



COMMONWEALTH OF MASSACHUSETTS
OFFICE OF CONSUMER AFFAIRS AND BUSINESS REGULATION

**DEPARTMENT OF
TELECOMMUNICATIONS & ENERGY
Cable Television Division**

CTV 03-4

Review by the Cable Television Division of the Department of Telecommunications and Energy of Federal Communications Commission Forms 1240 and 1205 filed by Time Warner Cable, Inc.

ORDER ON REQUEST FOR CONFIDENTIAL TREATMENT

APPEARANCES: Nancy P. Karm, Vice President, Finance
Peter Taubkin, Vice President of Gov. Relations & Public Affairs
Time Warner Cable - Albany Division
1021 High Bridge Road
Schenectady, NY 12303

FOR: TIME WARNER CABLE
Petitioner

I. INTRODUCTION

On October 2, 2003, Time Warner Entertainment-Advance/Newhouse Partnership d/b/a Time Warner Cable (“Time Warner” or “the Company”) filed with the Cable Television Division (“Cable Division”) of the Department of Telecommunications and Energy (“Department”) a Federal Communications Commission (“FCC”) Form 1240 proposing basic service tier rates for the Pittsfield system, which includes the communities of Dalton, Pittsfield, and Richmond. As part of the Cable Division’s investigation, we issued information requests to the Company. Time Warner provided responses to the information requests on May 5, 2004, and requested confidential treatment for its response to Information Request 3 (“Motion”). At the Cable Division’s request, on June 24, 2004, the Company provided supplemental information as to its Motion (“Supplement to Motion”).

In Information Request 3, the Cable Division sought information concerning the operating expenses of Capital News 9, a local news channel for which Time Warner claimed programming costs on its FCC Form 1240. Time Warner contends that the response to Information Request 3 should be kept confidential because disclosure of the information would benefit competing media outlets by outlining the resources invested in the Company’s services as well as the costs incurred (Supplement to Motion at 2). Time Warner has requested that the information be kept confidential indefinitely (id.).

II. STANDARD OF REVIEW

Information filed with the Department or its Divisions may be protected from public disclosure pursuant to G.L. c. 25, § 5D, 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 upon 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.

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

G.L. c. 25, § 5D establishes a three-part standard for determining whether, and to what extent, information filed by a party in the course of a Department proceeding may be protected from public disclosure. First, the information for which protection is sought must constitute

“trade secrets, [or] confidential, competitively sensitive or other proprietary information;” second, the party seeking protection 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; and third, even where a party proves such need, the Department may protect 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. 25, § 5D.

Previous Department applications of the standard set forth in G.L. c. 25, § 5D reflect the narrow scope of this exemption. See Boston Edison Company: Private Fuel Storage Limited Liability Corporation, D.P.U. 96-113, at 4, Hearing Officer Ruling (March 18, 1997) (exemption denied with respect to the terms and conditions of the requesting party's Limited Liability Company Agreement, notwithstanding requesting party's assertion that such terms were competitively sensitive); see also, Standard of Review for Electric Contracts, D.P.U. 96-39, at 2, Letter Order (August 30, 1996) (Department will grant exemption for electricity contract prices, but "[p]roponents will face a more difficult task of overcoming the statutory presumption against the disclosure of other [contract] terms, such as the identity of the customer"); Colonial Gas Company, D.P.U. 96-18, at 4 (1996) (all requests for exemption of terms and conditions of gas supply contracts from public disclosure denied, except for those terms pertaining to pricing).

III. ANALYSIS

In support of its Motion, Time Warner states that potential customers choosing between competing media outlets will look at numerous factors such as quality, accurateness, timeliness, completeness, presentation, and distribution (Supplement to Motion at 1). Time Warner contends that its ability to provide a product that addresses these evaluating factors is directly driven by the resources invested (id.). As such, the Company argues that disclosure of the information would benefit competing media outlets by outlining how the limited resources are applied by Time Warner (id. at 2). Specifically, Time Warner notes that Capital News 9, as a 24-hour local news channel dedicated to providing local news and information, competes aggressively with other media outlets that also provide local news and information (id.). Time Warner argues that information such as employee compensation and marketing expenses would offer a level of detail into the Company's operation that could prove detrimental (id.).

Massachusetts law establishes the presumption that the information for which confidential protection is sought is public information, and the burden is on Time Warner to

provide the need for such protection.¹ G.L. c. 25, § 5D. In considering whether Time Warner met its burden, we note that the information included in the response to Information Request 3 is broad in nature. For example, Time Warner argues that the competing media outlets would be able to use the information to lure employees or otherwise disrupt the Company's workforce (Supplement to Motion at 2). However, the employee compensation listed in the response to Information Request 3 is not broken down by position but rather the total salary expense for the projected and true-up periods is included as a lump sum. Further, there is no indication of the number of staff employed at the Capital News 9 location. Therefore, it is not entirely clear to us that disclosure of such salary information could provide beneficial to a competing media outlet. Nevertheless, we recognize that additional data, such as staff listings and work schedules, that would make sense of this information may be readily available to competitors through other means.

Moreover, with respect to the release of certain information relating to marketing and advertising, Time Warner convincingly argues that disclosure would allow other media outlets to devise competing marketing and advertising plans, especially as those media outlets compete for advertising clients within the limited area of the Pittsfield system (*id.*). Time Warner testified that advertising space available on Capital News 9 is 100 percent local, thus demonstrating the importance of its need to compete for a limited number of advertising clients (Tr. at 45). In addition, we note that there are no intervenors in this proceeding.

Therefore, on balance, we find that Time Warner has provided sufficient information to establish that release of the Company's responses to Information Request 3 may prove detrimental to the Company. Accordingly, we grant the Company's request that the information be protected from public disclosure. However, Massachusetts law allows the Cable Division to grant such protection only to the extent necessary to avoid competitive harm. G.L. c. 25, § 5D. Because it is unlikely that these programming expenses will remain constant or that they will continue to be competitively sensitive for an indefinite length of time, we grant the information confidential treatment for a length of five years from the date of this Order. At that time, the Company may renew its request for confidential treatment.

¹ In the supplement to its Motion, Time Warner notes that it has been agreeable to making information available to the Cable Division with the understanding that it be returned to the Company following review (Supplement to Motion at 2). Once filed with the Cable Division, information remains in the Cable Division's custody regardless of whether that information is considered a public record or has been granted confidential treatment.

IV. ORDER

Upon due notice, hearing and consideration, it is hereby ordered: Time Warner's Request for Confidential Treatment for the Company's response to Information Request 3 is granted for five years from the date of this Order.

By Order of the
Department of Telecommunications and Energy
Cable Television Division

/s/ Alicia C. Matthews
Alicia C. Matthews
Director

Issued: July 1, 2004