

**COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND CABLE**

)
Petition of CoxCom, Inc., d/b/a Cox
)
Communications to establish and adjust
)
the basic service tier programming,
)
equipment and installation rates for the
)
Town of Holland
)
_____)

D.T.C. 14-1

SEP - 5 2014

**MOTION OF COXCOM, INC., D/B/A COX COMMUNICATIONS NEW ENGLAND
FOR PROTECTIVE ORDER**

INTRODUCTION

Pursuant to G.L.c.25C, §5 and 801 C.M.R. 1.01(8), CoxCom, Inc., d/b/a Cox Communications New England (“Cox”), moves for a protective order regarding channel specific programming cost information that was provided in response to a Staff question during the confidential portion of the August 12, 2014 rate hearing in this matter. Cox requests that this channel specific programming cost information be protected from public disclosure and maintained on a confidential basis.¹

In this Motion, Cox explains why per channel programming cost information, submitted in the currently sealed part of the record, should be granted confidential treatment under G.L.c. 25C , §5 related Department standards of review and past Department precedent. The Company also requests that the Department maintain the confidentiality of the Company’s per channel

¹ Cox has provided a public, redacted response that lists programmers and redacts any programmer-specific cost information. The names of Basic Service Tier programmers are public in the Company’s Form 1240 filing and the only information redacted is the highly confidential per channel programming cost information.

programming cost information for a period of five years, with an opportunity afforded to Cox to request an extension of confidential treatment of its programming cost information.

ARGUMENT

A. DEPARTMENT CONFIDENTIALITY STANDARDS

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

The department 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 on the proponent of such protection to prove the need for such protection. Where such a need has been found to exist, the department shall protect only so much of the information as is necessary to meet such need.

The exemption afforded pursuant to G.L.c.25C, §5 is an exemption recognized under G.L.c.4, §7, cl. twenty-sixth (a) (“specifically or by necessary implication exempted from disclosure by statute”).

The Department has applied a 3 part standard in applying G.L.c.25C, §5. First, the information for which protection has been sought must constitute the type of information that can be exempted from public disclosure (e.g., confidential, competitively sensitive or other proprietary information). Second, the party seeking protection must prove the need for its non-disclosure as public information. Third, where such a need has been demonstrated, protection will be accorded only to so much of that information as is necessary to meet the established need and the length of time such protection may be in effect may be limited. *Time Warner Cable, Inc.*, CTV 03-4 (July 1, 2004) (Order on Request for Confidential Treatment). *CoxCom, Inc., d/b/a Cox Communications*, DTC 07-10(May 30, 2008) (Order on Request for Confidential Treatment). *CoxCom, Inc., d/b/a Cox Communications*, DTC 08-8 (June 23, 2009) (Hearing

Officer Ruling on Motion for Protective Order). *CoxCom, Inc., d/b/a Cox Communications*, DTC 10-10 (October 12, 2011).

For the reasons below, the information provided by Cox under seal and supporting evidence and argument meet the legal standards for an exemption from public disclosure of this information.

B. PER CHANNEL PROGRAMMING COST INFORMATION IS CONFIDENTIAL

1. Per Channel Programming Cost Information Has Been Treated as Confidential Information by Both the Department and the Federal Communications Commission

Both the Department and the FCC have classified programming contracts (and programming cost information contained therein) as exempt from public disclosure. The FCC permits programming contracts to be filed under seal without the need for a request for confidential treatment. 47 CFR §§0.457, 0.459.² The Department has specifically ruled that per channel programming costs are confidential information and exempt from public disclosure under G.L.c.25C, §5. *See, e.g., Time Warner Cable*, CTV 05-4 (June 12, 2006) at 5, note 2; *Time Warner Cable*, CTV 03-4 (Order on Request for Confidential Treatment dated July 1, 2004). *CoxCom, Inc., d/b/a Cox Communications*, D.T.C. 07-10 (May 30, 2008) (Order on Request for Confidential Treatment). *CoxCom, Inc., d/b/a Cox Communications*, DTC 08-8 (June 23, 2009) (Hearing Officer Ruling on Motion for Protective Order). *CoxCom, Inc., d/b/a Cox Communications*, DTC 08-8 (June 23, 2009) (Hearing Officer Ruling on Motion for Protective Order). *CoxCom, Inc., d/b/a Cox Communications*, DTC 09-7 (July 9, 2010) (Hearing Officer

² Cox acknowledges that in the context of ratemaking concerning basic service tier programming costs, the FCC has affirmed the obligation of cable operators to provide the requested information and made the determination of confidentiality of this information subject to state laws. *See, e.g., In the Matter of Tele-Media Company of Virginia*, 10 FCC Rcd. 3862 (DA 95-339) (Released February 24, 1995); *In the Matter of TCI Cablevision of the Metroplex, Inc.*, 10 FCC Rcd. 12210 (DA-95-2275) (Released November 9, 1995) (noting that the cable operator producing programming contract cost information need not associate specific contract information with an identified programmer).

Ruling on Motion for Protective Order). *CoxCom, Inc., d/b/a Cox Communications*, DTC 10-10 (October 12, 2011).

The Department should find that the per channel programming cost information provided by Cox in the sealed hearing transcript constitutes confidential information, based upon its past decisions regarding per channel programming cost information and the information submitted in support of this Motion.

2. The Requested Programming Cost Information is Confidential Commercial Information

Per channel programming cost information constitutes confidential, competitively sensitive and proprietary information. This information is among Cox's and the programmers' most highly confidential information. As the Affidavit of Richard J. Warren attests, programming cost information is highly sensitive commercial information, the public disclosure of which would result in significant commercial and competitive harm. Any disclosure is subject to confidentiality requirements contained in Cox's programming agreements. (Affidavit of Richard J. Warren at paragraphs 3-10).

Also, the requested information is not in the public domain. Cox and the programmers treat such information as highly confidential and competitively sensitive. The requested information is treated as confidential information within Cox and is not generally available within the Company. Only those employees with a need to know have access to this information. In addition, the requested information is not made public in the ordinary course of business and restrictions on any disclosure by Cox are imposed under its programming agreements. (Affidavit of Richard J. Warren at paragraphs 3-10)..

Cox and its programmers maintain strict confidentiality of per channel programming cost information internally and does not make any public disclosure of this information. (Affidavit of Richard J. Warren at paragraphs 3-10).

In other proceedings, the Department has granted an exemption from public disclosure in the case of gas and electricity contract pricing provisions. *Re Verizon New England, Inc., d/b/a Verizon Massachusetts*, D.T.E. 01-31-Phase I (Interlocutory Order on Verizon Massachusetts' Appeal of Hearing Officer Ruling Denying Motion for Protective Treatment)(citing rulings in *Standard of Review for Electric Contracts*, D.P.U. 96-39 at 2, Letter Order dated August 30, 1996), and *Colonial Gas Co.*, D.P.U. 96-18 at 4 (1996). Reasoned consistency requires that confidential treatment be accorded to the requested information. For these reasons, per channel programming cost information should continue to be recognized by the Department as confidential and proprietary information.

3. The Requested Per Channel Cost Information is Competitively Sensitive and its Disclosure Would Result in Substantial Competitive Harm to Cox as well as the Affected Programmers

The per channel cost information requested by the Department during the hearing also is competitively sensitive in nature. Cox would be placed at a competitive disadvantage if this information were made available to its competitors.³ The availability of channel by channel programming cost information would cause significant competitive harm to Cox because information about its cost structure could be used by competitors in fashioning marketing and pricing plans.

Public disclosure of this cost information also would subvert the competitive interests of the Company and stations that conduct negotiations with multiple cable operators. Actual per

³ The Department has acknowledged the competitive environment in which Cox operates.

subscriber per channel payments were discussed on the sealed record. The same channel is offered by Cox in communities in other states under the same programming agreement (Affidavit of Richard J. Warren at paragraphs 7-12).

The Department's legitimate needs to investigate rate filings and the legitimate interests of Cox and programmers in keeping programming cost information confidential can effectively be balanced by granting a protective order with regard to programming cost information on a per subscriber, per channel basis.

For these reasons, Cox has demonstrated that (1) the information produced falls within the categories of information that can be exempted from public disclosure and (2) a need for protection of that information from public disclosure exists in this case.

4. The Request for Protection of Per Subscriber, Per Channel Programming Cost Information is Narrowly Limited to Meet an Established Need for Protection

The information for which a protective order has been requested is limited in nature and necessary to meet the established need for protection. Cox has sought protection only regarding its responses to Department questions during the hearing that involve per channel programming cost information, proprietary, confidential and competitively sensitive information. G.L.c 25C, §5.⁴ See note 1, *supra*. Thus, the third standard applied by the Department is satisfied.

⁴ Cox appreciates the Department's tailoring its request to a narrow form, predicated on its need for confirmation of programming cost information used to derive the Form 1240 Maximum Permitted Rate. *See*, 47 C.F.R. §76.938; *In the Matter of TCI Cablevision of San Jose* 10 FCC Rcd. 12,581 (DA-95-2270)(Released November 15, 1995)(emphasizing that franchising authorities "...should be judicious in their requests for proprietary data, make sure that such information is needed, and narrow their requests, if appropriate, to permit cable operators to submit only the specific information requested.").

C. THE DEPARTMENT'S PROTECTIVE ORDER SHOULD CONTAIN CONTINUING SAFEGUARDS FOR PROTECTING THE SECRECY OF CONFIDENTIAL INFORMATION

The Department should adopt a protective order in this matter to: (1) classify per subscriber, per channel programming cost information as exempt from public disclosure under G.L.c.25C, §5; (2) include specific safeguards against public disclosure of this information; and (3) provide an opportunity to Cox to seek an extension of confidential treatment of this information at the end of a five year period of confidentiality.

The Department should make findings and rulings to confirm that the per subscriber, per channel programming cost information provided by Cox is confidential information that shall be exempt from public disclosure pursuant to G.L.c.25C, §5. Next, the Department should explain how it maintains the confidentiality of information accorded confidential treatment as part of its order. Finally, the Department's order should provide that Cox's programming cost information will be accorded confidential treatment for five (5) years from the date of its production, with an opportunity given to Cox to seek an extension of the period of confidentiality based upon a showing of need for continuing protection against public disclosure.⁵

A five year period of protection is appropriate because of the long-term relationships that have existed between Cox and the programmers and the likelihood of continuing relationships with its programmers. Indeed, programming cost information is maintained as confidential after the term an affiliation agreement expires and a new affiliation agreement is negotiated. (Affidavit

⁵ The Department has employed this protection for a period of five years in other cases. *CoxCom, Inc., d/b/a Cox Communications*, DTC 08—8 (June 23, 2009)(Order on Motion for Protective Order). The Department has adopted measures to enable an affected party to seek a further protection of confidential information in instances where the Department has accorded confidential treatment for a period of years and not in perpetuity. In *Re Verizon New England, Inc., d/b/a Verizon Massachusetts*, D.T.E. 01-31-Phase I (Interlocutory Order on Verizon Massachusetts' Appeal of Hearing Officer Ruling Denying Motion for Protective Treatment), the Department granted confidentiality of information for two years, but provided that after that time, Verizon would have the opportunity to move the Department to further extend such protection accompanied by adequate proof of the need to do so.

of Richard J. Warren at paragraphs 6-7). The increased competition in the cable industry is a further reason for providing a longer period of confidentiality.

While Cox understands that the Department will not afford it notice of any third party request for its per subscriber, per channel programming cost information in advance of its ruling on such a request and also understands that during the period of confidentiality granted the Department will maintain the confidentiality of Cox's information, Cox respectfully requests that in its grant of protection in this matter, the Department include notice to Cox after it rules on any such third party request. Such notice will enable Cox to inform the stations of any requests for public disclosure, as it is obligated to do as a matter of contract. Given that the third party requester may appeal the Department's denial of a public record request, Cox and affected stations have an interest in being aware of any attempts to force public disclosure of what they regard as highly confidential, proprietary and competitively sensitive information.⁶ /

CONCLUSION

For the reasons above, based upon the information provided under seal and supporting affidavit, and its past rulings on this issue, the Department should treat per subscriber, per channel programming cost information provided on a sealed record during the August 12, 2014

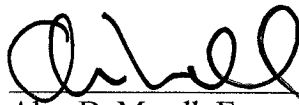
⁶ Cox notes that in protective agreements filed by parties in adjudicatory proceedings, it is commonly provided that in the event that the Department rules that information provided as confidential, but subject to reclassification by the Department at the request of a party, should be made public, the producing party is afforded a reasonable period of time to seek judicial protection against public disclosure before public disclosure is made by the Department.

hearing as confidential information not subject to public disclosure, in accordance with G.L.c.25C, §5, and adopt the protective order terms requested by the Company.

Respectfully submitted,

COXCOM, INC., D/B/A COX COMMUNICATIONS
NEW ENGLAND

By its attorneys,



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Dated: September 4, 2014

**COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND CABLE**

Review of Proposed Basic Service)	
Tier Programming, Equipment and)	Docket No. D.T.C. 14-1
Installation Rates of CoxCom, Inc. d/b/a)	
Cox Communications New England)	

AFFIDAVIT OF RICHARD J. WARREN

Richard J. Warren, who having personally appeared before the undersigned officer, duly authorized by law to administer oaths, having been first duly sworn according to law, deposes and states as follows:

1.

I voluntarily and freely make this affidavit of my own personal knowledge for use as evidence in the above-styled action and for any other use or purpose authorized by law. I am over the age of twenty-one years. I am suffering from no legal disability, and am competent and authorized to make this affidavit and testify to the statements and facts contained herein.

2.

I currently am Executive Vice President, Content Negotiations and Strategy and Associate General Counsel of Turner Network Sales, Inc. ("TNS"), a subsidiary of Turner Broadcasting System, Inc. ("TBS") (TNS and TBS are sometimes hereinafter collectively referred to as "Turner").

3.

TNS, among other things, is responsible for negotiating and administering agreements for the carriage and distribution of TBS's cable television programming services ("affiliation agreements"). In my capacity as Executive Vice President, Content Negotiations and Strategy and Associate General Counsel, I am personally familiar with Turner's policies and practices regarding affiliation agreements, including the price information contained in those agreements.

4.

TNS negotiates affiliation agreements with a number of television programming distributors, including numerous cable operators. These affiliation agreements address the carriage terms of TBS's cable television programming services that appear on the distributors' basic service tier as well as other tiers. TNS receives subscriber fees from distributors under the terms of its affiliation agreements with those distributors. These subscriber fees are negotiated with the distributors.

5.

The information included in Turner's affiliation agreements including price terms is confidential, proprietary and competitively sensitive to Turner and Turner intends to and does treat that information as confidential, proprietary and competitively sensitive. Information contained in Turner's affiliation agreements is not made available to the public. In addition, information contained in Turner's affiliation agreements is not disclosed to anyone other than employees and agents of Turner and TBS's parent who have a reason to

have access to the information, and the distributor with which Turner has entered into the agreement. Each of Turner's affiliation agreements contain a confidentiality provision that prohibits the public disclosure of any information contained in the affiliation agreement. Turner strictly maintains the confidentiality of the information contained in the affiliation agreements and takes steps to protect the confidentiality of that information from public disclosure.

6.

Additionally, the information contained in Turner's affiliation agreements, including price information for each programming service, is maintained as confidential after the term of an affiliation agreement expires and a new affiliation agreement is negotiated.

7.

The information contained in Turner's affiliation agreements, including the price information, has unique value to Turner. In particular, the terms of Turner's affiliation agreements with specific distributors are the subject of negotiation, and Turner derives value from the unique formulation of the terms contained in the affiliation agreements, including price terms.

8.

Public disclosure of the price terms for TBS's programming services would result in substantial harm to Turner's competitive position in the marketplace and would provide substantial benefit to Turner's competitors and to distributors with which Turner negotiates its affiliation agreements.

9.

Among other things, public disclosure of price terms in TBS's affiliation agreements would aid distributors in their negotiation of the terms contained in affiliation agreements regarding the carriage of specific programming services. Such disclosure also would aid other programmers with which Turner competes for access to a distributor's platform.

10.

Public disclosure of the information contained in Turner's affiliation agreements would impair Turner's ability to negotiate terms in its affiliation agreements with individual distributors now and in the future.

11.

Given the ongoing need for confidential treatment of price information for each of Turner's programming services, it is my good faith belief that the information provided by Cox to the Department under seal should remain confidential on an ongoing basis until such time as Cox and Turner mutually agree that such confidential treatment is no longer necessary. At a minimum, it is critical that Cox be afforded an opportunity to seek an extension of any confidential treatment granted by the Department for a period of years.

12.

I am aware that the Department has requested that Cox provide pertinent pricing information for each programming service included in Cox's basic service tier offered in Holland, Massachusetts. Certain of Turner's programming services are provided, not only to Cox subscribers in Holland, but also to Cox subscribers located in other communities in other states as well as to other distributors and their subscribers within and outside of

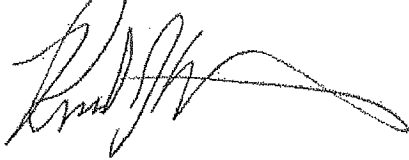
Massachusetts. I am aware of the information provided by Cox to the Department under seal and do not believe that any portion of that information can be released publicly without causing substantial harm to Turner.

13.

In a prior proceeding by the Department, Review of Proposed Basic Service Tier Programming, Equipment and Installation Rates of CoxCom, LLC d/b/a Cox Communications New England, Docket No. D.T.C. 12-1, the Hearing Officer afforded ongoing confidential treatment to the same type of information being requested in the instant matter.

Further Affiant sayeth not.

This ~~20th~~ day of August, 2014



Sworn and scribed before me this 20 day of August, 2014

Susan T. Duncan

Notary Public

My commission expires: 9/15/17

