

STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Case No. 18-0491-PET

Joint petition of Champlain Broadband, LLC, City of Burlington d/b/a Burlington Telecom, and Blue Water Holdings LLC for approvals, pursuant to 30 V.S.A. §§ 109, 231, and 504; 47 U.S.C. § 214(e); and Section 438(c)(1) of the City of Burlington Charter	
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Order entered: 08/01/2018

ORDER GRANTING IN PART AND DENYING IN PART MOTION FOR CONFIDENTIAL TREATMENT OF TWO EXHIBITS TO PREFILED TESTIMONY

I. INTRODUCTION

In this Order, the Vermont Public Utility Commission grants in part and denies in part the motion of Champlain Broadband LLC (“Champlain”) requesting a protective order providing confidential treatment of two exhibits to the prefiled testimony of Champlain’s treasurer, Gesumino A. Agostino.

On February 26, 2018, Champlain filed its motion with the Commission for a protective order to provide confidential treatment of the two exhibits. The two exhibits were filed in a sealed envelope with the Commission on the same date.

On March 29, 2018, the Vermont Department of Public Service (“Department”) filed a response to the motion stating that the Department does not oppose Champlain’s motion for confidential treatment on the basis that Champlain has made a *prima facie* showing that the two exhibits warrant confidential treatment. No other party filed a response to Champlain’s motion.¹

The two exhibits for which Champlain seeks a protective order are exhibits Champlain GA-2 and GA-3. Exhibit GA-2 is an eleven-year plan prepared by current management of Burlington Telecom, and exhibit GA-3 presents financial information related to the historic operating results of Burlington Telecom for fiscal years 2015 through 2018. Champlain did not

¹ The Burlington Access Management Organizations and the six citizen intervenors were not granted party status in this case until April 11 and May 9, 2018, respectively.

file redacted public versions of the exhibits because it maintains that a redacted version of either exhibit would not provide meaningful information.

II. POSITIONS OF PARTIES

Champlain's Motion and Averments

Champlain seeks a protective order for confidential treatment of both exhibits for an indefinite duration. Champlain also requests confidential treatment of anticipated future filings such as a proposal for decision that includes information from the exhibits.

Champlain states that the two exhibits are subject to a non-disclosure agreement with the City of Burlington (“City”) and that Champlain is required to take appropriate measures to prevent their disclosure.² Any external disclosure Champlain makes is subject to this agreement.³ Champlain also “anticipates that the causes giving rise to its need for the instant Protective Order will not be such that it can provide [the Commission] with authorization to release the information from the terms of the proposed Protective Order at a future time.”⁴ In support of its motion, Champlain asserts that the exhibits consist mostly of proprietary business information that “could be used by a third party wishing to compete in this already highly-competitive market.”⁵

In the case of exhibit GA-2, Champlain notes that it contains financial forecasts of the business, including details about operating strategies, market growth, market expansion opportunities, residential and commercial customer growth, capital expenditures for maintenance and market expansion, customer growth, general manager compensation, market assessments, and other information that Champlain maintains is proprietary and highly commercially sensitive. Champlain asserts that “public disclosure of any financial information about either past performance or future plans would give a substantial unfair advantage to Burlington Telecom’s competitors in the Burlington market.”⁶

Exhibit GA-3 contains financial information concerning Burlington Telecom’s historic operating results from 2015 through 2018. Champlain states that the information in this exhibit

² Champlain’s motion for confidential treatment at 2 (¶ 3).

³ *Id.* at 5 (¶ 8).

⁴ *Id.* at 5 (¶ 9).

⁵ *Id.* at 2 (¶ 4).

⁶ *Id.* at 3 (¶ 5).

is “proprietary and highly competitive sensitive” and that “public disclosure of such recent financial information would give a substantial unfair advantage to Burlington Telecom’s competitors in the Burlington market.”⁷

Department’s Response to Champlain’s Motion

The Department does not oppose Champlain’s motion and contends that Champlain has made a *prima facie* showing that confidential treatment of both exhibits is warranted. The Department states that: the exhibits “detail both historical financial information that is not currently subject to public inspection and planning documents that include detailed financial information and business strategies for Burlington Telecom for the next eleven years;” Burlington Telecom provides telecommunications, cable television, and internet access services in a city in which “comparable services are provided by numerous competitors;” and making these documents publicly available could cause cognizable harm because of their potential use by competitors to gain a business advantage. The Department also does not believe it is necessary for Champlain to file redacted public versions of the exhibits because Mr. Agostino’s testimony adequately describes the content of the exhibits.

III. DISCUSSION

To promote full understanding of the basis for its decisions, the Commission has actively taken steps to limit the amount of information subject to protective orders. The Commission has encouraged parties to remove material from that protection to the extent possible. The Commission requires petitioners seeking a protective order to submit a document-specific (or information-specific) averment of the basis for keeping confidential any document (or information) that they wish to be kept under seal. This arrangement appropriately places a heavy burden on the party seeking confidentiality to justify that decision. It also ensures that counsel for the party seeking confidentiality has actually reviewed and considered the relevant confidentiality factors, as they relate to the specific document or information at issue.⁸

⁷ *Id.* at 4 (¶ 6).

⁸ Case 6545, *Investigation into General Order No. 45 Notice filed by Vermont Yankee Nuclear Power Corporation re: proposed sale of Vermont Yankee Nuclear Power Station to Entergy Nuclear Vermont Yankee, LLC*, Order of 11/9/01 at 5-6.

Generally, the Commission resolves disputes about information only when there is a disagreement about its confidential nature.⁹ However, even when the motion is uncontested (as in this case), the Commission will review the motion and supporting averment or averments to ensure that the moving party has presented a *prima facie* case for keeping the document or information under seal. In determining whether to protect allegedly confidential information, the Commission considers three issues:

- (1) Is the matter sought to be protected a trade secret or other confidential research, development, or commercial information which should be protected?
- (2) Would disclosure of such information cause a cognizable harm sufficient to warrant a protective order?
- (3) Has the party seeking protection shown “good cause” for invoking the Commission’s protection?¹⁰

Champlain seeks a protective order of indefinite duration that would provide confidential treatment for the entirety of the two exhibits. The two exhibits relate to the cable television, telephone, and internet access business of Burlington Telecom and are subject to a non-disclosure agreement between Champlain and the City. It appears from the motion that Champlain is contractually obligated to take appropriate measures to prevent public disclosure of the exhibits (which presumably would include the filing of a motion for a protective order in this case). Although Champlain does not assert the non-disclosure agreement as the sole or principal basis for its request for confidential treatment of the exhibits, it is important to note that, historically, the Commission has given no weight to contractual provisions that call for confidential treatment. Contracting parties cannot “arrange merely through their own agreements to shield” information from public view.¹¹ Instead, the Commission assesses the merits of confidentiality requests without regard to any contractual arrangements.

Exhibit GA-2 is a five-page document titled “Burlington Telecom Eleven Year Plan” that includes, among other things, projections of future results of Burlington Telecom through fiscal year 2028, plans for the business, growth opportunities, as well as certain current and historical information about the business. Prior Commission orders provide a clear basis to support

⁹ *Id.* at 6.

¹⁰ *See, e.g., Case 6545, Order of 3/29/02 at 2.*

¹¹ *Case 7670, Petition of twenty Vermont utilities for authorization for purchase of electricity of H.Q. Energy Services (U.S.), Inc., Protective Order of 12/14/10 at 4.*

confidential treatment of management's projections of future operating results¹² as well as projections of average revenue per unit ("ARPU"), subscriber numbers, and capital expenditures.¹³ Accordingly, the Commission concludes that there is a sufficient *prima facie* basis for the confidential treatment and redaction of at least the following information from exhibit GA-2:

- all numbers and percentages on page 4 except under the first column;
- all numbers and percentages on page 5 except under the first two columns;
- any specific numerical reference to the projected future operating results on pages 1 to 3; and
- any numerical reference to projected future ARPU, subscriber numbers, or capital expenditures on pages 1 to 3.

With respect to all other information contained in exhibit GA-2, the Commission concludes that Champlain has not met the "heavy burden" appropriately placed on it to justify confidential treatment. The Commission disagrees with both Champlain and the Department that confidential treatment for the entirety of this exhibit is warranted.

Champlain makes only the general assertion in its motion that "public disclosure of any financial information about either past performance or future plans would give a substantial unfair advantage to Burlington Telecom's competitors in the Burlington market." Champlain's averment states only that the exhibit contains "proprietary sensitive commercial information," and its motion provides only general and non-specific reasons to support its assertion that both exhibits should be afforded confidential treatment.¹⁴ There is no explanation in either the motion or the averments of how various information in the exhibit could be used by competitors to cause cognizable harm that would be sufficient to warrant a protective order.

¹² See, e.g., Case 8301, *In Re: Renewal of the CPG of Comcast*, Protective Order of 8/4/16. In that Order, the Commission issued a protective order providing confidential treatment for a period of two years to an exhibit filed by Comcast in September 2015 that consisted of projected financial results for calendar years 2015 through 2017

¹³ Case 7044, *Petition of City of Burlington, d/b/a Burlington Telecom*, Protective Order of 9/5/14 at 4 & 6-7. In that Order, the Commission granted confidential treatment for this information for a period of up to five years. The City in that case provided information-specific support for its assertions of cognizable harm resulting from disclosure beyond the general assertion that public disclosure would give a substantial unfair advantage to Burlington Telecom's competitors. For example, the City's averment contended that disclosure of the ARPU "would provide competitors with a revenue figure with which to budget to attract customers away from [Burlington Telecom]." *Id.* at 4.

¹⁴ See Champlain's motion for confidential treatment at 5-6 (¶ 11).

To the extent that Champlain continues to seek confidential treatment for any information in exhibit GA-2 beyond the items identified in the bulleted list above, the Commission will require Champlain within 15 days of this Order to file specific signed averments with respect to any such information that clearly explain the cognizable harm that the business could suffer if such information became public.

Exhibit GA-3 is a one-page document titled “Burlington Telecom Historical Operating Results” that includes financial information related to Burlington Telecom’s operations in recent years. Champlain asserts that “[t]his exhibit discloses confidential financial information from 2015 through to 2018.”¹⁵ Champlain asserts that “public disclosure of such recent financial information would give a substantial unfair advantage to Burlington Telecom’s competitors in the Burlington market.”¹⁶ However, Champlain again provides no explanation in either the motion or the unsigned averment about how the financial information in the exhibit could be used by competitors to cause cognizable harm to the business.

The City is required under state law to file annual reports for Burlington Telecom each year that provide operating results for the previous calendar year. On April 13, 2018, the City filed annual reports, which are publicly available on ePUC, that include detailed information about 2017 operating results for Burlington Telecom’s cable business (Case no. 2018-Cable-AR-04801) and its telecommunications business (Case no. 2018-T-AR-04798). In 2017, similar information about operating results for 2016 was provided in the publicly available annual reports for Burlington Telecom (Case nos. 2017-Cable-AR-00761 and 2017-T-AR-01778). Although presented on a fiscal rather than a calendar-year basis and including less detail, the summary financial results contained in exhibit AG-3 provide information that appears, for the most part, to be the same as that presented in or that which may largely be derived with simple arithmetic from public documents. The public availability of such information about operating results provides the Commission with a sufficient basis to deny Champlain’s motion for a protective order as it relates to exhibit GA-3.

Furthermore, Champlain does not reference any Commission Order in which the Commission granted confidential treatment to prefiled evidence containing operating results of a

¹⁵ Champlain’s motion for confidential treatment at 4 (¶ 6).

¹⁶ *Id.*

company currently conducting a business in Vermont for which a certificate of public good (“CPG”) is required. The only order cited by Champlain involves a protective order related to projections of future operating results.¹⁷

As a general matter, there is and should be a much greater threshold for the confidential treatment of information concerning companies engaged in public service businesses. It is not enough that the Commission and parties in a case (including the Department) have access to significant information concerning these companies that may be relevant to a determination by the Commission. The Commission regards it as a matter of great importance that individual members of the public, news organizations, researchers, and others have access to material information about these companies.¹⁸

Champlain should recognize that its plans for Burlington Telecom are a matter of significant public interest, which needs to be carefully weighed against the strength of any demonstration of cognizable harm that may result from public disclosure. We also note that in the 2005 proceeding that resulted in the issuance of a CPG to the City to own and operate Burlington Telecom, substantial evidence about the City’s plans for Burlington Telecom, including projections, was provided without a request for confidential treatment of such information.¹⁹

Finally, Champlain requests confidential treatment of indefinite duration for the exhibits but has not demonstrated good cause for indefinite protection of this information. The Commission seeks to avoid protective orders of indefinite duration whenever possible as these orders impose burdens far into the future on those seeking access to such documents and on the Commission and the State archives to protect documents from public disclosure.

The Commission therefore grants Champlain’s motion for confidential treatment of the information in exhibit GA-2 that is identified in the bulleted list above for a period of only five

¹⁷ Champlain cites the Commission’s Protective Order in Case 8301 that is referenced in note 12 above.

¹⁸ In this case, the Commission has heard or received public comments specifically expressing concern regarding the limited amount of information provided by the joint petitioners about Burlington Telecom. Among the issues identified in comments at the May 9 public hearing in this case was that the joint petitioners should be required to present a current set of financial statements for Burlington Telecom to allow the public to understand the financial condition of the company.

¹⁹ Case 7044, *Petition of City d/b/a Burlington Telecom for CPG to operate a cable television system in Burlington*, Order of 9/13/05. Also, in that case, the most significant potential competitor to Burlington Telecom was granted party status.

years. Any party may make a filing to extend the period of confidential treatment of such information before the expiration of this period if it believes such an extension is warranted.

With respect to any other information in exhibit GA-2 for which Champlain (or the City) continues to seek confidential treatment, the Commission directs Champlain to file within 15 days of the date of this Order supplemental information-specific averments that clearly explain the cognizable harm that the business could suffer if such information became public. This filing shall be accompanied by a public version of exhibit GA-2 that redacts only the information specified in the bulleted list on Page 5 of this Order and in the supplemental averments. Before making these filings, Champlain and the City are directed to review all publicly available information about Burlington Telecom, including information in any filing previously made with the Commission or the Department, and advise the Commission in this filing whether the type of information for which confidentiality is requested has previously been made public by the City. The Commission will consider these filings in determining whether any other information in exhibit GA-2 warrants confidential treatment.

As discussed above, the Commission denies Champlain's motion for confidential treatment of exhibit GA-3. However, the Commission will continue to treat this exhibit as allegedly confidential information and protect it accordingly until the Commission rules on any request by Champlain that the Commission reconsider in whole or in part the denial of confidential treatment for this exhibit, provided Champlain files such a request within 15 days from the date of this Order.

IV. ORDER

IT IS HEREBY ORDERED by the Vermont Public Utility Commission (“Commission”) that:

1. The following information contained in exhibit Champlain GA-2 to the prefiled testimony of Gesumino A. Agostino filed with the Commission on February 26, 2018:

- all numbers and percentages on page 4 of except under the first column;
- all numbers and percentages on page 5 except under the first two columns;
- any specific numerical reference to these projected future operating results on pages 1 to 3; and
- any numerical reference to projected future average revenue per unit, subscriber numbers, or capital expenditures in the future on pages 1 to 3;

shall be protected from public disclosure as set forth in paragraphs a. through f. below.

- a. All testimony, affidavits, transcripts, exhibits, and other documents that are subject to this Order as confidential information, and any testimony or documents that discuss or reveal documents that constitute confidential material, shall be placed in sealed envelopes or other appropriate sealed containers containing the caption and case number of the proceeding, the nature of the content (*e.g.*, exhibit, report, etc.), and a statement that it shall not be opened or released from the custody of the Clerk of the Commission except by order of the Commission. Despite this statement, the members of the Commission, any employee or consultant specifically authorized by the Commission to assist the Commission in this proceeding, and any Hearing Officer appointed in this case may have access to the sealed confidential information, but shall not disclose this information to any person.
- b. At any hearing or conference in this proceeding, no persons, other than those who have agreed to be bound by this Order and any Protective Agreement approved in this case, and those whom the Commission has expressly authorized to have access to this confidential information, shall be permitted to give, hear, or review testimony given or held with respect to this confidential information.
- c. Each Commission stenographer or reporter in this proceeding shall acknowledge and be bound by this Order. Each Commission stenographer or reporter shall be

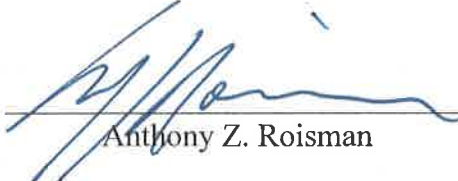
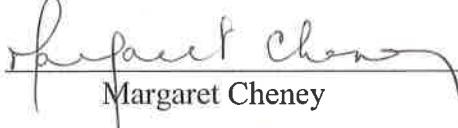

instructed to and shall start a separate transcription for testimony or discussion on the record of confidential information. This transcription shall be marked “Confidential” and shall be sealed and filed with the Clerk of the Commission, and copies shall be made available only to those persons authorized to view this information. The transcription shall, in all other respects, be treated as confidential information pursuant to this Order.

- d. The Commission retains jurisdiction to make amendments, modifications, and additions to this Order.
- e. Any party or other person may apply to the Commission for an amendment, modification, or addition to this Order.
- f. The protection provided for in this Order shall expire five years from the date of this Order.

2. To the extent that Champlain Broadband, LLC (“Champlain”) or the City of Burlington (“City”) seeks confidential treatment for any additional information contained in exhibit GA-2 beyond the items identified in the bulleted list above, the Commission directs them to file within 15 days of the date of this Order supplemental information-specific averments that clearly explain the cognizable harm that the business of Burlington Telecom could suffer if this information became public. This filing shall be accompanied by a public version of exhibit GA-2 that redacts only the information specified in the supplemental averments. Before making these filings, Champlain and the City shall review all publicly available information about Burlington Telecom, including information in any filing previously made with the Commission or the Department, and advise the Commission in their filing whether the type of information for which confidentiality is requested has previously been made public by the City.


3. Champlain’s motion for a protective order providing confidential treatment of exhibit Champlain GA-3 is denied. The Commission will continue to treat this exhibit as allegedly confidential information and protect it accordingly for 15 days or until the Commission rules on any request that it reconsider in whole or in part the denial of confidential treatment for exhibit Champlain GA-3 if this request is made within 15 days from the date of this Order.

Dated at Montpelier, Vermont, this 1st day of August, 2018.

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Anthony Z. Roisman)	PUBLIC UTILITY
)	
)	
Margaret Cheney)	COMMISSION
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)	
Sarah Hofmann)	OF VERMONT

OFFICE OF THE CLERK

Filed: August 1, 2018

Attest: 
Clerk of the Commission

Notice to Readers: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Commission (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: puc.clerk@vermont.gov)

PUC Case No. 18-0491-PET - SERVICE LIST

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