

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

In the matter of)
)
Altrio Communications, Inc.)
)
Request for Confidentiality for Information)
Submitted on Forms 325 for the Year 2003)
)

ORDER

Adopted: June 29, 2004

Released: June 30, 2004

By the Chief, Media Bureau:

I. INTRODUCTION

1. We have before us a Request for Confidentiality (“Request”) in which Altrio Communications, Inc., (“Altrio”) seeks protection from disclosure to the public for information submitted for its systems in 2003 in various fields of FCC Form 325, the Annual Report of Cable of Systems. We deny Altrio’s request in part and grant it in part.

II. BACKGROUND

2. Cable television system operators are required to submit a completed Form 325 within 60 days of receiving the form.¹ The forms are sent annually to all systems that have 20,000 or more subscribers and a sample of systems that have fewer than 20,000 subscribers. Submitted Forms 325 are routinely available to the public in the Commission’s Reference Information Center.² Cognizant of potentially sensitive information, cable operators, however, may request that the information, or portions of the information, submitted on Form 325 not be made routinely available to the public.³ A request for confidentiality must specify the reasons the information should be withheld and address nine specific issues.⁴ Six of these issues are most relevant to the case at hand: 1) the degree to which the information is financial or commercial or is privileged, 2) the degree to which the information concerns a service that is subject to competition, 3) how disclosure of the information would result in substantial competitive harm, 4) measures taken by the submitting party to prevent unauthorized disclosure, 5) whether the information is available to the public and the extent of any previous disclosure to third parties, and 6) justification for the period during which the submitting party asserts disclosure should be withheld.⁵ The request must show by a preponderance of the evidence that non-disclosure is consistent with the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552.⁶ Should the request be granted, the status of the materials

¹ 47 C.F.R. § 76.403.

² *Id.* § 0.453(a)(2)(v)(C).

³ *Id.* § 0.459.

⁴ *Id.* § 0.459(b)

⁵ *Id.* § 0.459(b)(3) - (8).

⁶ *Id.* § 0.459(d)(2).

becomes the same as materials not routinely available to the public. Then, a person seeking access to the information must file a request for inspection pursuant to the FOIA procedures.⁷

3. Altrio submitted the Request with its completed Forms 325 on September 15, 2003, identifying the portion of the submitted materials to which the Request applies.⁸ The Request seeks confidentiality for information provided in the following fields of the form: II.2.a – number of subscribers, II.2.b – number of potential subscribers, II.2.c – number of cable modem subscribers, II.2.d – number of telephony subscribers, II.3 – number of leased cable modems and the numbers of leased units of each of the various types of set-top boxes, II.4.a. – length of coaxial cable, II.4.b – length of fiber optic plant, and II.4.c – number of fiber optic nodes and average number of subscribers per node. Altrio informs us that it has never allowed this information to be distributed to any person or government agency.⁹ Further, Altrio states that it has negotiated with franchising authorities the right for them to inspect Altrio's records, but they may not require submission in writing of this information.¹⁰ Altrio also states that it limits the internal circulation of the data to only those with a need-to-know.¹¹ Altrio requests that the information be permanently kept confidential.

III. DISCUSSION

4. Under Exemption 4 of the FOIA, 5 U.S.C. § 552(b)(4),¹² financial or commercial information may be withheld from disclosure if disclosure is likely to cause substantial harm to the competitive position of the party from whom it was obtained.¹³ With respect to requests for confidentiality under the Commission's rules, "conclusory and generalized allegations" are not sufficient.¹⁴ Thus, the Commission's rules specify the types of information that should be included in a request to substantiate a claim of confidentiality.¹⁵ The information on Form 325 is commercial in nature.

5. To determine whether this commercial information should be kept confidential, we must determine whether there is preponderance of the evidence that shows that disclosure of the information will cause Altrio substantial competitive harm. That Altrio is itself protective of the information in question is significant, but not dispositive.¹⁶ Resolution of the issue in favor of Altrio requires that they show "(1) they actually face competition, and (2) substantial competitive injury would likely result from disclosure."¹⁷ Altrio argues that it is competing with incumbent cable television systems and telephone carriers to provide voice, video, and high speed data services. As a direct competitor to incumbent cable

⁷ *Id.* § 0.459(h). FOIA procedures are in Section 0.461 of the Commission's Rules. *Id.* § 0.461.

⁸ *Id.* § 0.459(a).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² Request at 1.

¹³ *Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, 13 FCC Rcd 24816, 24819 (1998) (citing *National Parks and Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974)) (Confidentiality Order).

¹⁴ *Letter from Kathleen M. H. Wallman to John L. McGrew*, 10 FCC Rcd 10574, 10574 (1995) (*McGrew Letter*).

¹⁵ *Confidentiality Order* at 24826-27.

¹⁶ *See National Parks and Conservation Association v. Morton*, 498 F.2d 765, 767 (D.C. Cir. 1974) (*National Parks I*).

¹⁷ *National Parks and Conservation Association v. Kleppe*, 547 F.2d 673 (D.C. Cir. 1976) (*National Parks II*).

systems, there is no question that Altrio is in a competitive market. Whether disclosure of the information will result in substantial competitive injury focuses on two considerations: “(1) the commercial value of the requested information, and (2) the cost of acquiring the information through other means.”¹⁸

6. As an initial matter, in connection with the *Local Competition and Broadband Reporting Order*, the Commission decided not to publish information relating to the number of Internet and telephony subscribers collected on the FCC Form 477, Local Competition and Broadband Reporting Form.¹⁹ Consistent with that decision, we will not release the same type of same data collected on Form 325 (numbers of cable modem subscribers (II.2.c.) and telephony subscribers (II.2.d.)).

7. Some of the other information for which Altrio seeks confidentiality is sufficiently available or can be deduced from other sources such that disclosure in this forum is unlikely to result in substantial competitive injury. A reasonable estimate of homes passed (II.2.b) can be calculated from various public sources, including industry publications and general population statistics.

8. As to the numbers of leased cable modems and the number of leased navigation devices (II.3), Altrio has not established to which competitors this information may be of commercial value. Altrio states that release of this information would negatively affect its relationship with equipment vendors.²⁰ Altrio argues that, if equipment vendors were to obtain this information, they might be able to negotiate different price points to reflect the decrease or increase in equipment counts. Altrio does not, however, establish the likelihood that this will happen or its direct result in competitive injury. We will not treat this information as confidential.

9. Data on the amount of coaxial cable (II.4.a), the amount of fiber optic cable (II.4.b.) and number of fiber optic nodes and number of subscribers per node (II.4.c.) arguably could provide information on systems that are operating at the capacity for existing hardware and would have a high marginal cost for adding customers or services. We believe, further, that disclosure of this information would result in harm to Altrio’s competitive position. We, therefore, conclude that Altrio has carried its burden of proof that this information should be treated as confidential.

10. Altrio asks, “for the following reasons,”²¹ that we not disclose the information covered by the request ever.²² Unfortunately, no reasons follow. We do not believe any information should be kept confidential forever; we will grant three years.

IV. CONCLUSION

11. Altrio has not met the burden of persuasion to establish confidentiality for all of the information covered by its request. Altrio has not established how all of the information on Form 325 for which its requests confidentiality would be of use to competitors or how substantial harm to its competitive position would occur by disclosure. We, therefore, deny Altrio the confidentiality it requests, except with respect to the information regarding the numbers of cable modem subscribers, the numbers of telephony subscribers, the amount of coaxial cable, the amount of fiber optic cable, and the number of fiber optic nodes and subscribers per node. For the categories of information on the Form 325 that we grant confidentiality, we will not disclose the information for a period of three years from the date it was collected, June 30, 2003.

¹⁸ *Worthington Compressors, Inc. v. Costle*, 662 F.2d 45, 51 (D.C. Cir. 1981).

¹⁹ *Local Competition and Broadband Reporting*, 15 FCC Rcd 7717, 7760 (2000).

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 4.

V. ORDERING CLAUSES

12. Accordingly, IT IS ORDERED, pursuant to Sections 0.459(d)(2) of the Commission's Rules, 47 C.F.R. § 0.459(d)(2), that the request for CONFIDENTIALITY by Altrio Communications, Inc., IS DENIED IN PART AND GRANTED IN PART.

FEDERAL COMMUNICATIONS COMMISSION

W. Kenneth Ferree
Chief, Media Bureau