept. of Telecomms. & Energy of FCC Forms 1240 & 1205 filed by Time Warner Cable, Inc., C.T.V. 04-5 Phase II, Rate Order* at 6-7 (Nov. 30, 2005). Accordingly, the Department finds that Comcast satisfies its burden to demonstrate that confidential treatment is warranted.

C. Scope of Protection from Public Disclosure

In considering the third prong of its confidential treatment standard, the Department is required to limit confidential treatment to only so much of the information and for only the length of time necessary to meet the established need. G. L. c. 25C, § 5. Comcast has explicitly limited its redactions to only the portions of its responses to IRs 1-6, 1-7, and 1-8 and RR 13 that contain the information afforded protective treatment. Motion at 1; Supplemental Motion at 1. Comcast also requests that if the Department must limit the period of confidentiality, it should do so for a minimum of five years, at which point these materials will no longer be of competitive value to Comcast's competitors. Motion at 2; Supplemental Motion at 2. The Department has typically granted confidential treatment to programming and retransmission consent fees and agreements for a limited period. *See Comcast Rate Case, D.T.C. 12-2, Hearing Officer Ruling on Motion for Confidential Treatment* at 11 (Nov. 27, 2012); *Pet. of Time Warner Cable for Review of FCC Forms 1240 & Form 1205 for the Great Barrington, N. Adams, & Pittsfield Sys., D.T.C. 11-15, Rate Order* at 12-13 (Oct. 31, 2012) (granting confidential treatment for per-channel program cost information for a period of five years with opportunity to renew its request for confidential treatment at the expiration of the five-year period based upon a showing of need for continuing protection); *Cox Rate Case, D.T.C. 08-8, Hr'g Officer's Ruling on Motion of Cox Commc'ns New England for Protective Order* at 6 (June 23, 2009) (granting confidential treatment for channel by channel programming costs for a period of five years with opportunity

to renew its request for confidential treatment at the expiration of the five-year period based upon a showing of need for continuing protection); *Cox Rate Case*, D.T.C. 07-10, *Hr'g Officer's Ruling on Second Motion of Cox Commc'ns New England for Protective Order* at 5 (May 30, 2008) (granting confidential treatment for channel by channel programming costs for a period of five years with opportunity to renew its request for confidential treatment at the expiration of the five-year period based upon a showing of need for continuing protection); *Review by the Cable Television Div. of the Dept. of Telecomms. & Energy of FCC Forms 1240 and 1205 filed by Time Warner Cable, Inc.*, C.T.V. 04-5 Phase II, *Rate Order* at 7 (granting confidential treatment for channel operating cost information including programming expenses and personnel information deemed competitively sensitive). Accordingly, the Department limits confidential treatment to a five-year period. The Department further affords Comcast an opportunity to renew its request for confidential treatment at the end of that five-year period based upon a showing of need for continuing protection. *See Comcast Rate Case*, D.T.C. 12-2, *Hearing Officer Ruling on Motion for Confidential Treatment* at 12 (Nov. 27, 2012); *Pet. of Time Warner Cable for Review of FCC Forms 1240 & Form 1205 for the Great Barrington, N. Adams, & Pittsfield Sys.*, D.T.C. 11-15, *Rate Order* at 12-13 (Oct. 31, 2012) (granting confidential treatment for per-channel program cost information for a period of five years with opportunity to renew its request for confidential treatment at the expiration of the five-year period based upon a showing of need for continuing protection); *Cox Rate Case*, D.T.C. 08-8, *Hr'g Officer's Ruling on Motion of Cox Commc'ns New England for Protective Order* at 6 (June 23, 2009) (granting confidential treatment for channel by channel programming costs for a period of five years with opportunity to renew its request for confidential treatment at the expiration of the five-year period based upon a showing of need for continuing protection); *Cox Rate Case*, D.T.C. 07-10, *Hr'g Officer's Ruling on*

*Second Motion of Cox Commc 'ns New England for Protective Order at 5 (May 30, 2008)*  
(granting confidential treatment for channel by channel programming costs for a period of five years with opportunity to renew its request for confidential treatment at the expiration of the five-year period based upon a showing of need for continuing protection).

IV. RULING

The Motion of Comcast Cable Communications, LLC for Protective Treatment of Confidential Information is GRANTED, as detailed above.

/s/Michael Scott  
Michael Scott  
Hearing Officer

NOTICE OF RIGHT TO APPEAL

Under the provisions of 220 C.M.R. § 1.06(d)(3), any aggrieved party may appeal this Ruling to the Commissioner by filing a written appeal with supporting documentation within five (5) days of this Ruling. A copy of this Ruling must accompany any appeal. A written response to any appeal must be filed within two (2) days of the appeal.