

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

In the Matter of	)	
	)	
Restoring Internet Freedom	)	WC Docket No. 17-108
	)	
	)	

**MOTION OF INCOMPAS TO MODIFY PROTECTIVE ORDERS**

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**MOTION OF INCOMPAS TO MODIFY PROTECTIVE ORDER**

Pursuant to 47 C.F.R. § 1.41, INCOMPAS submits this motion to modify the protective orders in recent merger proceedings<sup>1</sup> to permit interested commenters to use certain confidential and highly confidential materials collected in those proceedings to provide the Commission here with critical information and analysis, while continuing to maintain the exact same level of confidentiality.

**I. PRIOR COMMISSION MERGER REVIEWS INCLUDE INFORMATION NECESSARY TO THE COMMISSION’S FULL INQUIRY**

In its review of prior mergers of major telecommunications firms, the Commission collected extensive data, documents, and materials documenting the economic incentives

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<sup>1</sup> See Applications of Charter Communications, Inc., Time Warner Cable, Inc., and Advance/Newhouse Partnership for Consent to Assign or Transfer Control of Licenses and Authorizations, *Order*, 30 FCC Rcd. 10360 (2015) (“*Charter/TWC Protective Order*”); Applications of Comcast Corp. and Time Warner Cable Inc. for Consent to Assign or Transfer Control of Licenses Authorizations, *Second Amended Modified Joint Protective Order*, 29 FCC Rcd. 11864 (2014) (“*Comcast/TWC Protective Order*”); Applications of AT&T Inc. and DIRECTV for Consent to Assign or Transfer Control of Licenses and Authorizations, *Joint Protective Order*, 29 FCC Rcd. 6047 (2014), modified by 29 FCC Rcd. 11883 (2014), amended by 29 FCC Rcd. 13616 (2014), amended by 29 FCC Rcd. 13810 (2014) (“*ATT-DIRECTV Protective Order*”); Applications of Comcast Corp., General Electric Co. and NBC Universal, Inc. for Consent to Assign Licenses or Transfer Control of Licensees, *Protective Order*, 25 FCC Rcd. 2133 (2010) (“*First Comcast/NBCU Protective Order*”); Applications of Comcast Corp., General Electric Co. and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees, *Second Protective Order*, 25 FCC Rcd. 2140 (2010) (“*Second Comcast/NBCU Protective Order*”).

and abilities of incumbent broadband providers to curb competition, including through their control of residential broadband connections. Before issuing the 2015 open Internet rulemaking, the Commission had already reviewed an extensive record in the Comcast/NBCU merger proceeding. Because of the harms to competition posed by the merger, the Commission adopted several open Internet principles as conditions to approving the merger,<sup>2</sup> which it then referenced in the *2015 Open Internet Order*.<sup>3</sup> Since 2015, the threat to competition posed by incumbent broadband providers has been further confirmed by both the Commission and the Department of Justice’s review of AT&T’s merger with DIRECTV, Comcast’s failed merger with Time Warner Cable, and Charter’s merger with Time Warner Cable and Bright House Networks.

To fully understand the potential costs and benefits of repealing, or modifying the *2015 Open Internet Order*, the Commission needs to consider the extensive record developed in those proceedings. The record includes economic studies and analyses submitted by applicants and interested parties, internal presentations and correspondence, and datasets relating to the abilities and incentives of incumbent broadband providers to harm consumers. The Commission should therefore modify the protective orders in these proceedings to permit interested commenters here to use those materials in their

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<sup>2</sup> See Applications of Comcast Corp., General Electric Co., and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees, *Memorandum Opinion and Order*, 26 FCC Rcd. 4238, 4275 ¶ 94 (“*Comcast/NBCU Order*”) (“[N]either Comcast nor Comcast-NBCU shall prioritize affiliated Internet content over unaffiliated Internet content.”).

<sup>3</sup> Protecting and Promoting the Open Internet, *Report and Order On Remand, Declaratory Ruling, and Order*, 30 FCC Rcd. 5601, 5620 ¶ 65 (2015) (“*2015 Open Internet Order*”) (noting that approval of the Comcast/NBCU merger was conditioned on compliance with the Commission’s 2005 Internet Policy Statement), *aff’d sub nom. United States Telecom Ass’n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016).

comments. Absent Commission action, commenters in this proceeding will be unable to use any information covered by the protective orders in those proceedings—including, for example, the unredacted versions of the Commission’s own orders in AT&T/DIRECTV and Charter/TWC.

This information is necessary to the creation of a full and adequate record here. For example, the NPRM has criticized certain rules, such as the ban on paid prioritization, as not being necessary because “several large Internet service providers made it clear that they did not engage in paid prioritization and had no plans to do so.”<sup>4</sup> However, in each of the mergers that the Commission has approved, it has found that the merged entity will have incentive to discriminate against unaffiliated OVDs through a variety of tactics.<sup>5</sup> To mitigate these harmful effects, the Commission imposed conditions on the applicants but only because it made exactly the kind of findings that are required to be considered in this proceeding.

The Commission’s public statements in redacted orders, although very helpful, are not enough. In making these findings, the Commission relied upon redacted information to make conclusions about the resulting market power and incentives of the merged entities

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<sup>4</sup> Restoring Internet Freedom, *Notice of Proposed Rulemaking*, 32 FCC Rcd. 4434, 4462 ¶ 85 (2017) (“NPRM”) (citations omitted).

<sup>5</sup> Applications of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership for Consent to Assign or Transfer Control of Licenses and Authorizations, *Memorandum Opinion and Order*, 31 FCC Rcd. 6327, 6342-43 ¶ 38 (2016) (“Charter/TWC Order”) (“[W]e conclude that New Charter will have an increased incentive to discriminate against or harm OVDs.”); Applications of AT&T Inc. and DIRECTV for Consent to Assign or Transfer Control of Licenses and Authorizations, *Memorandum Opinion and Order*, 30 FCC Rcd. 9131, 9207 ¶ 205 (2015) (“AT&T/DIRECTV Order”) (“We conclude that post-transaction AT&T has an increased incentive to discriminate against unaffiliated OVDs.”); *Comcast/NBCU Order*, 26 FCC Rcd. at 4272-73 ¶ 86 (“[W]e find that OVDs pose a potential competitive threat to Comcast’s MVPD service, and that the Applicants therefore will have an incentive to take actions to hinder that competition.”).

that directly informs whether those and other entities today will have the incentive and ability to harm competition in the absence of the open Internet rules.<sup>6</sup> In many cases, the conclusions relied on the companies' internal documents.<sup>7</sup> The redacted information reaches to the heart of the issues that the NPRM states the Commission will consider: what incentives and abilities do broadband providers have to interfere with edge providers or their customers in a manner that harms competition and consumers? These questions are central to the Commission's task in considering revising the open Internet rules.

Being able to reference the merger materials will allow parties to bring to the Commission's attention concrete evidence that speaks directly to the incentives and ability of incumbent broadband providers to harm consumers. For instance, AT&T and DIRECTV based their merger in large part on the improved bundles they would be able to offer consumers.<sup>8</sup> Understanding how the incentives to protect both their broadband and cable

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<sup>6</sup> See, e.g., *Comcast/NBCU Order*, 26 FCC Rcd. at 4270 ¶ 81 ("For example, an OVD that rents or sells movies competes against Comcast's pay-per-view movie service and, hence, competes with Comcast for revenue. [REDACTED]"); *AT&T/DIRECTV Order*, 30 FCC Rcd. at 9209-10 ¶ 210 ("We find that as the combined entity expands its online offerings, it will have an increased incentive to limit subscriber demand for competitors' online video content, including through data caps that discriminate against third-party content by exempting its own content from the data cap. Indeed, AT&T's internal documents indicate that [BEGIN HIGHLY CONF. INFO.] [END HIGHLY CONF. INFO.]."); *Charter/TWC Order*, 31 FCC Rcd. at 6344 ¶ 42 ("New Charter would have an incentive to harm OVDs that could serve as substitutes for some or all of its video products. For instance, the record indicates that the Applicants have taken steps to [BEGIN HIGHLY CONF. INFO.] \*\*\* [END HIGHLY CONF. INFO.].").

<sup>7</sup> See, e.g., *AT&T/DIRECTV Order*, 30 FCC Rcd. at 9209-10 ¶ 210 ("We find that as the combined entity expands its online offerings, it will have an increased incentive to limit subscriber demand for competitors' online video content, including through data caps that discriminate against third-party content by exempting its own content from the data cap. Indeed, AT&T's internal documents indicate that [BEGIN HIGHLY CONF. INFO.] [END HIGHLY CONF. INFO.].").

<sup>8</sup> *Id.* at 9190-91 ¶¶ 155-57.

component drive the merged entity's actions is crucial to demonstrating why the combined firm continues to be incentivized to harm OVDs and has greater ability to do so. Yet, the crucial data that the Commission relied upon in the merger order cannot be used in this proceeding absent Commission action.

The NPRM suggests that the concerns raised in the *2015 Open Internet Order* were “hypothetical” or “theoretical.”<sup>9</sup> Yet, important and strong evidence for the risk of these harms is found in the internal documents from the merger proceedings, as the Commission repeatedly recognized when it cited discrepancies between what the companies said publicly and what their internal documents revealed.<sup>10</sup> If the Commission wants to know the actual risks of broadband-provider action in the absence of the Open Internet rules, it needs to allow access to these documents. Absent access to these documents and the unredacted version of the Commission's orders, parties in this proceeding will lack the full benefit of the available evidence, and the Commission will lack both a full record and the

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<sup>9</sup> *NPRM*, 32 FCC Rcd. at 4452 ¶ 50, 4459 ¶74.

<sup>10</sup> See, e.g., *Charter/TWC Order*, 31 FCC Rcd. at 6344-45 ¶ 42 (“New Charter would have an incentive to harm OVDs that could serve as substitutes for some or all of its video products. For instance, the record indicates that the Applicants have taken steps to [BEGIN HIGHLY CONF. INFO.] \*\*\* [END HIGHLY CONF. INFO.]”); *AT&T/DIRECTV Order*, 30 FCC Rcd. at 9210-11 ¶ 210 (“We find that as the combined entity expands its online offerings, it will have an increased incentive to limit subscriber demand for competitors' online video content, including through data caps that discriminate against third-party content by exempting its own content from the data cap. Indeed, AT&T's internal documents indicate that [BEGIN HIGHLY CONF. INFO.] [END HIGHLY CONF. INFO.]”); *Comcast/NBCU Order*, 26 FCC Rcd. at 4272 ¶ 85 (“Finally, despite their arguments in this proceeding, the Applicants' internal documents and public statements demonstrate that they consider OVDs to be at least a potential competitive threat. The record here is replete with e-mails from Comcast executives and internal Comcast documents showing that Comcast believes that OVDs pose a potential threat to its businesses, that Comcast is concerned about this potential threat, and that Comcast makes investments in reaction to it.”) (footnotes omitted).

full benefit of the distinctive perspective that commenters can bring to evidentiary material.

The NPRM also emphasizes the importance of economic analysis. The merger proceedings are rife with economic studies examining aspects of the applicants' businesses that are directly relevant here, including incentives to discriminate against OVDs, other MVPDs, relevant markets,<sup>11</sup> and consumers.<sup>12</sup> This treasure-trove of economic analysis is absolutely critical to a full understanding of the economics that inform ISPs, MVPDs, OVDs, and other entities. For these reasons, the highly confidential and confidential information contained in the merger dockets is relevant and necessary to the Restoring Internet Freedom docket.<sup>13</sup>

The below chart is a non-exhaustive list of redacted materials that directly relate to topics in the NPRM.

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<sup>11</sup> Comments of Entravision Communications Corp., MB Docket No. 14-57 (Aug. 25, 2014) (economic study describing harm of Comcast/TWC merger to Latino audiences and incentives for Comcast to discriminate against unaffiliated programmers).

<sup>12</sup> American Cable Association, Notice of Ex Parte Filing, MB Docket No. 10-56 (Nov. 8, 2010).

<sup>13</sup> While parties with access to confidential or highly confidential material under the Commission's protective orders are required to return or destroy such material at the conclusion of the proceeding, the protective orders specifically exempt the Commission or its staff from these destruction requirements. *See Charter/TWC Protective Order*, 30 FCC Rcd. at 10394 ¶ 21 ("The provisions of this paragraph regarding retention of Stamped Confidential Documents and Stamped Highly Confidential Documents and copies of the same and Confidential and Highly Confidential Information shall not be construed to apply to the Commission or its staff."); *Comcast/TWC Protective Order*, 29 FCC Rcd. at 13806 ¶ 22 (same); *AT&T/DIRECTV Protective Order*, 29 FCC Rcd. 6054 at ¶ 22 (same); *Second Comcast/NBCU Protective Order*, 25 FCC Rcd. at 2147 ¶ 20 (same).



NPRM Topic	Examples of Redacted Materials
Open Internet Rules Generally	<p><b><i>Redacted information from internal documents referred to by the Commission's orders:</i></b></p> <p><i>Charter/TWC Order</i>, 31 FCC Rcd. at 6365-66 ¶ 80: “We are unconvinced by Charter's arguments that it has no incentive to harm OVDs through the use of data caps or [usage-based pricing]. We rejected this argument in our discussion above and find that New Charter's incentive to retain MVPD subscribers is quite strong. Internal Charter documents detailing Charter's anxiety regarding OTT substitutes for MVPD services evidence Charter's incentives. For example, Charter's internal documents predict [BEGIN HIGHLY CONF. INFO.] *** [END HIGHLY CONF. INFO.]. Charter's internal documents appear to indicate that the company's position on usage-based billing is subject to change [BEGIN HIGHLY CONF. INFO.]*** [END HIGHLY CONF. INFO.]. For example, a 2012 PowerPoint presentation [BEGIN HIGHLY CONF. INFO.] *** [END HIGHLY CONF. INFO.]. While a 2010 executive level presentation [BEGIN HIGHLY CONF. INFO.] *** [END HIGHLY CONF. INFO.]. However, [BEGIN HIGHLY CONF. INFO.] *** [END HIGHLY CONF. INFO.]. A 2014 document discusses [BEGIN HIGHLY CONF. INFO.] *** [END HIGHLY CONF. INFO.]. Again, the document notes that [BEGIN HIGHLY CONF. INFO.] *** [END HIGHLY CONF. INFO.]. Therefore, [BEGIN HIGHLY CONF. INFO.] *** [END HIGHLY CONF. INFO.]”</p> <p><i>AT&amp;T/DIRECTV Order</i>, 30 FCC Rcd. at 9210 ¶ 210: “We find that as the combined entity expands its online offerings, it will have an increased incentive to limit subscriber demand for competitors’ online video content, including through data caps that discriminate against third-party content by exempting its own content from the data cap. Indeed, AT&amp;T’s internal documents indicate that [BEGIN HIGHLY CONF. INFO.] [END HIGHLY CONF. INFO.]”</p> <p><b><i>Redacted information in the economic studies submitted by parties:</i></b></p> <p><i>Charter/TWC Order</i>, 31 FCC Rcd. at 6357 ¶ 64 n.188: “Dr. Scott Morton claims that the survey ‘implies approximately [BEGIN HIGHLY CONF. INFO.] [END HIGHLY CONF. INFO.] percent of total broadband subscribers would switch’ if Netflix was foreclosed.”</p>
Interconnection Disputes	<p><b><i>Redacted information from internal documents referred to by the Commission's orders:</i></b></p>

	<p><i>Charter/TWC Order</i>, 31 FCC Rcd. at 6383 ¶ 117: “The transaction would transform Charter from <b>[BEGIN HIGHLY CONF. INFO.]</b> *** <b>[END HIGHLY CONF. INFO.]</b>. New Charter therefore would be capable of exerting control over interconnection traffic bound for its BIAS subscribers, and well-positioned to charge edge providers for access to its BIAS subscribers.”</p> <p><i>AT&amp;T/DIRECTV Order</i>, 30 FCC Rcd. at 9208 ¶ 205 n.577: “AT&amp;T’s internal documents confirm this view. When Netflix was suffering from congestion in interconnecting to AT&amp;T’s last-mile network, AT&amp;T’s Chief Technology Officer stated <b>[BEGIN HIGHLY CONF. INFO.]</b> <b>[END HIGHLY CONF. INFO.]</b> See ATT-FCC-02459548, <b>[BEGIN HIGHLY CONF. INFO.]</b> <b>[END HIGHLY CONF. INFO.]</b>.”</p>
Incentive and ability of ISPs to discriminate against unaffiliated OVDs	<p><b><i>Redacted information from internal documents referred to by the Commission’s orders:</i></b></p> <p><i>Charter/TWC Order</i>, 31 FCC Rcd. at 6342 ¶ 37: “In their critical loss analysis, the Applicants argue that based on their estimate of the number of broadband subscribers that are also Netflix subscribers, the new firm would lose an average of <b>[BEGIN HIGHLY CONF. INFO.]</b> <b>[END HIGHLY CONF. INFO.]</b> per month for each subscriber that switched to another BIAS provider and that it would gain an average of <b>[BEGIN HIGHLY CONF. INFO.]</b> <b>[END HIGHLY CONF. INFO.]</b> per month for each subscriber that purchased MVPD video from the new firm as the result of OVD foreclosure. As a result, the Applicants state that more than <b>[BEGIN HIGHLY CONF. INFO.]</b> <b>[END HIGHLY CONF. INFO.]</b> subscribers would have to newly purchase video for each subscriber that left the new firm for another BIAS provider, in order for OVD foreclosure to be profitable for the new firm.”</p> <p><i>AT&amp;T/DIRECTV Order</i>, 30 FCC Rcd. at 9248 ¶ 304: “While we accept that the proposed transaction may allow the Applicants to improve their ability to launch OVD services by pooling their assets and efforts, we do not find that the transaction creates a significant, quantifiable public interest benefit, and as noted above, we are concerned that any such improvement in the Applicants’ OVD services creates an incentive to limit competition from competing OVD services. We also note that <b>[BEGIN HIGHLY CONF. INFO.]</b> <b>[END HIGHLY CONF. INFO.]</b>.”</p> <p><i>Comcast/NBCU Order</i>, 26 FCC Rcd. at 4270 ¶ 81: “For example, an OVD that rents or sells movies competes against Comcast’s pay-per-view movie service and, hence, competes with Comcast for revenue. <b>[REDACTED]</b>.”</p>

	<p><i>Charter/TWC Order</i>, 31 FCC Rcd. at 6359 ¶ 68 n.199: “Charter appears to be rolling out friendly practices for certain arguably complementary OVDs that are not considered replacement services for an MVPD subscription in order to improve its BIAS product. For example, <b>[BEGIN HIGHLY CONF. INFO.] [END HIGHLY CONF. INFO.]</b>. Scott Morton Reply Decl. at para. 47.”</p> <p><i>Charter/TWC Order</i>, 31 FCC Rcd. at 6361 ¶ 71 n.213: “The record indicates that edge providers such as OVDs represent a common threat to both New Charter and the entire cable industry. . . . According to internal Charter documents, <b>[BEGIN HIGHLY CONF. INFO.] *** [[END HIGHLY CONF. INFO.]</b>. See CHR2-DOJ-00000246437 at 4, <b>[BEGIN HIGHLY CONF. INFO.] *** [END HIGHLY CONF. INFO.]</b>.”</p> <p><i>AT&amp;T/DIRECTV Order</i>, 30 FCC Rcd. at 9208 ¶ 205 n. 577: “AT&amp;T’s internal documents confirm this view. When Netflix was suffering from congestion in interconnecting to AT&amp;T’s last-mile network, AT&amp;T’s Chief Technology Officer stated <b>[BEGIN HIGHLY CONF. INFO] [END HIGHLY CONF. INFO]</b> See ATT-FCC-02459548, <b>[BEGIN HIGHLY CONF. INFO] [END HIGHLY CONF. INFO]</b>.”</p> <p><b><i>Redacted information in the economic studies submitted by parties:</i></b></p> <p><i>AT&amp;T/DIRECTV Order</i>, 30 FCC Rcd. at 9190 ¶ 157: “Additionally, the record supports the Applicants’ position that bundles of broadband and video are more attractive to consumers. An analysis prepared for AT&amp;T by Frost and Sullivan found that <b>[BEGIN CONF. INFO.] [END CONF. INFO.]</b>”</p>
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## II. THE MERGER PROTECTIVE ORDERS SHOULD BE MODIFIED TO ALLOW RELEVANT INFORMATION TO BE USED HERE

INCOMPAS therefore is making limited requests for modification of the protective orders in the Comcast/NBCU, AT&T/DIRECTV, Comcast/TWC, and Charter/TWC merger proceedings. It does not request that *all* confidential or highly confidential information be allowed into the proceeding. Instead, INCOMPAS requests only that four categories of confidential or highly confidential information be allowed into this proceeding:

- 1) unredacted versions of the Commission’s orders;

- 2) the underlying confidential or highly confidential information that the Commission cited and therefore relied upon in the orders;
- 3) economic studies submitted by the applicants and all commenting parties, including full transcripts of any economic fora, such as the one conducted in Comcast/TWC and Comcast/NBCU; and
- 4) documents and materials requested by the Commission that directly relate to the topics raised in the NPRM including:
  - a. the Hart-Scott-Rodino 4(c) documents submitted by Charter in the Charter/TWC proceeding;<sup>14</sup>
  - b. strategic documents submitted by Comcast in the Comcast/TWC proceeding including short-term and long-range strategic plans and presentation to management committees and boards of directors;<sup>15</sup>
  - c. strategic documents submitted by AT&T in the AT&T/DIRECTV proceeding including short-term and long-range strategic plans and presentation to management committees and boards of directors;<sup>16</sup> and
  - d. strategic plans and presentations relating to distribution of video programming over the Internet as submitted in the Comcast/NBCU proceeding.<sup>17</sup>

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<sup>14</sup> See Letter from William T. Lake, FCC, to Catherine Bohigian, Charter Communications, Information and Data Request to Charter Communications, Inc., MB Docket No. 15-149, ¶ 85 (Sept. 21, 2015) (requesting a copy of Hart-Scott-Rodino 4(c) documents).

<sup>15</sup> See Letter from William T. Lake, FCC, to Kathryn A. Zachem, Comcast Corp., Information and Data Request to Comcast Corp., MB Docket No. 14-57, ¶ 14 (Apr. 21, 2014).

<sup>16</sup> See Letter from William T. Lake, FCC, to Robert W. Quinn Jr., AT&T Inc., Information and Data Request to AT&T Inc., MB Docket No. 14-90, ¶ 26 (Mar. 3, 2015).

INCOMPAS also requests that the relevant protective orders be extended to this proceeding so that the same protection for the confidential and highly confidential information is ensured.

These materials meet the standard set by the D.C. Circuit in *CBS Corp. v. FCC*, 785 F.3d 699 (D.C. Cir. 2015). To make commercially sensitive documents available for review, (1) disclosure must be in the public interest; (2) a balance of interests must favor disclosure; and (3) the information must serve a necessary link in the chain of evidence. *Id.* at 705. This standard is satisfied because as in *CBS*, “disclosure would serve the public’s interest in a thorough review process, and the benefits outweigh the harms.” *Id.* And the court emphasized that if “a large number of documents were excluded from review . . . it would deprive commenters of the opportunity to argue that the documents have significance in ways that are not apparent to the Commission,” thus facilitating “informed decision making.” *Id.* Here, the above-requested material is more than just a necessary link in the chain of evidence—is it necessary to understanding and fully analyzing the incumbent broadband providers’ ability and incentives to harm edge providers.

This request is viewpoint-neutral. Of course, commenters that support or oppose repeal of the open Internet rules would be allowed to use confidential and highly confidential information from the merger proceedings to support their positions. Allowing the confidential and highly confidential information to be used by all parties who agree to follow the protective orders from the mergers will only strengthen the debate and lead to a better and more reasoned outcome. And, of course, this motion is not now asking that the

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<sup>17</sup> See Letter from William T. Lake, FCC, to Michael H. Hammer, Counsel for Comcast Corp., Information and Data Request to Comcast Corp., MB Docket No. 10-56, ¶ 25 (May 21, 2010).

Commission agree with the INCOMPAS analysis of such documents, merely that it recognize the importance of the materials to any resolution of the current proceeding and the public interest in compiling a full record for Commission decision and any appellate review that might follow.

This request accords with Commission precedent. When approving the assignment of licenses and spectrum leases, the Commission used data under a protective order in a separate docket to analyze the competitive effects of the assignment.<sup>18</sup> To add the confidential data to the docket, the Commission created a new protective order.<sup>19</sup> Similarly, the Commission allowed highly confidential information from a prior proceeding to be brought into a subsequent rulemaking proceeding. ILECs requested the Commission allow information collected in the business data services (“BDS”) rulemaking proceeding to be used in a later tariff pricing proceeding.<sup>20</sup> The Commission found that the information in the BDS rulemaking proceeding was relevant and closely related to the tariff pricing plan, and issued two new protective orders allowing the highly confidential and confidential information from the BDS rulemaking proceeding to be used in the tariff pricing proceeding.<sup>21</sup> The Commission noted that allowing the use of data from the BDS proceeding

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<sup>18</sup> Applications of AT&T Mobility Spectrum LLC, Tampnet Inc., Tampnet Licensee LLC, Broadpoint License Co., LLC, and Broadpoint Wireless License Co., LLC for Consent to Assign Licenses and Approval of Long-Term De Facto Transfer Spectrum Leasing Arrangements, Numbering Resource Utilization and Forecast Reports and Local Number Portability Reports To Be Placed into the Record, Subject to Protective Order, *Public Notice*, 30 FCC Rcd. 11597, 11598 (2015).

<sup>19</sup> *Id.*

<sup>20</sup> See Motion of AT&T Inc., Verizon, CenturyLink, and Frontier to Modify Protective Orders, WC Docket Nos. 15-247, 05-25 (filed Oct. 23, 2015).

<sup>21</sup> Investigation of Certain Price Cap Local Exchange Carrier Business Data Service Tariff Pricing Plans; Special Access for Price Cap Local Exchange Carriers; AT&T Corp. Petition for

would be time-saving and cost-efficient, as parties would not need to duplicate data.<sup>22</sup> The same is true here.

Adding the confidential and highly confidential information described in this motion to the Restoring Internet Freedom docket will allow parties to better develop their positions and provide the Commission with a richer and better understanding of the costs and benefits of repealing the open Internet rules. Failing to add this record evidence data will leave the commenters hobbled in their ability to meaningfully engage the Commission's NPRM and prevent the Commission from reaching a decision based on a full record.

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Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services, *Order and Protective Orders*, 30 FCC Rcd. 13680, 13683 ¶¶ 9-10 (2015).

<sup>22</sup> *Id.* at 13682-83 ¶ 8.

## CONCLUSION

The Commission should modify the protective orders in the merger proceedings (or issue a new protective order if it prefers) as described above. To ensure an adequate opportunity for commentators to express their views on this proceeding, INCOMPAS respectfully suggests that it is critical for this motion to be decided and implemented expeditiously (no later than July 31, 2017), because the record is already being compiled and the formal comment period will conclude on August 16, 2017.

Respectfully submitted,

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