

**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

SUPPORT OF INCOMPAS MOTION TO MODIFY PROTECTIVE ORDERS

New America’s Open Technology Institute (“OTI”)¹ supports the motion by INCOMPAS to modify protective orders in recent merger reviews.² The dockets referenced in the motion are highly relevant to the current proceeding.³ As a participant in these merger reviews, OTI believes that granting the motion will give the Commission a necessary link to understanding the notoriously opaque transit market and the interconnection authority it now proposes to rescind.

OTI agrees with INCOMPAS that the concerns raised in the 2015 *Open Internet Order* were not “hypothetical” or “theoretical,” as the Notice of Proposed Rulemaking

¹ OTI is a 501(c)(3) organization that works to advance the public interest. We do not compete with AT&T, Charter, or any other company referenced in the merger dockets.

² Motion of INCOMPAS to Modify Protective Orders, WC Docket No. 17-108 (July 17, 2017).

³ 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); 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); 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); 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); 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).

suggests.⁴ OTI has documented widespread, prolonged degradation of service that impacted millions of Americans.⁵ The degradation appeared to stem from interconnection disputes that involved the nation’s four largest internet service providers by market share. These harms were a core reason the Commission asserted its authority to adjudicate interconnection disputes in 2015,⁶ and they resurfaced in several subsequent merger reviews that are referenced in the INCOMPAS motion.

For example, the AT&T/DIRECTV docket includes evidence that AT&T’s network was severely congested during interconnection disputes in 2014 and 2015.⁷ That evidence was based on open, publicly-available data gathered by Measurement Lab.⁸ AT&T’s response to this evidence was heavily redacted and relied on information that was subject to the protective order.⁹ The Commission was nonetheless able to make an

⁴ Restoring Internet Freedom, Notice of Proposed Rulemaking, 32 FCC Rcd. 4434, at 4452 ¶ 50, 4459 ¶ 74 (2017) (“NPRM”).

⁵ See “Beyond Frustrated: The Sweeping Consumer Harms as a Result of ISP Disputes,” Open Technology Institute, November 2014.

⁶ *Protecting and Promoting the Open Internet*, GN Dkt. 14-28, Report and Order, 30 FCC Rcd. 5601, (Mar. 12, 2015) (“2015 Order”).

⁷ Letter from New America’s Open Technology Institute to Marlene H. Dortch, Secretary, FCC, MB Docket No. 14-90 (June 24, 2015); see also Letter from Free Press, Public Knowledge, and New America’s Open Technology Institute to Marlene H. Dortch, Secretary, FCC, MB Docket No. 14-90 (May 28, 2015).

⁸ *Id.*

⁹ See Letter from Maureen R. Jeffreys, Counsel for AT&T, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 14-90 at 2 (filed June 25, 2015) (“In just the past two months, AT&T has reached comprehensive, long-term interconnection agreements with Level 3, Cogent, and [BEGIN AT&T HIGHLY CONFIDENTIAL INFORMATION] [END AT&T HIGHLY CONFIDENTIAL INFORMATION]. As a result of these agreements alone, AT&T will add at least [BEGIN AT&T HIGHLY CONFIDENTIAL INFORMATION] [END AT&T HIGHLY CONFIDENTIAL INFORMATION] of capacity at interconnection points, which translates to an increase in capacity of approximately [BEGIN AT&T HIGHLY CONFIDENTIAL INFORMATION] [END AT&T HIGHLY CONFIDENTIAL INFORMATION] percent. Moreover, while these agreements will bring total peering capacity to more than [BEGIN AT&T HIGHLY CONFIDENTIAL INFORMATION] [END AT&T HIGHLY CONFIDENTIAL INFORMATION], they also provide the [BEGIN AT&T HIGHLY CONFIDENTIAL INFORMATION] [END AT&T HIGHLY CONFIDENTIAL INFORMATION]”).

informed conclusion because the protective order allowed the government and certain parties to more fully scrutinize the veracity of AT&T's argument.¹⁰

The Commission cannot contemplate rescinding its interconnection authority, as the NPRM proposes, without developing a complete record of AT&T's interconnection disputes and others like it. Indeed, similar interconnection behavior was examined in the review of Charter's merger with Time Warner Cable and Bright House Networks.¹¹ The AT&T/DIRECTV and Charter/TWC dockets appear to contain important context and data that clarifies how interconnection disputes occur and what role the Commission should play. Neither docket existed during the 2010 and 2015 Open Internet proceedings. Without this information in the current proceeding, it is difficult to envision how the Commission can make an informed conclusion about its interconnection authority.

Furthermore, past merger reviews demonstrate that sensitive information can be in the public record and protected from wrongful disclosure. Charter argues that the efficacy of protective orders cannot be trusted in the current proceeding, but offers no evidence that the orders have failed in the past, no evidence that the Commission or commenters have mishandled the information, and no evidence that a substantial risk of disclosure exists.¹² Instead, Charter merely asserts that the Commission is unable to "police the use of thousands of pages."¹³ This assertion is baseless.

¹⁰ The Commission ultimately decided that the evidence was sufficient to justify imposing an interconnection disclosure condition on the transaction. *See 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 (2015).

¹¹ *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 (2016).

¹² Charter Communications, *Opposition to Motion*, WC Docket No. 17-108 (July 27, 2017).

¹³ *Id.* at 5.

INCOMPAS' motion is ultimately necessitated by the fact that the broadband and video markets have consolidated since the 2015 Order was enacted. The recent AT&T and Charter transactions are evidence of that consolidation, and they provide a necessary link to understanding the effects of the Commission's interconnection authority. Without this link, the Commission's record in the current proceeding will be incomplete and vulnerable to cherry-picked, poorly scrutinized data. For these reasons, the Commission should grant the INCOMPAS motion.

Respectfully submitted,

Joshua Stager
New America's Open Technology Institute
740 15th Street NW, Suite 900
Washington, DC 20005

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