

**STATE OF NEW YORK
DEPARTMENT OF PUBLIC SERVICE**

Joint Petition of)	
)	
TIME WARNER CABLE INC.)	
)	
and)	
)	Case 14-M-0183
COMCAST CORPORATION)	
)	
For Approval of a Holding Company Level)	
Transfer of Control)	
)	

**TIME WARNER CABLE APPEAL TO SECRETARY BURGESS
REGARDING THE DETERMINATION ON SECOND REMAND ISSUED
BY ADMINISTRATIVE LAW JUDGE DAVID PRESTEMON**

Time Warner Cable Inc. (“Time Warner Cable”) by and through its undersigned counsel, respectfully submits this appeal to the December 2, 2014 determination on remand from the Secretary concerning exception from disclosure of certain records requested by Mr. Norlander. Administrative Law Judge, David L. Prestemon, specified that review of the determination could be sought by filing a written appeal with the Secretary of the Commission by December 12, 2014. Time Warner Cable respectfully appeals Judge Prestemon’s determination that the build-out information in Exhibit 46 should be publicly disclosed, and hereby requests that the trade secret deployment and build-out information be granted exception from disclosure.

I. Build-Out Information Should be Excepted from Disclosure

Judge Prestemon determined that the list of “New York State Rural Builds,” Exhibit 46, is a compilation of information that confers competitive advantage on the Companies, and, therefore, constitutes a trade secret that should be excepted from disclosure. Judge Prestemon

found that “advanced disclosure of a planned Time Warner project could diminish the Company’s competitive advantage by allowing a competitor to, say, target marketing efforts specifically at customers in the affected locality. Keeping the project confidential as long as possible helps preserve that advantage.” These statements show that Judge Prestemon agreed that the information met the trade secret standard.

However, Judge Prestemon then attempted to delineate that build-out information should not be held confidential after construction commenced or completed. Judge Prestemon referenced that one project on the list of rural build-outs had been included in a public filing submitted to the Commission as well as the subject of a local newspaper article. Judge Prestemon, therefore, concluded that only projects that had not been initiated, or otherwise disclosed publicly, would be entitled to protection from disclosure. However, such conclusions do not accurately represent when and what type of information is known to the general public or competitors, and should not be used as a basis to disclose the confidential, trade secret build-out information. Moreover, this information would be difficult and costly for a competitor to compile, such that disclosure would significantly harm Time Warner Cable’s competitive advantage.

A. Commencement of Construction Does Not Publicly Disclose Build-Out Details

Judge Prestemon erroneously declared that once actual construction begins or is completed, the project is within the public domain. Whether a build-out has commenced or been completed is not an accurate measure of whether the project information is publicly disclosed. As more fully detailed in the declaration of Noel Dempsey, granular information found in the list of build-outs is not the type or kind of information that would be known, available, or easily ascertainable outside of the business, or otherwise publicly disclosed. The list includes the

location, total miles, number of passings, and estimated completion date for each build-out project. As Judge Prestemon noted, this information could be used by competitors to target marketing efforts in the affected locality, and should not be publicly disclosed. Here, however, simply because physical construction begins on a project does not mean that the public or competitors would be aware of who is completing the project, the geographic extent of the project, the number of passings, or the estimated completion date.

Time Warner Cable typically uses subcontractors to complete the physical construction. Therefore, the vehicles used to construct the build-out are often not Time Warner Cable owned vehicles. While Time Warner Cable generally requires contractors to display signs stating “Contractor for Time Warner Cable,” the existence of construction vehicles on the side of a road would not convey to an average member of the public or a competitor that Time Warner Cable was engaged in construction of new facilities, as opposed to repair, maintenance, or some other activity. In similar fashion, if a Time Warner Cable vehicle was present on the side of a road, it would not mean that a new build-out was being constructed as the vehicle could be performing any number of tasks that would not be known to the public. As stated in the declaration, “[e]ven if a passer-by noticed that Time Warner Cable personnel were installing new cables and equipment, it would be impossible to discern from that observation any detailed information regarding the build-out plans and specifications such as the number of potential customers that the build-out would pass or the estimated date of completion or operation.” Dempsey Declaration at 2. Therefore, physical construction of a build-out does not convey to others outside of the business or the public the type of granular information found in Exhibit 46. As such, trade secret information on the build-outs should not be subject to disclosure once construction is initiated.

B. Completion of Construction Does Not Publicly Disclose Build-Out Details

Just as the act of physical construction does not, in and of itself, reveal granular information regarding a build-out, once the build-out is complete, such information is still not known outside the business, readily ascertainable, easily reproduced, or otherwise publicly disclosed. While some discrete portions of the information will be publicly available through direct marketing, word of mouth, or general knowledge at an unknown, future point in time, once a project is completed, specific information regarding the build-out is not exposed such that the information is no longer a secret.

Time Warner Cable constructs certain build-outs on a speculative basis to attract business-class customers. In those cases, Time Warner Cable does not solicit the businesses until the new build-out is completed, tested, and confirmed to be working. Therefore, to allow competitors to have access to this information before Time Warner Cable has had a chance to market customers for which it speculatively built the line would not only negate any competitive advantage, it would allow its competitors to reap the benefits of Time Warner Cable's investment, causing substantial competitive and financial injury to Time Warner Cable.

C. Mere Existence of a Build-Out Does Not Publicly Disclose its Details

Judge Prestemon indicated that a project is considered publicly disclosed if the project is named in a filing with the Commission or in a newspaper article. However, publication in those types of sources does not reveal the granular information contained in Exhibit 46.

Proposed build-outs are often referenced in or included as a condition in franchise agreements executed with local municipalities. However, the exact geographic location, the full extent of the build-out, and the number of passings are not typically included in franchise

documents submitted to the Commission as part of a public filing. Therefore, that a proposed build-out is referenced in a franchise agreement or other similar filing does not upset the secrecy of the specific details of that build-out.

It is assumed that Judge Prestemon's reference to a project noted in an Albany Times Union newspaper article is in regards to Time Warner Cable's participation in Connect NY and Time Warner Cable's commitment to statewide broadband expansion. While Judge Prestemon implies otherwise, mere reference to the existence of a project in a public source, such as a newspaper, does not rise to the level of public disclosure, especially where little detail is disclosed. And it certainly does not indicate that the granular information sought to be protected would be publicly available.

E. The Information Would Be Difficult and Costly for a Competitor to Compile

The compilation of information on all the Time Warner Cable New York deployments, distances, and passings into one document would be of enormous value to a competitor. This information could not be developed independently by competitors, and any estimates developed through publicly available data or data from third-party sources, if possible at all, would be expensive and burdensome to assemble, and less accurate than the data provided in Exhibit 46. As previously found in Judge Prestemon's initial determination, the value of information in a compilation is "obvious." "Although the information might be acquired by independent effort, the value to a competitor here, as in Encore, is in being able to avoid the time and expense of such research." July 22, 2014 Determination at 15. Therefore, disclosure of the compilation of information on the New York Rural Builds would cause substantial competitive injury to Time Warner Cable, and should be granted exception from disclosure.

II. Conclusion

Contrary to Judge Prestemon's finding that continued non-disclosure of initiated or completed projects serves no further strategic purpose with respect to the competitive position of Time Warner Cable, it is clear that release of trade secret information on initiated or completed build-outs would severely diminish its competitive advantage, especially when the information is not known outside the business. Moreover, the completion date of a build-out, the extent of the deployment, and the number of passings is not information that would be publicly ascertainable or made publicly available once a build-out is complete, regardless of whether the public was aware that a project was completed or if the existence of a project was publicly disclosed. Thus, the trade secret status of build-out information remains intact far beyond the construction or completion of the project, and is not disturbed by general reference in a public source. Finally, disclosure of the compilation of information on the rural build-outs could not be recreated without significant effort and expense, thereby reinforcing the value of the information to competitors and the potential for competitive harm should the compilation of information be disclosed. Therefore, the information contained in Exhibit 46 should continue to be excepted from public disclosure.

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