Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

COMCAST CORPORATION'S OPPOSITION TO MOTION OF INCOMPAS TO MODIFY PROTECTIVE ORDERS

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Comcast Corporation ("Comcast") hereby opposes the motion of INCOMPAS to modify protective orders from various transaction reviews by the Commission involving Comcast and other companies ("Motion").[1] INCOMPAS requests that "interested commenters" in the above-captioned rulemaking be permitted to review and use vast amounts of confidential and highly confidential information and data from those concluded adjudicatory proceedings, which it contends will "strengthen the debate" and lead to a "better" general rulemaking here.[2] As shown below, the Motion lacks merit and is an obvious—and improper—procedural tactic

[1] The transaction review proceedings and protective orders encompassed by the Motion include: (a) *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); (b) *Applications of Comcast Corp. and Time Warner Cable Inc. for Consent to Assign or Transfer Control of Licenses and Authorizations*, Second Amended Modified Joint Protective Order, 29 FCC Rcd. 13799 (2014) ("*Comcast/TWC Protective Order*"); (c) *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); (d) *Applications of Comcast Corp., General Electric Co. and NBC Universal, Inc. for Consent to Assign Licenses or Transfer Control of Licenses*, Protective Order, 25 FCC Rcd. 2133 (2010) ("*First Comcast/NBCU Protective Order*"); and (e) *Applications of Comcast Corp., General Electric Co. and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licenses*, Second Protective Order, 25 FCC Rcd. 2140 (2010) ("*Second Comcast/NBCU Protective Order*").

[2] Motion at 11.

designed to delay and muddy consideration of the legal and policy issues relevant to the Commission's Notice of Proposed Rulemaking ("NPRM"). The Motion should be denied.

I. THE DISCLOSURES OF TRADE SECRETS AND OTHER CONFIDENTIAL SUBMISSIONS REQUESTED BY INCOMPAS WOULD BE BOTH UNLAWFUL AND BAD POLICY.

INCOMPAS represents companies that are direct competitors to Comcast. By its Motion, INCOMPAS proposes to make trade secrets and other highly confidential information submitted by Comcast and other applicants and participants in several major transaction review adjudications open to general inspection by "interested commenters" in this rulemaking, who now number into the millions.[3] INCOMPAS contends that this highly confidential information is "relevant" to the NPRM[4] and would "strengthen the debate and lead to a better and more reasoned outcome."[5] In fact, as INCOMPAS well knows, its Motion is unprecedented and would trample on the confidentiality protections afforded to Comcast's trade secrets under federal law. INCOMPAS's assertion that its request "meets the standard set by the D.C. Circuit in *CBS Corp. v. FCC*" is flatly wrong. The court's ruling there makes clear that granting the Motion would *violate* the Trade Secrets Act and the Commission's confidentiality policies.[6]

The Commission's use of confidential and highly confidential information submitted by applicants and participants in a transaction review adjudication is for the specific and limited

[3] For example, among the large quantities of Comcast's highly confidential information that INCOMPAS seeks to open for inspection here are "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" and "strategic plans and presentations relating to distribution of video programming over the Internet as submitted in the Comcast/NBCU proceeding." *Id.* at 10.

[4] *Id.* at 2-10.

[5] *Id.* at 11.

[6] *Id.* (citing *CBS Corp. v. FCC*, 785 F.3d 699 (D.C. Cir. 2015)).

purpose of evaluating whether the proposed transaction would serve "the public interest, convenience, and necessity."[7] In submitting their competitively sensitive materials in these adjudications, applicants and participants rely on the Trade Secrets Act and associated Commission confidentiality policies limiting any use of their information for that specific proceeding.[8] As the D.C. Circuit explained in *CBS Corp.*, the Commission's "regulations acknowledge that '[t]rade secrets . . . [are] not routinely available for public inspection,' 47 C.F.R. § 0.457(d), and the Confidential Information Policy makes clear that disclosure will not be 'automatic[ ]' but will instead be proper only in limited circumstances, *Confidential Information Policy* at 24822-23 (¶ 8)."[9] The court continued:

> [R]ecognizing that its disclosure decisions could have significant collateral consequences, the Commission has long worked to ensure that confidential materials are as protected as possible—while also serving the public's interest in meaningful merger review—by using protective orders. According to the Commission, such orders "can provide the benefit of protecting competitively valuable information while permitting *limited* disclosure for a *specific public purpose*."[10]

The protective orders governing the Comcast-related transactions adhere to the requirements of the Trade Secrets Act and Commission policies. They expressly (a) limit any use of confidential information "*solely* for the preparation and conduct of [the] proceeding before the Commission" and any ensuing judicial review, and (b) prohibit any use of confidential information for "*any other purpose*, including without limitation business,

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[7] 47 U.S.C. § 310(d).

[8] The Trade Secrets Act "makes it criminal for government officials to publish such information unless disclosure is 'authorized by law.'" *CBS Corp.*, 785 F.3d at 703-04 (quoting 18 U.S.C. § 1905).

[9] *Id.* at 706.

[10] *Id.* at 701-02 (quoting *Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, Report and Order, 13 FCC Rcd. 24816 ¶ 21 (1998)) ("*Confidential Information Policy*") (emphasis added) (other citation omitted).

governmental, or commercial purposes, or in other *administrative*, *regulatory* or judicial proceedings."[11] As an authorized recipient, through its counsel, of information governed by these protective orders, INCOMPAS violates their spirit, if not their letter, by intimating in its Motion—unfairly and self-servingly—that certain confidential submissions from the transactions provide "important and strong evidence" of alleged "incentives to discriminate" against competitors and others.[12]

Notably, in *CBS Corp*., the D.C. Circuit held that the Commission had failed to justify the ordered disclosure of the highly confidential information at issue *even in the pertinent*

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[11] *First Comcast/NBCU Protective Order* ¶ 9 ("*Use of Confidential Information*. Persons obtaining access to Confidential Information (including Stamped Confidential Documents) under this Protective Order shall use the information solely for the preparation and conduct of this proceeding before the Commission as delineated in this paragraph and paragraphs 10, 14, and 15, and any subsequent judicial proceeding arising directly from this proceeding and, except as provided herein, shall not use such documents or information for any other purpose, including without limitation business, governmental, or commercial purposes, or in other administrative, regulatory or judicial proceedings."); *see also Second Comcast/NBCU Protective Order* ¶ 7 ("*Use of Highly Confidential Information*. Persons obtaining access to Highly Confidential Information (including Stamped Highly Confidential Documents) under this Second Protective Order shall use the information solely for the preparation and conduct of this proceeding before the Commission as delineated in this and subsequent paragraphs, and any judicial proceeding arising directly from this proceeding, and, except as provided herein, shall not use such documents or information for any other purpose, including, without limitation, business, governmental, or commercial purposes, or in other administrative, regulatory or judicial proceedings."); *Comcast/TWC Protective Order* ¶ 12 ("*Use of Confidential and Highly Confidential Information*. Persons obtaining access to Confidential and Highly Confidential Information under this Modified Joint Protective Order shall use the information solely for the preparation and conduct of this proceeding before the Commission and any subsequent judicial proceeding arising directly from this proceeding and, except as provided herein, shall not use such documents or information for any other purpose, including without limitation business, governmental, or commercial purposes, or in any other administrative, regulatory or judicial proceedings. Should the Commission rely upon or otherwise make reference to any Confidential or Highly Confidential Information in its orders in this proceeding, it will do so by redacting any Confidential or Highly Confidential Information from the public version of the order and by making the unredacted version of the order available only to a court and to those persons entitled to access to Confidential or Highly Confidential Information under this Modified Joint Protective Order, as appropriate.").

[12] Motion at 5-6.

transaction review there, where the use of such information was strictly limited to that adjudication under the governing protective order.[13] The court ruled "that a general desire to permit broad public participation, or even an interest in a more effective decision-making process, must yield when sensitive information will be disclosed to competitors."[14] Otherwise, "such information would, subject to the governing protective orders, be routinely available for inspection. We must read the [Trade Secrets Act] and the Commission's precedents to avoid that construction if we are to be faithful to Congress's plan and to the Commission's own historical approach."[15]

These principles from *CBS Corp*. have even greater force here, where INCOMPAS proposes to open trade secrets and other highly confidential information from multiple transaction reviews to general inspection by "interested commenters" in a completely separate agency rulemaking. Even in cases where certain confidential and highly confidential information from a transaction review is potentially relevant to issues in another Commission proceeding, *CBS Corp*. makes clear that any public policy interest in such information "must yield" to the rights of submitting parties to protect their trade secrets from disclosure to competitors and others.[16]

Nor can INCOMPAS possibly show (or the Commission properly find) that such sweeping, unprecedented disclosures of trade secrets are justified in this general rulemaking. To the contrary, the public record already is, and will be, substantial and more than adequate for

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[13] 785 F.3d at 706.

[14] *Id*.

[15] *Id.*

[16] *Id*. (citing *Qwest Commc'ns Int'l Inc. v. FCC,* 229 F.3d 1172, 1180-84 (D.C. Cir. 2000) (likewise finding that the Commission failed to justify ordering the disclosure of confidential information under the Trade Secrets Act and Commission policies)).

the Commission to address the issues raised in the NPRM. The record contains millions of comments, with many stakeholders submitting detailed economic, legal, and policy arguments, both supporting and expressing opposition to the proposals in the NPRM.[17] Moreover, the Commission has twice before considered many of the same open Internet regulatory questions and policy matters based on the comments and public records developed in those proceedings, *and without seeking highly confidential information from any party or issuing a protective order*.[18] Tellingly, INCOMPAS (then COMPTEL) participated in *both* of these prior proceedings without ever suggesting that access to trade secrets from any contemporaneous transaction review was relevant or necessary. Nothing about this current open Internet proceeding warrants a different rulemaking approach, much less one that would violate the Trade Secrets Act and break the Commission's confidentiality commitments to Comcast and other parties who submitted highly confidential information in good faith reliance on these protections.

Far from supporting the Motion, therefore, *CBS Corp.* clearly forecloses the massive trade secret disclosures that INCOMPAS requests. While INCOMPAS and some of its members may be willing to disregard federal law protections for their own confidential, competitively-sensitive materials, ordering such disclosures of trade secrets over a party's objection would be unlawful.

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[17] Like other commenters, INCOMPAS has been able to review and cite to public versions of the Commission's orders and analyses in the various transaction review proceedings, to the extent that it contends anything in those materials is relevant to this rulemaking. *See, e.g.,* Comments of INCOMPAS, WC Docket No. 17-108, at 8 n.10, 12 n.26, 19 n.46, 20 n.48, 21 n.55, 24 nn.65, 66, 72 n.234 (filed July 17, 2017) (citing to—and mischaracterizing—various aspects of the *Comcast-NBCUniversal Order*).

[18] *Preserving the Open Internet; Broadband Industry Practices*, Report and Order, 25 FCC Rcd. 17905 (2010); *Protecting and Promoting the Open Internet,* Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd. 5601 (2015).

It also would be bad policy for the Commission to renege on its confidentiality rules and protective order commitments to parties who submit trade secrets in reliance on them for a specific adjudicatory proceeding, by then later allowing their use in a generalized rulemaking or other agency matter without consent. Such an action would chill the submission of confidential information in future agency proceedings and embroil the Commission in burdensome confidentiality disputes like the *CBS Corp.* case.[19]

Similarly, the Commission has determined that the use of protective orders in rulemaking proceedings can chill public participation, and thus should be avoided except "in extremely rare instances."[20] INCOMPAS tramples on this Commission policy, as well, further indicating that the real intent of its Motion is to complicate and impede this rulemaking by injecting vast amounts of confidential trade secrets from unrelated transaction reviews that have no legitimate place here.

II. THE "COMMISSION PRECEDENTS" THAT INCOMPAS CITES FOR ITS EXTRAORDINARY REQUEST ARE INAPT.

INCOMPAS also mischaracterizes the instances in which the Commission has permitted the use of confidential information submitted in one proceeding by parties in another. The two instances INCOMPAS identifies are readily distinguishable and do not support the Motion.

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[19] Besides being unlawful, the trade secret disclosures that INCOMPAS requests would place enormous and inordinate burdens on Commission staff. INCOMPAS acknowledges that confidential and highly confidential material under the Commission's protective orders must be returned or destroyed "at the conclusion of the proceeding," but notes that the Commission is "exempt" from these requirements and thus suggests that Commission staff should be tasked with reassembling and producing the vast amounts of trade secret information and data covered by its request. Motion at 6 n.13.

[20] *Confidential Information Policy* ¶ 45 ("Protective orders generally are not practical solutions in rulemakings, however, because rulemakings frequently involve numerous parties. Use of protective orders could also inhibit full public participation in proceedings that are of broad public interest.").

One involved a tariff investigation that was "a direct outgrowth of [the Commission's then-ongoing] special access rulemaking" and "rooted" in information from that docket.[21] The Commission had "already sought comment and data" in the special access rulemaking on issues pertinent to the tariff investigation, which involved a subset of the parties involved in the rulemaking.[22] "All parties to the rulemaking thus understood that the data they submitted in the rulemaking would be used in part to address the issues raised in the investigation."[23] Under these particular circumstances, the Commission determined that confidential information submitted in the rulemaking should be available for use in the tariff investigation under appropriate governing protective orders.[24] This situation bears no resemblance to the transaction reviews at issue where, as shown, parties submitted confidential and highly confidential information in reliance on the Commission's express policies and protective order commitments limiting its use to each specific adjudicatory proceeding.

The other instance involved applications to the Commission for approval of certain cellular license assignments and a *de facto* transfer of a long-term spectrum lease.[25] In order to

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[21] *See* Motion of AT&T Inc., Verizon, CenturyLink, and Frontier to Modify Protective Orders, WC Docket Nos. 15-247, 05-25, at 4 (filed Oct. 23, 2015) ("Joint ILEC Motion"); *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 Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, Order and Protective Orders, 30 FCC Rcd. 13680 ¶¶ 9-10 (2015) ("FCC Tariff Investigation Order").

[22] Joint ILEC Motion at 8.

[23] *Id*.

[24] FCC Tariff Investigation Order ¶¶ 1, 10.

[25] *See 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*

evaluate the applications, the Commission used carrier-specific telephone number assignments ("NRUF") and local number portability ("LNP") data from biannual and monthly reports filed by wireless telecommunications carriers.[26] In the Commission's words:

> [I]t is *standard Commission practice* that when confidential information regarding the number of telephone numbers that have been assigned to each mobile wireless carrier is relevant to a license transfer proceeding (in order to determine market shares), the Commission places that information into the record of the license transfer proceeding and adopts an appropriate protective order; it does not modify the protective order in the proceeding where that information was originally collected to allow it to be used elsewhere.[27]

This instance thus involved a "standard practice" by the Commission to use telephone numbering data that is commonly reported to the agency and routinely used to evaluate a particular type of license transfer application. Parties regularly submitting their confidential telephone numbering data to the Commission were thus on notice that it could be used in a specific license application review for the limited purpose of evaluating market shares.

There plainly is no such "standard Commission practice" for major transaction reviews. And, rather than being on "notice" of other possible uses of their trade secrets, transaction review participants are promised that their highly confidential information will only be used for the limited and specific purpose of those singular-event proceedings under the governing protective orders. There is simply *no* precedent for taking large quantities of trade secrets and competitively sensitive data from a transaction review and importing it, over a submitter's

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to be Placed into the Record, Subject to Protective Order, Public Notice, 30 FCC Rcd. 11597 (2015) ("*Wireless Applications Order*").

[26] *Id.* at 11598.

[27] FCC Tariff Investigation Order ¶ 13 & n.29 (discussing *Wireless Applications Order*) (emphasis added). The Commission gave affected parties an opportunity to oppose disclosure of their NRUF and LNP data. *Wireless Applications Order* at 11599.

objection, into a broad, generalized rulemaking such as this one. If that were allowed here, there would be no limitation to future disclosure requests for confidential information from *any* Commission proceeding whenever a third party contends it is "relevant" to issues being considered in another Commission matter.[28] As shown above, the Trade Secrets Act forbids an agency from treating a party's confidential information in such a "slippery slope" manner, which would create untenable risks of competitive misuse and even inadvertent disclosures of its trade secrets.

Like its mischaracterization of the *CBS Corp.* decision, INCOMPAS turns the relevant principles from these two "Commission precedents" on their head, further confirming that its Motion is a procedural tactic designed simply to throw a monkey wrench into this important rulemaking.

CONCLUSION

For these reasons, the Commission should deny the Motion.

Respectfully submitted,

/s/

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[28] For example, parties' highly confidential information in program access or program carriage adjudications could be characterized as "relevant" to a later Commission rulemaking considering potential changes to those rules.