

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

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

OPPOSITION TO MOTION OF INCOMPAS TO MODIFY PROTECTIVE ORDERS

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July 27, 2017

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OPPOSITION TO MOTION OF INCOMPAS TO MODIFY PROTECTIVE ORDERS

Charter Communications, Inc. (“Charter”) hereby opposes INCOMPAS’s motion to modify the protective orders in certain license transfer proceedings (“merger proceedings”)¹ to allow the disclosure and use of “highly confidential” and “confidential” information from those proceedings in this rulemaking proceeding.² Charter submitted highly sensitive commercial information in a number of these proceedings under protective orders that, among other things, expressly limited use of the information to the specific proceeding in which the information was submitted.³ Indeed, each of the protective orders from these merger proceedings includes a provision effectively limiting the use of highly confidential and confidential information submitted

¹ See *In re 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 10,360 (2015) (“Charter Protective Order”); *In re 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 11,864 (2014), order clarified on reconsideration, 29 FCC Rcd 13,597 (2014); *In re 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 11,883 (2014), amended by 29 FCC Rcd 13,616 (2014), amended by 29 FCC Rcd 13,810 (2014); *In re 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); *In re 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).

² See *In re Restoring Internet Freedom*, WC Docket No. 17-108, Motion of INCOMPAS to Modify Protective Orders (July 17, 2017) (“INCOMPAS Motion”).

³ In addition to submitting substantial amounts of highly confidential and confidential information in the Commission’s proceeding involving Charter’s recent merger with Time Warner Cable Inc. and Bright House Networks, and Comcast’s attempted merger with Time Warner Cable Inc., Charter also provided highly confidential information in response to Data Requests from the Commission in the AT&T-DirecTV merger docket. See Letter from John L. Flynn, Jenner & Block, to Marlene Dortch, Secretary, Federal Communications Commission, MB Docket No. 14-90 (Jan. 20, 2015), <https://ecfsapi.fcc.gov/file/60001014773.pdf>.

in the proceeding “solely” to “the preparation and conduct of *this proceeding* before the Commission and any subsequent judicial proceeding arising *directly from* this proceeding”—excluding use “for any other purpose, including without limitation . . . *governmental . . . purposes*, or in *any other administrative, regulatory or judicial proceedings*.”⁴

INCOMPAS, whose members include direct competitors to Charter and other participants in the merger proceedings, now seeks to require disclosure of highly sensitive commercial information in a wholly unrelated proceeding that involves millions of comments and hundreds of thousands of commenters. Such an outcome would eviscerate the core protection of the Commission’s protective orders, thereby unfairly punishing Charter’s past compliance and threatening the Commission’s ability to obtain sensitive information from private parties in the future. It is thus unsurprising that the relief INCOMPAS seeks is patently unlawful and harmful to the public interest. It violates the Trade Secrets Act to disclose confidential commercial information in this context, and, even under the Commission’s own rules, INCOMPAS has failed to make the necessary showing to justify a disclosure. The materials INCOMPAS seeks are at best merely factual context for the issues raised in this proceeding, falling far short of any justification for disturbing the parties’ expectations that their information would be protected from future disclosure. The balance of interests and public interest are also fatal to INCOMPAS’s motion, as the relief it seeks would harm individual providers and competition more generally as well as chill voluntary disclosures of essential information to the Commission going forward. For all of these reasons, and as discussed in more detail below, INCOMPAS’s motion should be denied.

⁴ *E.g.*, *Charter Protective Order*, 30 FCC Rcd at 10,392 ¶ 11 (emphases added). The Commission has used “substantially the same” protective order “over the past fifteen years.” *Id.* at 10,361 ¶ 3 n.6.

I. The Disclosure INCOMPAS Seeks Is Unlawful.

Disclosing the sensitive commercial information submitted in the merger proceedings as “confidential” and “highly confidential,” as INCOMPAS seeks, would violate the Trade Secrets Act. That statute prohibits federal agencies from “publish[ing], divulge[ing], disclos[ing], or mak[ing] known in any manner or to any extent not authorized by law” sensitive commercial information.⁵ The “highly confidential” and “confidential” materials to which INCOMPAS seeks access plainly fall within that protection.⁶ INCOMPAS cites no provision of law that authorizes the requested disclosure and, indeed, fails even to acknowledge the Trade Secrets Act. Accordingly, on that ground alone, INCOMPAS’s motion should be denied.⁷

But even if the Trade Secrets Act were not a bar to disclosure here, INCOMPAS concedes that, under the Commission’s own rules, the disclosure it seeks is subject to the “persuasive showing” standard, under which disclosure is allowed only if the information “serve[s as] a necessary link in the chain of evidence,” if the “disclosure . . . [is] in the public interest,” and if “a balance of interests . . . favor[s] disclosure.”⁸ INCOMPAS has not made—nor can it make—that showing here.

⁵ 18 U.S.C. § 1905.

⁶ See, e.g., *Charter Protective Order* 30 FCC Rcd at 10,388, Attachment – Protective Order (defining confidential information to mean “information that is not otherwise available from publicly available sources and that is subject to protection under the freedom of Information Act (‘FOIA’), 5 U.S.C. § 552 and the Commission’s implementing rules”; and defining highly confidential information to mean confidential information that additionally “the Submitting Party has kept strictly confidential” and “that the Submitting Party claims constitutes some of its most sensitive business data which, if released to competitors or those with whom the Submitting Party does business, would allow those persons to gain a significant advantage in the marketplace or in negotiations”).

⁷ See *Charter Protective Order*, 30 FCC Rcd at 10,403 (Statement of Commissioner Ajit Pai Dissenting in Part and Concurring in Part); cf. *Chrysler Corp. v. Brown*, 441 U.S. 281, 310 (1979). While the Commission has previously asserted statutory authority to release information subject to the Trade Secrets Act in particular contexts, the Commission has not addressed the Trade Secrets Act implications of expanding a protective order over objection years after the fact to allow for disclosure in a rulemaking proceeding with hundreds of thousands of parties.

⁸ INCOMPAS Mot. at 11. The Commission previously concluded—wrongly in Charter’s view—that the “persuasive showing” standard does not apply to the disclosure of highly confidential and confidential information *within* a licensing proceeding covered by a protective order. See *Charter Protective Order*, 30 FCC Rcd at 10,362 ¶ 6, 10,384

First, the information INCOMPAS seeks from the merger proceedings is in no way a “necessary link in the chain of evidence” in this proceeding. While INCOMPAS claims that the information bears on the ability and incentives of ISPs to harm edge providers,⁹ it has made no showing that such material is anything more than factual context for the questions before the Commission, which plainly falls short of the “persuasive showing” standard even under the Commission’s most recent articulation of that test.¹⁰ And in this rulemaking proceeding in particular, the argument that merger-specific highly confidential and confidential information is necessary to resolve any issue is farcical. This record is bursting with comments, filed by a diversity of commenters, including ISPs, trade associations, content providers, hardware providers, consumers, think tanks, and consumer advocate groups, as well as local, state, and federal government officials and entities. There is thus no perspective, argument, or information that will not be readily available to commenters and the Commission. Indeed, this is the third time the Commission has sought comment on the Internet openness questions at issue in this proceeding, and it has never before incorporated confidential or highly confidential information from another proceeding in doing so—even though several of the merger proceedings INCOMPAS seeks to incorporate here were concluded and no more or less relevant to the earlier Internet openness proceedings than they are to this one.

¶ 44; *see also id.* at 10,399-401 (Statement of Commissioner Ajit Pai Approving in Part and Dissenting in Part). But that holding by its own terms does not apply to the disclosure and use of highly confidential and confidential information subject to a protective order in a *separate* rulemaking proceeding. *See id.* at 10,361 ¶ 4 (eliminating persuasive showing for disclosures of highly confidential and confidential submissions pursuant to a protective order only in “licensing proceedings”); *id.* at 10,362 ¶ 6 (explaining that “persuasive showing” standard does not apply “when we permit participants *in a proceeding* to review confidential information pursuant to a protective order” (emphasis added)); *id.* at 10,367-68 ¶ 16 (explaining that protective orders balance the public interest because, among other things, “they limit the use of the information to the current proceeding”); *id.* at 10,385 ¶ 46 (explaining that protective orders render the persuasive showing unnecessary in “licensing proceedings”). And, in any case, as noted above, INCOMPAS concedes the applicability of the persuasive showing standard here.

⁹ *See* INCOMPAS Mot. at 3, 11.

¹⁰ *See Charter Protective Order*, 30 FCC Rcd at 10,383-84 ¶ 43.

Second, the balance of relevant interests militates strongly against disclosure. As set forth above, the benefits of the requested disclosure are minimal: The information is, at most, purely factual context for a proceeding with an enormous, detailed, and diverse docket. On the other side of the ledger, however, the requested disclosure could cause substantial harm to the parties that disclosed the requested information in the merger proceedings. “The Trade Secrets Act exists for an important reason—Congress has decided that confidential business information should be private unless there’s good cause to disclose it.”¹¹ That purpose has special salience in advanced communications markets, which are capital-intensive, dynamic, growing, and competitive.¹² If certain parties’ highly confidential and confidential information from prior transaction proceedings were to become widely available to commenters in this proceeding, those parties would face a serious risk that their information would be misused, resulting in economic harm to individual providers—and harms to innovation and competition in those markets in general.¹³

The fact that the disclosure would be subject to modified protective orders does not adequately mitigate these risks. Whatever the efficacy of protective orders in license transfer proceedings,¹⁴ it is not feasible for the Commission to police the use of thousands of pages of highly confidential and confidential information by hundreds of thousands of commenters with

¹¹ *CBS Corp. v. FCC*, 785 F.3d 699, 706 (D.C. Cir. 2015).

¹² *Cf. Charter Protective Order*, 30 FCC Rcd 10,405 (Dissenting Statement of Commissioner Michael O’Rielly) (“The practical effect of this item will be to expose sensitive details of business decisions made by content providers, programmers, and others to their competitors and potential partners. The inevitable result will be a chilling impact on the creativity of productions and business dealings in a video programming industry that is already subject to a highly competitive and rapidly changing marketplace.”).

¹³ *See id.* at 10,402 (Statement of Commissioner Ajit Pai Approving in Part and Dissenting in Part) (“Here, however, the Commission opens the door to the wide dissemination of large swaths of confidential commercial information. This is not only bad for individual competitors in the marketplace, it is bad for competition itself.”).

¹⁴ *See id.* at 10,405 (Dissenting Statement of Commissioner Michael O’Rielly) (describing that even under protective orders, information will “be exposed under inconsequential and ineffective protections” and warning that “the ‘safeguards’ proffered in this Order will be insufficient to provide any real protection”).

varying degrees of sophistication and resources, in a highly politically charged rulemaking proceeding. Additionally, as the Commission has recognized, one of the safeguards in its protective orders is the limitation that highly confidential and confidential information will be used only in a specific proceeding; if the Commission can retroactively nullify that protection, over objection, it will undermine the deterrent effect of the other safeguards, inviting parties to test the Commission's resolve in enforcing those protections.

Third, the requested disclosure would cause additional public interest harms by substantially chilling the voluntary disclosure of information to the Commission for years to come. Parties often voluntarily provide the Commission with confidential data for a specific purpose, but that data could be relevant to multiple Commission proceedings. If that data can be used by participants in all of those proceedings over the objections of the disclosing party, including possibly years after the initial disclosure, following a unilateral modification of the relevant protective order, that "new policy will deter companies from voluntarily disclosing commercially sensitive information to the FCC" in the first place.¹⁵

II. The Precedent INCOMPAS Relies Upon Is Inapposite.

INCOMPAS fails to grapple with the many problems discussed above and instead purports to rely on "Commission precedent."¹⁶ The items INCOMPAS relies upon, however, which cannot accurately be described as either "Commission"-level or "precedent[ial]," are readily distinguishable.

First, INCOMPAS cites a non-final Public Notice from a proceeding involving a wireless transaction, where the Commission expressed its intent, subject to objections from affected parties

¹⁵ See *id.* at 10,402 (Statement of Commissioner Ajit Pai Approving in Part and Dissenting in Part).

¹⁶ INCOMPAS Mot. at 12.

and to a Bureau-level protective order, to incorporate confidential Numbering Resource Utilization and Forecast (“NRUF”) and local number portability (“LNP”) data contained in certain reports and data otherwise provided to the Commission.¹⁷ No party filed objections to the proposed incorporation—nor did any party file comments or petitions to deny the transaction—meaning that the Commission’s authority to undertake a disclosure without consent was not at issue.¹⁸ Moreover, the Public Notice proposed, and the Bureau protective order authorized, the obverse of what is being requested here—*i.e.*, the Commission sought to incorporate data from other proceedings into a license transfer proceeding, not vice versa. This procedural difference is significant, because the risks to the holders of confidential information from incorporation into a small, transaction-specific proceeding are minimal. Here, by contrast, the proceeding involves millions of comments, and hundreds or thousands of commenters who realistically could assert an interest in reviewing transaction-specific highly confidential and confidential information, magnifying the risk of improper handling and usage, and putting a few individual providers at a competitive disadvantage, merely by virtue of the fact that they were parties to mergers.

¹⁷ See *In re 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*, Public Notice, 30 FCC Rcd 11,597, 11,598 (2015) (“*AT&T-Tampnet Public Notice*”). INCOMPAS cites the Commission’s Public Notice, rather than the relevant WTB protective order. See *In re 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*, NRUF/LNP Protective Order, 30 FCC Rcd 11,590 (WTB 2015) (“*AT&T-Tampnet Protective Order*”). This distinction is significant: Because the Public Notice provided parties with an opportunity to object to the proposed incorporation of information into the docket, see *AT&T-Tampnet Public Notice*, 30 FCC Rcd at 11,599, it lacked finality and was not an appealable order. See *AT&T Corp. v. FCC*, 369 F.3d 554, 561-62 (D.C. Cir. 2004) (per curiam). And the Protective Order was an action by the Wireless Telecommunications Bureau, acting on delegated authority, and thus is not Commission-level precedent.

¹⁸ See *In re 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*, Memorandum Opinion and Order and Declaratory Ruling, 31 FCC Rcd 7890, 7899-900 ¶ 21 (WTB 2016). Additionally, carriers providing NRUF and LNP data have long been on notice that such information may be incorporated in relevant transaction proceedings. See, e.g., *AT&T-Tampnet Protective Order*, 30 FCC Rcd at 11,598.

Second, INCOMPAS cites an Order from the Wireline Competition Bureau allowing the subjects of an investigation into tariff pricing plans for business data services (“BDS”) to use the highly confidential and confidential information that had been submitted in the BDS rulemaking proceeding.¹⁹ Although one party opposed the requested disclosure, it did so only on a theory that the disclosure would be burdensome, and its opposition was rejected as untimely in any event;²⁰ thus, the order does not satisfy (or identify a hook for satisfying) any of the legal requirements discussed above. Moreover, disclosure in the BDS proceedings was more amenable to treatment by a protective order than the instant proceeding, given the BDS proceeding’s smaller number of participants. Accordingly, this “precedent” is readily distinguishable, because in this rulemaking proceeding both the benefits of disclosure are lower, and the costs of disclosure are higher.

¹⁹ See *In Re Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans*, Order and Protective Orders, 30 FCC Rcd 13,680, 13,680 ¶ 1 (WCB 2015).

²⁰ *Id.* at 13,684 ¶ 12.

CONCLUSION

For the foregoing reasons, the Commission should deny INCOMPAS's Motion to modify the protective orders in the merger proceedings to permit the use of highly confidential and confidential information in this proceeding. INCOMPAS's unprecedented request is a harmful fishing expedition, which, if granted, would violate federal law, be inconsistent with prior Commission decisions, harm individual providers and competition, and chill the voluntary disclosure of information that is essential for the Commission's ability to act in the public interest.

Respectfully submitted,

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