

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

In the Matter of

Restoring Internet Freedom

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WC Docket No. 17-108

**OPPOSITION OF AT&T SERVICES INC.
TO MOTION OF INCOMPAS TO MODIFY PROTECTIVE ORDERS**

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TABLE OF CONTENTS

I.	GRANTING INCOMPAS' MOTION WOULD CAUSE ENORMOUS HARM, IMPOSE MASSIVE UNNECESSARY BURDENS, AND COULD POTENTIALLY BRING THIS PROCEEDING TO A SCREECHING HALT.....	5
A.	Granting INCOMPAS' Proposal Would Cause Enormous Harm To AT&T And Other Parties That Submitted Competitively Sensitive Materials In The Merger Proceedings.	6
B.	Granting INCOMPAS' Motion Would Undermine The Commission's Credibility And Ability To Collect Confidential Materials In the Future.....	7
C.	Granting INCOMPAS' Motion Would Impose Enormous Burdens on the Commission And Parties, And Would Bog This Proceeding Down In Endless Disputes And Appeals Over Access To The Confidential Data.	9
II.	THERE ARE NO COGNIZABLE BENEFITS TO GRANTING INCOMPAS' MOTION.....	11
	CONCLUSION.....	19

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AT&T Services Inc. (“AT&T”) respectfully submits this opposition to the Motion of INCOMPAS to Modify Protective Orders (“Motion”)¹ in this proceeding.

INTRODUCTION AND SUMMARY

INCOMPAS asks the Commission to abrogate the protective orders from prior merger proceedings to import a selected subset of highly confidential and competitively sensitive information that AT&T, Comcast, Charter, and many other parties submitted in those proceedings. The Motion is frivolous. Indeed, INCOMPAS’ Motion appears to be an improper end run around the protective orders governing the confidential materials at issue here. Both in-house and outside counsel in the merger proceedings at issue – including INCOMPAS – signed protective orders providing that “Reviewing Parties . . . agree . . . not to use Confidential or Highly Confidential Information to seek disclosure in any other proceeding.”² INCOMPAS’ “limited” motion

¹ Motion of INCOMPAS to Modify Protective Orders, *Restoring Internet Freedom*, WC Docket No. 17-108 (filed July 17, 2017) (“Motion”). INCOMPAS improperly filed this Motion solely in Docket No. 17-108, hidden amongst literally millions of comments, but not in the respective merger dockets in which the protective orders that it seeks to modify were issued.

² See Joint Protective Order, *Applications of AT&T, Inc. and DIRECTV for Consent to Assign or Transfer Control of Licenses and Authorizations*, MB Docket No. 14-90, ¶ 17 (rel. June 11, 2014) (“Joint Protective Order”).

requesting very specific and targeted categories of previously submitted documents and data raises serious questions as to whether INCOMPAS and its counsel are in fact “us[ing]” the confidential materials they obtained as the basis for “seek[ing] disclosure” in this quite different rulemaking proceeding.

Regardless, INCOMPAS has not come close to providing the necessary legal justification for the unprecedented action it seeks. INCOMPAS relies on the D.C. Circuit’s ruling that the Commission may require parties to make commercially sensitive data available only if disclosure is “in the public interest,” a good idea on balance, and the materials are a “necessary link” in a relevant chain of evidence required by the Commission to make its findings.³ INCOMPAS’ request cannot meet even one of these branches of the test, let alone all of them.

First, granting INCOMPAS’ Motion would clearly harm the parties that provided the data. These protective orders were put in place for a reason: there is no dispute that AT&T and others who submitted these data could incur enormous competitive harms if those data are exposed to competitors. Yet INCOMPAS proposes to make such highly sensitive information available in a politically charged rulemaking proceeding with millions of comments filed, and where the vast majority of commenters have no experience whatsoever with Commission protective orders or procedures designed to protect against disclosure. INCOMPAS’ request thus creates an unacceptably high risk that these competitively sensitive documents will be exposed to competitors, either intentionally or inadvertently.

Second, sudden abrogation of these protective orders after the fact would dramatically undermine the credibility of the Commission’s confidentiality procedures and policies, impeding its ability to obtain sensitive information in future proceedings. The parties that submitted the

³ *CBS Corp. v. FCC*, 785 F.3d 699, 705 (D.C. Cir. 2015).

information sought by INCOMPAS did so voluntarily in reliance on the protective orders' provisions that strictly limit access to that information and flatly prohibit their use in other regulatory proceedings. Granting INCOMPAS' motion would send a clear message that those protective orders do not mean what they say, dramatically impeding the Commission's ability to collect confidential materials in the future. The efficacy and credibility of the Commission's processes for protecting sensitive information should not be undermined by regulatory gamesmanship.

INCOMPAS' request also would dramatically impede the Commission's ability to move forward in this proceeding, which may in fact be its ultimate purpose. Were the Commission to grant INCOMPAS' motion, thousands or even millions of commenters could request access to the data, through the same coordinated and automated processes that produced most of those comments in the first instance. Those requests would grind this proceeding to a halt, as the Commission weighed each request and considered the inevitable challenges and potentially endless disputes as to whether particular individuals are qualified to access the data under the protective order. Given that many have already expressed interest in slowing the Commission's proceedings down (and there is evidence that unscrupulous entities have even engaged in DDoS attacks), advocacy groups could easily seek to inundate the Commission with unfounded requests for access to these competitively sensitive materials just to gum up the works. And beyond this, the Commission would also have the added burden of having to run a data room where parties could review the materials, and setting up procedures to provide these materials to requesting parties on encrypted media.

Against these very substantial harms, INCOMPAS offers only unsupported rhetorical justifications. There is already a voluminous public record in this docket, including millions of

comments, many of which include rigorous legal, economic, and policy analyses. This record will provide ample basis for resolving the issues in this proceeding. In fact, the Commission has addressed many of these very issues in prior proceedings without resorting to these highly sensitive materials. There is no reason it cannot do the same now. Moreover, as INCOMPAS concedes, it already has access to the public versions of the merger orders, which contain detailed descriptions of the Commission's findings and the data relied upon, and there are myriad publicly available studies concerning the issues INCOMPAS raises that are far more recent than the materials it seeks. And, by focusing only on data submitted by certain companies but not others – including INCOMPAS' own members – the data would paint an incomplete, and in many cases highly inaccurate, picture of these disputes from yesteryear.

INCOMPAS' claims that the Commission has granted similar requests in the past are also wrong. For example, in the Business Data Services proceeding, the Commission moved confidential data from a general rulemaking to an adjudication involving a subset of the parties that *already had access to the data*. Here, INCOMPAS is proposing the opposite – to expose confidential information collected in contained merger adjudications to millions of inexperienced commenters who did not previously have access to the data. INCOMPAS' other example involving the NRUF data is likewise inapposite. There, the Commission made NRUF available in license transfer adjudications with a limited set of parties (largely a subset of providers whose data comprises NRUF) who are familiar with the Commission's protective orders and have procedures in place to protect the NRUF data. The Commission never placed NRUF data in a large politically charged rulemaking like this one.

ARGUMENT

INCOMPAS' Motion does not remotely satisfy the high bar set by the D.C. Circuit in *CBS Corp. v. FCC*, 785 F.3d 699, 705 (D.C. Cir. 2015), on which INCOMPAS relies. Under that

standard, disclosure of competitively sensitive materials, even under a strict protective order, is appropriate only if it is “in the public interest,” “a good idea on balance,” and the materials are a “necessary link” in any relevant “chain of evidence” required by the Commission to make its findings. *Id.*

None of these requirements is satisfied here. As demonstrated below, granting INCOMPAS’ Motion would be a very *bad* idea on balance and *contrary* to the public interest, because it would (1) cause enormous harm to the entities that submitted sensitive business data in reliance on the protective order; (2) undermine the Commission’s credibility and ability to collect the materials it needs to carry out its statutory mandates in the future; and (3) impose insuperable administrative burdens on the Commission and parties that would needlessly bog this proceeding down in endless disputes over access to these materials. At the same time, none of the competitively sensitive materials INCOMPAS seeks to place in this record would be a “necessary link” in any “chain of evidence” relevant to this proceeding. To the contrary, the materials are outdated, add nothing to the voluminous materials already publicly available, and are completely one-sided in the sense that they relate to only certain companies and do not contain any similarly confidential information relating to INCOMPAS’ own members. INCOMPAS’ Motion would fail any standard that balances harms against benefits.

I. GRANTING INCOMPAS’ MOTION WOULD CAUSE ENORMOUS HARM, IMPOSE MASSIVE UNNECESSARY BURDENS, AND COULD POTENTIALLY BRING THIS PROCEEDING TO A SCREECHING HALT.

Granting INCOMPAS’ Motion would be contrary to the public interest and a bad idea on balance because it would cause substantial harm to AT&T and the other parties that submitted competitively sensitive information in merger proceedings in reliance on the protective orders, undermine the Commission’s credibility and ability to collect competitively sensitive information

in the future, impose enormous burdens on the Commission and parties to this proceeding, and cause substantial delays in completing this proceeding.

A. Granting INCOMPAS' Proposal Would Cause Enormous Harm To AT&T And Other Parties That Submitted Competitively Sensitive Materials In The Merger Proceedings.

There is no dispute that the confidential materials submitted by AT&T and other parties in the merger proceedings are extremely competitively sensitive and would cause great harm if publicly disclosed. The Commission has already explained that these materials contain highly competitively sensitive information, including, for example, “[i]nformation that details the terms and conditions of or strategy related to [AT&T’s and other entities’] most sensitive business negotiations or contracts,” “[i]nformation that provides granular information about [AT&T’s and other entities’] current or future costs, revenues, marginal revenues, market share or customers,” and “[i]nformation that provides detailed or granular engineering capacity information or information about specific facilities, including collocation sites, cell sites, or maps of network facilities.”⁴ Indeed, it was largely because of the sensitivity of this information that the Commission required parties to destroy the confidential materials they received from others at the conclusion of the proceeding.⁵ Moreover, “the restrictions on the use and disclosure of Confidential or Highly Confidential Information do not terminate at [the] end of the respective proceedings but remain in perpetuity.”⁶

⁴ Joint Protective Order, Appendix A ¶¶ 1, 5, 9. *See also* Joint Protective Order ¶¶ 1-2 (disclosure of these materials “to competitors or those with whom the [companies] do business” “would allow those persons to gain a significant competitive advantage or an advantage in negotiations.”).

⁵ *Id.* ¶ 20

⁶ Order, *Applications of AT&T, Inc. and DIRECTV for Consent to Assign or Transfer Control of Licenses and Authorizations*, MB Docket No. 14-90, ¶ 6 (rel. Oct. 7, 2014).

Granting INCOMPAS' Motion would dramatically increase the risk that these materials would be publicly exposed and lead to these competitive harms. In contrast to the merger proceedings in which the documents were submitted, this is a politically charged rulemaking proceeding that appears to have drawn millions of commenters, most of which have little experience with Commission procedures and policies designed to ensure compliance with the strict requirements of protective orders. Worse yet, many of these commenters have already evidenced a desire to disrupt and delay these proceedings – to “resist” – and there is reason to be concerned that such commenters will not honor the Commission's rules and policies on confidentiality (whether intentionally or inadvertently). In this context, even with a strict protective order in place, there is an extremely high likelihood that competitively sensitive materials will be publicly disclosed, causing substantial competitive harm to AT&T and the others who provided those materials with the assumption that they would be safeguarded by the relevant protective orders.

B. Granting INCOMPAS' Motion Would Undermine The Commission's Credibility And Ability To Collect Confidential Materials In the Future.

But INCOMPAS' Motion, if granted, would harm far more than just those whose sensitive business information would be at risk of disclosure. The Commission's ability to obtain information going forward would be damaged as well. All of the confidential materials in the merger proceedings were submitted by AT&T and other parties in reliance on the promise, implicit in the Commission's protective orders, that the Commission's procedures would be sufficient to prevent wide-spread disclosure. Those procedures include provisions mandating that the materials would be accessible only to certain individuals representing the limited number of entities participating in those merger proceedings. *See* Joint Protective Order ¶ 10 (limiting access to only certain representatives of parties to the proceeding and prohibiting the use of those materials “for any other purpose, including without limitation . . . other administrative, regulatory or judicial

proceedings.”). INCOMPAS is asking the Commission to effectively abrogate these key provisions, by permitting these data to be made available to thousands if not millions of parties to an unrelated, and highly politically charged rulemaking proceeding.

Taking this unprecedented step would demonstrate to the industry that it can no longer rely on Commission protective orders, which would significantly damage the Commission’s credibility and future ability to collect information needed to carry out its statutory and regulatory mandates. As the Commission has repeatedly emphasized, failure to enforce protective orders would “undermine public confidence in the effectiveness and integrity of the Commission’s processes, and have a chilling effect on the willingness of parties to provide [the Commission] with information needed to fulfill [its] regulatory duties.”⁷

Even in merger proceedings, where the parties seeking the license transfer may continue to feel compelled to disclose confidential materials to obtain approval of the transaction, third

⁷ *Applications of Craig O. McCaw, Transfer, and American Telephone and Telegraph Co., Transferee*, 9 FCC Rcd. 5836, 5923-24, ¶ 163 (1994). *See also* Memorandum Opinion and Order, *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, ¶ 10, n.29 (rel. Dec. 3, 2015) (disclosure of information submitted pursuant to a protective order “could undermine public confidence in the Commission’s processes and ‘have a chilling effect’ on parties’ willingness to file confidential information”) (citing *Applications of Craig O. McCaw*, 9 FCC Rcd. 5836); Order, *Applications of America Online, Inc. and Time Warner, Inc. for Transfers of Control*, CS Docket No. 00-30, ¶ 4 (Oct. 10, 2000); Order, *Special Access Price Cap Local Exchange Carriers*, WC Docket No. 05-25, ¶ 10 (rel. Mar. 9, 2016) (“if the industry were to lose confidence in the robustness of the Commission’s procedures for protecting competitively sensitive confidential information, the existing protective order system (which has worked well) could easily devolve into routine and costly interlocutory litigation.”) (internal quotations omitted). *See also, e.g., Judicial Watch, Inc. v. Exp.-Imp. Bank*, 108 F. Supp. 2d 19, 30 (D.D.C. 2000) (“The government has a compelling interest in ensuring that the information it receives is of the highest quality and reliability, and disclosure of potentially sensitive commercial and financial information, even where submissions of information are mandatory, would jeopardize the Bank’s ability to rely on any such information. . . , thereby hindering the Bank’s fulfillment of its statutory purpose.”); *Africa Fund v. Mosbacher*, No. 92 CIV 289, 1993 WL 183736 at *7 (S.D.N.Y. May 26, 1993) (“Disclosure would . . . impinge upon the agency’s receipt of substantial information that potential exporters voluntarily submit when seeking export licenses and that the agency finds invaluable in making policy and maintaining effective export controls.”).

parties would now be extremely hesitant to do so, thus undermining the Commission's ability to obtain a complete record. For example, a portion of the materials requested and submitted by AT&T and DIRECTV in its merger proceeding were materials that contained information from third-parties and that were subject to non-disclosure agreements (*e.g.*, counterparties to contracts, third-party copyright holders). These third-parties provided consent to AT&T and DIRECTV to submit those materials to the Commission in reliance on the protections afforded by the protective orders in that transaction. Obviously, third parties would be far less likely to grant such consent if they could no longer rely on the integrity of the protective orders.

C. Granting INCOMPAS' Motion Would Impose Enormous Burdens on the Commission And Parties, And Would Bog This Proceeding Down In Endless Disputes And Appeals Over Access To The Confidential Data.

Granting INCOMPAS' Motion would also likely bring this proceeding to a screeching halt. To begin with, the Commission would have to develop a new protective order for this proceeding to govern access to the selected confidential information from the previous proceedings. Given the politically charged nature of this proceeding and the millions of commenters, there is a substantial likelihood that any protective order adopted by this Commission would be challenged and appealed. Those proceedings alone would divert substantial Commission resources – and those of parties – to unnecessary reconsiderations, judicial proceedings, and remands, and would likely take many months to resolve, as confirmed by the most recent dispute involving the terms of a protective order in the *CBS Corp.* case.

Even after a lawful protective order was in place, the Commission and parties would inevitably become embroiled in endless disputes over who qualifies for access to confidential materials under the protective orders. Indeed, any lawful protective order would necessarily contain provisions limiting access to the highly sensitive materials at issue to carefully selected categories of individuals, *e.g.*, outside counsel, consultants, non-competitive decision-makers.

Such an order would also provide procedures for parties to oppose requests for confidential information, for the Commission to decide those disputes, and for those decisions to be appealed.

Given the millions of commenters in this proceeding, one could expect a flood of requests by those seeking access to the confidential materials submitted by AT&T, cable companies and third-parties in the merger proceedings. Each request would have to be reviewed by the owners of the materials sought and, where appropriate, opposed, adding enormous unnecessary burdens on those parties (and *only* those parties). The Commission too would be dragged into the process, and would surely find itself overwhelmed resolving disputes about whether particular persons are authorized to obtain the confidential materials under the protective orders, and defending against appeals of those decisions, rather than moving forward with a decision in this proceeding.

These substantial burdens would occur even if all parties in this proceeding were acting in good faith. But there is already evidence of concerted efforts by various advocacy organizations to bog down this proceeding by whatever means possible. For example, the Commission has noted evidence that entities opposing the policies proposed in the *NPRM* have engaged in DDoS attacks and other schemes designed solely to disrupt and slow down the Commission's work. In this environment, accepting INCOMPAS' proposed framework allowing parties to seek access to confidential data would likely result in an avalanche of confidentiality requests made for the express purpose of bringing this proceeding to a crashing halt, while countless disputes over access to information are resolved and/or adjudicated.

On top of everything else, granting the Motion would saddle the Commission with the additional responsibility of making these data available to parties in this proceeding. During the pendency of the merger proceedings, parties were required to maintain data rooms where the confidential data could be reviewed, and to provide materials to those that qualified for access on

encrypted media or, where appropriate, on paper. But when those adjudications ended, so did the parties' responsibilities to retain the confidential data. Commission Staff, however, was permitted to maintain complete sets of the confidential information. As a result, as INCOMPAS concedes (at 6 n.13), Commission Staff would ultimately have the responsibility of maintaining and operating a data room where parties can view the confidential materials, and providing encrypted copies of confidential information to potentially millions of entities that will seek access to it, thus needlessly tying up Commission resources that would be better used resolving the issues in this proceeding.⁸

II. THERE ARE NO COGNIZABLE BENEFITS TO GRANTING INCOMPAS' MOTION.

INCOMPAS fails to identify any legitimate benefit to disclosure of this confidential information that could offset the enormous harms of granting its Motion. As the D.C. Circuit explained in *CBS Corp.*, the type of confidential information at issue must be more than merely “relevant” or even “central” to be disclosed – it must be a “*necessary* link in a chain of evidence,” and indeed, “absolutely needed.” *CBS Corp.*, 785 F.3d at 705-06 (emphasis added). INCOMPAS cannot remotely meet this standard, or *any* reasonable standard for disclosure: the information it requests is significantly outdated, adds nothing to the voluminous record and other information that is already publicly available, and would provide a one-sided and misleading view of the facts of the old disputes on which it focuses. If anything, adding these outdated and one-sided materials to this record could only produce a *less* accurate and *more* distorted picture of the broadband marketplace.

⁸ The Commission could not simply issue an order requiring AT&T to take on these responsibilities in this rulemaking. Such a requirement would be a document “collection” under the Paperwork Reduction Act, which would require approval from the Office of Management and Budget.

The core of INCOMPAS' argument is that placing the confidential information from the AT&T/DIRECTV and cable company license transfer adjudications into this rulemaking proceeding is needed "[t]o fully understand the potential costs and benefits of repealing, or modifying the *2015 Open Internet Order*."⁹ This argument is pure contrivance. Given that neither the prior Commission nor any party (including INCOMPAS and its members) believed such information was "necessary" when the Commission adopted the *same* rules in 2015 that INCOMPAS advocates here,¹⁰ such data is obviously not "necessary" now, after the passage of two additional years.¹¹

In fact, the confidential information submitted in the license transfer adjudications is significantly outdated, and if added to this proceeding, would only produce a distorted and misleading record.¹² For example, INCOMPAS cites to a confidential AT&T document that the Commission relied upon in the AT&T/DIRECTV adjudication to find that, post transaction, AT&T might have increased incentives to use "data caps that discriminate against third-party content by exempting its own content from the data cap[s]."¹³ But time has eliminated that

⁹ Motion at 2.

¹⁰ At the time the Commission was considering the adoption of the *2015 Open Internet Order*, the Commission had already collected all or most of the data in these other adjudicatory proceedings.

¹¹ INCOMPAS asserts that it is "critical" that the Motion be "decided and implemented expeditiously." Motion at 14. But if INCOMPAS thought the information it seeks was "critical" to this proceeding, it could have sought those data months ago, rather than after the initial comments were filed.

¹² INCOMPAS never comes to grips with the fact that the Commission approved these license transfer proceedings, finding them to be in the public interest and, in instances where the Commission found that the proposed license transfers raised public interest concerns, it adopted remedies to address them. INCOMPAS cannot demonstrate any need for materials relied upon by the Commission related to concerns that have already been addressed.

¹³ Motion at 7 (quoting Memorandum Opinion and Order, *In re Applications of AT&T Inc. and DIRECTV for Consent to Assign or Transfer Control of Licenses and Authorizations*, MB Docket No. 14-90, ¶ 210 (rel. Jul. 28, 2015) ("*AT&T/DIRECTV Order*").

concern. Since then, AT&T has largely transitioned away from usage allowances to unlimited plans for both wireless and wireline services, without the need for regulatory mandates.¹⁴ Thus, the factual predicate that animated the Commission’s concerns during the merger review – AT&T’s use of usage allowances in 2014 – has largely vanished, and the highly confidential documents the Commission relied upon for those findings have no relevance to today’s marketplace.

The information INCOMPAS seeks also would add nothing of value to the voluminous evidence already publicly available. The reality is that the Commission’s final orders published at the end of these adjudicatory merger review proceedings already explain its findings in great detail, typically identifying multiple sources of data and analyses underlying its conclusions. Indeed, in most cases, these orders make clear that the Commission’s findings did not turn on any particular document, but rather were supported by other publicly available record evidence. In addition, more recent publicly available data generally address the specific propositions set forth in these orders. And in all cases, INCOMPAS can cite to the Commission’s bottom line conclusions in the public version of the various merger orders, which have not been redacted.

For example, INCOMPAS claims it needs access to a confidential AT&T document that the Commission relied upon for the proposition that “the record supports [the. . .] position that bundles of broadband and video are more attractive to consumers.”¹⁵ There are myriad public – and considerably more recent – studies addressing this issue. In any case, if INCOMPAS insists upon using outdated information from the AT&T/DIRECTV proceeding, it can rely on the publicly

¹⁴ See Bob Bickerstaff, *More Data, More Choices* (May 29, 2016), http://about.att.com/inside_connections_blog/more_data_more_choic.

¹⁵ Motion at 9 (quoting *AT&T/DTV Order* ¶ 157).

available portions of that *Order* for support for this proposition, including the Commission’s finding that “78 percent of basic cable video subscribers purchase a bundle of services and that more than 97 percent of AT&T’s 5.7 million video customers subscribe to bundled service.”¹⁶ Disclosing AT&T’s highly confidential documents relating to this issue is thus wholly unnecessary.

Similarly, INCOMPAS cites a highly confidential AT&T document that the Commission relied upon for the proposition that consumers face “switching costs” when changing broadband providers.¹⁷ Again, this document is cited at the end of a long footnote containing numerous references to publicly available materials that support the same proposition. If INCOMPAS believes that the costs of switching broadband providers are relevant to this rulemaking, here again it can rely upon numerous, and far more recent, public sources for that proposition.¹⁸ Of course, it is understandable why INCOMPAS does not want to rely on widely available, current data regarding switching – because those data devastate INCOMPAS’ arguments.¹⁹

Even more far afield, INCOMPAS asserts that the license transfer adjudications contain a “treasure trove of economic analysis” that could be useful here.²⁰ But those analyses are three to

¹⁶ *AT&T/DTV Order* ¶ 157 (internal quotations omitted).

¹⁷ Motion at 8-9.

¹⁸ The only other confidential AT&T document INCOMPAS claims would be useful is one cited in the *AT&T/DTV Order* in support of a concern “that any . . . improvement in the Applicants’ OVD services creates an incentive to limit competition from competing OVD services . . .” Motion at 8 (quoting *AT&T/DTV Order* ¶ 304). But the non-confidential portions of the *AT&T/DIRECTV Order* clearly set forth the basis for those concerns based on non-confidential materials. Adding the confidential document to this proceeding would add nothing.

¹⁹ See Declaration of Mark. A. Israel, Allan L. Shampine & Thomas A. Stemwedel, attached to Comments of AT&T Services Inc., Restoring Internet Freedom, WC Docket No. 17-108 (filed Jul. 16, 2017).

²⁰ Motion at 6.

seven years old, and are based on even older data. That is an eternity in the rapidly evolving marketplace for broadband services. The Commission’s goal in this proceeding, of course, is to adopt forward-looking regulations that account for the direction the marketplace is heading, not where it was several years ago. Old economic analyses, based on old data, do not advance that purpose, and could only result in an inaccurate and misleading record.

INCOMPAS’ request is also unsustainably one-sided and self-serving. The confidential information INCOMPAS seeks was collected from just three industry participants: AT&T, Charter, and Comcast. INCOMPAS is not asking the Commission to incorporate materials it may have collected from INCOMPAS’ own members or other relevant industry participants in the license transfer proceedings.²¹ INCOMPAS’ proposal to effectively obtain discovery from just three companies, while shielding its members from similar discovery, would create a biased, incomplete and misleading record.²² Indeed, the incomplete and asymmetric administrative record

²¹ At its most basic level, neither the Commission nor the parties are entitled to discovery in a rulemaking proceeding. If the Commission determines that it requires data that have not been voluntarily submitted, the proper course is to develop a mandatory data request, which must then be fully vetted under Administrative Procedure Act (“APA”) notice and comment procedures, and reviewed and authorized by the Office of Management and Budget under the Paperwork Reduction Act. Moreover, any such data request would have to be designed to obtain a balanced view of the issues – not, as INCOMPAS proposes, a request that selectively focuses on only a subset of relevant industry participants and documents (and that are largely stale in any event). Indeed, in the most recent rulemaking where the Commission issued a mandatory data collection, it collected comprehensive data from all relevant industry participants. *See* Order on Reconsideration, *Special Access for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, ¶ 3 (rel. Sept. 15, 2014) (BDS data collection included both providers and purchasers of special access services, as well as providers of certain best efforts business broadband internet access service).

²² INCOMPAS’ characterization of its request as “viewpoint-neutral,” Motion at 11, is absurd. INCOMPAS itself describes the confidential information it seeks as “documenting the economic incentives and abilities of incumbent broadband providers to curb competition,” “relating to the abilities and incentives of incumbent broadband providers to harm consumers,” the basis of conclusions “about the resulting market power and incentives of the merged entities,” and materials that “will allow parties to bring to the Commission’s attention concrete evidence that

that would result from granting INCOMPAS' Motion would not provide a basis for reasoned decision-making²³ and would raise fundamental due process concerns.²⁴

This is not an academic concern. For example, the past disputes over interconnection illustrate the one-sided and improper nature of INCOMPAS' request. One of INCOMPAS' largest members, Cogent, continues to argue that large Internet Service Providers ("ISPs") "unilaterally" caused widespread congestion in 2013,²⁵ even though it is now widely accepted that the congestion was the entirely avoidable result of the routing decisions of Cogent and other INCOMPAS members.²⁶ At the time, Cogent was attempting to leverage its Tier 1 peering status into an artificial competitive advantage in the content delivery (or "CDN") business. Prominent CDNs like Akamai and Limelight are not Tier 1 peers and therefore *purchase* backbone transiting services from other backbone service providers as an input to their service. Cogent apparently saw an opportunity to compete with these CDNs by abusing its settlement-free peering arrangement with ISPs like AT&T and Comcast by pushing enormous amounts of CDN video traffic directly to AT&T and Comcast on a settlement-free basis, and then attempted to blame AT&T and Comcast when those peering links became congested.

speaks directly to the incentives and ability of incumbent broadband providers to harm consumers." *Id.* at 1-4.

²³ See *Nat. Res. Def. Council v. US Nuclear Regulatory Comm'n*, 547 F.2d 633, 646 (D.C. Cir. 1976) ("Where only one side of a controversial issue is developed in any detail, the agency may abuse its discretion by deciding the issues on an inadequate record.").

²⁴ *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 (D.C. Cir. 1977) (the APA's requirements are designed to "provide fair treatment for persons affected by a rule"); *Prometheus Radio Project v. FCC*, 652 F.3d 431, 449 (3d Cir. 2011).

²⁵ See Comments of Cogent Communications Inc., *Restoring Internet Freedom*, WC Docket No. 17-108, at 13 (filed Jul. 17, 2017); see also Motion at 7-8.

²⁶ See, e.g., David Clark, Steve Bauer, William Lehr, kc claffy, Amogh D. Dhamdhere, Bradley Huffaker, Matthew Luckie, "Measurement and Analysis of Internet Interconnection and Congestion" (Sept. 9, 2014).

INCOMPAS clearly hopes to be able to cherry-pick out-of-context snippets from prior merger orders and records to bolster its arguments that the Commission should continue to regulate interconnection. That by itself is improper, but it would clearly be unfair to allow INCOMPAS to do so while shielding from exposure its own members' confidential internal documents, data analyses, and business plans that would refute INCOMPAS' arguments. Indeed, INCOMPAS' "heads-we-win-tails-you-lose" approach would effectively force AT&T to introduce *additional* confidential information into the rulemaking record to correct the misleading arguments that INCOMPAS apparently intends to make.

Finally, there is no merit to INCOMPAS' assertion that abrogating protective orders, as it proposes here, "accords with Commission precedent." Motion at 12-13. In both of the cases INCOMPAS cites, the Commission allowed confidential data from a general rulemaking to be used in a much more limited adjudication or rulemaking involving a subset of the parties that already had access to the data. Those cases, therefore, did not inherently involve any material increase in the risk of intentional or inadvertent disclosure of sensitive data to competitors. INCOMPAS, by contrast, is proposing to take materials submitted under protective orders in an adjudication with a relatively small number of parties with experience protecting confidential data, then placing them in an entirely unrelated rulemaking with millions of commenters with little experience protecting confidential data.

For example, in the Business Data Services ("BDS") proceeding, the Commission had collected, pursuant to protective orders, confidential information from the participants in a large rulemaking. The Commission subsequently initiated an investigation involving a subset of the

parties that had already obtained access to the confidential data in the larger proceeding.²⁷ Further, in opening the smaller proceeding – a tariff investigation – the Commission relied on the confidential data from the larger proceeding. Accordingly, the Commission formally added the data from the larger proceeding to the smaller one, where all of the parties already had obtained access to the confidential data in the larger proceeding.

INCOMPAS points to the Commission’s practice of using the number of telephone numbers that have been assigned to each mobile wireless carrier (called “NRUF” data) to compute market shares in wireless license transfer adjudications, pursuant to strict protective orders. But again, those are not remotely analogous to the situation here. The wireless transfer proceedings involve a relatively small subset of entities with substantial experience protecting confidential information obtained pursuant to protective orders. The relatively small number of participants in these proceedings – combined with their experience protecting data – minimize the potential for inadvertent or intentional public disclosure of the materials. Moreover, with the relatively small number of participants in these proceedings, the parties and the Commission can more effectively monitor which persons are seeking access to the data and adjudicating disputes, without unduly burdening either the parties or the Commission. By contrast, as noted, INCOMPAS is proposing to expose competitively sensitive information to potentially millions of applicants, which can only result in endless disputes and adjudications, all of which would create unacceptable risk of disclosure and overwhelm the resources of parties and the Commission to such an extent that it will impede the Commission’s ability to promptly carry out its statutory and regulatory responsibilities.

²⁷ See Report and Order, *Business Data Services in an Internet Protocol Environment*, WC Docket No. 16-143, ¶¶ 8-9 (rel. April 28, 2017).

CONCLUSION

For the foregoing reasons, the Commission should deny the Motion.

Respectfully Submitted,

/s/

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