

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

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

**VERIZON¹ OPPOSITION TO INCOMPAS’S
MOTION TO MODIFY PROTECTIVE ORDERS**

Verizon opposes INCOMPAS’s Motion in the *Restoring Internet Freedom* docket to modify multiple protective orders in other, unrelated proceedings.² INCOMPAS asks the Commission to allow potentially millions of “interested commenters” in a completely separate matter to access and use highly confidential and competitively sensitive information submitted in long-closed transaction reviews.³ Comcast, Charter, and AT&T, applicants in those proceedings,

¹ The Verizon companies participating in this filing are the regulated, wholly owned subsidiaries of Verizon Communications Inc.

² Motion of INCOMPAS to Modify Protective Orders, Restoring Internet Freedom, WC Docket No. 17-108 (filed July 17, 2017) (“Motion”). Verizon requests leave to file this Opposition out of time. INCOMPAS filed the Motion solely in Docket No. 17-108, submitted among more than fifteen million comments, and it does not appear that INCOMPAS served parties to the protective orders that it now seeks to modify. *See generally* Opposition of AT&T Services Inc. at n.1 (filed July 27, 2017) (“AT&T Opposition”). As a consequence, Verizon learned of the Motion only recently. However, given the sensitivity of the business data that Verizon and other third parties submitted to the Commission in good faith reliance on the protective orders subject to the Motion and the enormous harm that could result from release of that data, good cause exists for the Commission to accept this Opposition out of time.

³ Motion at 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*, Protective Order, 30 FCC Rcd 10360 (2015); *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); *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 Licenses*, Protective Order, 25 FCC Rcd 2133 (2010); and *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).

have opposed the Motion.⁴ Verizon agrees with their objections and further opposes INCOMPAS's request because it could make public the highly sensitive business information of third parties like Verizon who, in response to Commission requests, submitted highly confidential and confidential information in those transaction proceedings. There is no legal justification or sound policy basis to justify making this highly sensitive business information available in the *Restoring Internet Freedom* proceeding. Moreover, INCOMPAS improperly filed this Motion only in the *Restoring Internet Freedom* proceeding and not in the respective transaction dockets in which the protective orders were issued. As such, these various protective orders are not properly before the Commission. For each of these reasons, the Motion should be denied.

I. INCOMPAS SEEKS THE UNLAWFUL AND UNWARRANTED DISCLOSURE OF SENSITIVE BUSINESS INFORMATION.

The D.C. Circuit has ruled that disclosure of sensitive business information in FCC proceedings is “proper only in *limited* circumstances,” and 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.”⁵ As such, disclosure of competitively sensitive materials is appropriate *only* upon a showing that disclosure (1) is in the public interest and “is a good idea on balance” and that (2) the information is a “*necessary* link in a chain of evidence.”⁶ The Motion fails to satisfy these strict standards.

⁴ See Comcast Corporation's Opposition to Motion of INCOMPAS to Modify Protective Orders (filed July 27, 2017); Charter Communications, Inc.'s Opposition to Motion of INCOMPAS to Modify Protective Orders (filed July 27, 2017) (“Charter Opposition”); AT&T Opposition.

⁵ *CBS Corp. v. FCC*, 785 F.3d 699, 706 (D.C. Cir. 2015) (emphasis added).

⁶ *Id.* at 705.

A. Disclosure Here Is Not in the Public Interest and Is Not a Good Idea.

Granting the Motion cannot be construed as being “in the public interest” or “a good idea on balance.” INCOMPAS is seeking to provide potentially millions of “interested commenters” with access to highly sensitive business information not only from merger applicants Comcast, Charter, and AT&T, but also from Verizon and numerous other third parties who submitted confidential and highly confidential information in response to FCC requests for data in those transaction review proceedings. Providing access to such highly sensitive information in the *Restoring Internet Freedom* proceeding would significantly increase the risk that these materials would be improperly disclosed and cause enormous competitive harm not only to merger applicants, but also to third parties such as Verizon.

In response to Commission information requests, Verizon submitted highly sensitive business information under protective order in three of the transaction review proceedings subject to INCOMPAS’s request: MB Docket Nos. 15-149, 14-90, and 14-57. For instance, in the Charter/Time Warner Cable transaction review, the Commission sought, and Verizon submitted, highly sensitive information including: confidential Internet interconnection agreements; information regarding how Verizon responded to competitors’ pricing behaviors and product offerings; profitability and other financial data; customer-specific data about the number of customers, the type of service to which they subscribe, and the number of disconnects and gross adds per state per month for specified states; and Internet exchange data.⁷ Similarly, in the AT&T/DirectTV transaction review, Verizon provided, among other things, confidential monthly data regarding Fios Internet and Fios TV residential lines in

⁷ See Letters from Meredith Singer, Wiley Rein LLP, Counsel to Verizon, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 15-149 (Nov. 6, 2015, Dec. 23, 2015, Feb. 4, 2016).

service.⁸ And, in the Comcast/Time Warner Cable transaction review, Verizon submitted highly sensitive information including: average revenue per user for certain services; estimated costs relating to customer acquisition; confidential disaggregated monthly data on lines in service, disconnects and gross adds; and certain confidential Internet interconnection agreements.⁹

This information – already designated as highly confidential and confidential – is extremely competitively sensitive.¹⁰ Indeed, the Commission adopted protective orders in those cases precisely because such information is especially confidential and would cause competitive harm if improperly disclosed. To that end, the protective orders include strict limits on which individuals may review the material, how they may use it, and where and how it is disclosed. Even some participants in the proceedings did not have access to some of this information, as it was limited in some cases to outside counsel only. The Commission deemed this type of information so sensitive that it required even those parties who did have access to it from third parties to destroy it at the conclusion of the proceedings.¹¹

Nothing has changed since the adoption of these protective orders that warrants the Commission weakening these protections by allowing this sensitive business information to be

⁸ See Letter from Meredith Singer, Wiley Rein LLP, Counsel to Verizon, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 14-90 (Apr. 16, 2016).

⁹ Letters from Meredith Singer, Wiley Rein LLP, Counsel to Verizon, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 14-57 (Dec. 8, 2014, Mar. 2, 2015, Mar. 27, 2015).

¹⁰ See, e.g., *Charter/Time Warner Cable*, Protective Order, 30 FCC Rcd at 10389 ¶ 3; *Comcast/Time Warner Cable*, Second Amended Modified Joint Protective Order, 29 FCC Rcd at 13801 ¶ 3; *AT&T/DirecTV*, Joint Protective Order, 29 FCC Rcd at 6049 ¶ 3.

¹¹ See, e.g., *Charter/Time Warner Cable*, Protective Order, 30 FCC Rcd at 10392 ¶¶ 9, 11, 12; *Comcast/Time Warner Cable*, Second Amended Modified Joint Protective Order, 29 FCC Rcd at 13804 ¶¶ 9, 11, 12; *AT&T/DirecTV*, Joint Protective Order, 29 FCC Rcd at 6051 ¶¶ 8, 10, 11.

disclosed to potentially millions of “interested commenters” in the *Restoring Internet Freedom* proceeding. INCOMPAS does not challenge the sensitivity of the data Verizon or other parties submitted in those earlier transaction review proceedings. Nor can it – there is no dispute that improper disclosure of this material would cause third parties significant economic harm.

INCOMPAS instead seeks to downplay the risks of improper disclosure that are inherent in allowing millions of filers access to this sensitive business data. But INCOMPAS’s arguments fall short.

First, it is simply not credible to assert that the Motion would affect only a limited amount of information.¹² INCOMPAS’s request is extraordinarily expansive. It seeks, without limitation, *all* “documents and materials requested by the Commission that directly relate to the topics raised in the instant proceeding.”¹³ This request sweeps broadly and could be interpreted to include information supplied by Verizon and other third parties in the transaction review proceedings.

Second, contrary to INCOMPAS’s claims,¹⁴ the existing protective orders cannot be modified and imported into this proceeding in a way that will both allow potentially millions of “interested commenters” to access Verizon’s and others’ highly sensitive data, and adequately protect that data from improper disclosure. There is no way to guarantee that each and every one of these commenters has the experience or procedures necessary to protect these data from improper disclosure. Nor is it even reasonably possible to create a process by which all of these parties could sign a protective order acknowledgment, be subject to review and potential

¹² Motion at 9 (emphasis in original).

¹³ *Id.* at 10.

¹⁴ *Id.* at 11.

challenge, and then be provided access to the materials for review, as the protective orders contemplate. As Charter put it, “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 varying degrees of sophistication and resources. . . .”¹⁵ In short, the relevant protective orders are simply insufficient to address the realities of the *Restoring Internet Freedom* proceeding.

Further, grant of the Motion risks impairing the Commission’s ability to gather sensitive business information in the future. Verizon, and all other third parties, submitted highly confidential and confidential information in express reliance on the use and disclosure guarantees enshrined in the protective orders – e.g., the information would be used “solely for the preparation and conduct of [the] proceeding before the Commission and any ensuing judicial proceeding arising directly from this proceeding,” and would not be used for “*any other purpose.*”¹⁶ As AT&T notes, a failure to enforce Commission 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.”¹⁷

¹⁵ Charter Opposition at 5-6.

¹⁶ See, e.g., *Charter/Time Warner Cable*, Protective Order, 30 FCC Rcd at 10392 ¶ 11 (emphasis added); *Comcast/Time Warner Cable*, Second Amended Modified Joint Protective Order, 29 FCC Rcd at 13804 ¶ 12; *AT&T/DirecTV*, Joint Protective Order, 29 FCC Rcd at 6052 ¶ 10.

¹⁷ AT&T Opposition at 8 (quoting *Applications of Craig O. McCaw, Transfer, and American Telephone and Telegraph Co., Transferee*, 9 FCC Rcd 5836, 5923-24, ¶ 163 (1994)).

B. Disclosure is Not a Necessary Link in a Chain of Evidence and Will Add Little Value to the Record of the Instant Proceeding.

Finally, there is no credible argument that the information INCOMPAS seeks to introduce into this proceeding is a “*necessary* link in a chain of evidence,” let alone that it is “absolutely necessary.”¹⁸ To the contrary, the requested confidential and highly confidential information from these historical transaction proceedings will not materially add to the voluminous record and other information that is already publicly available in this rulemaking proceeding.

The public record in this proceeding is already voluminous. There are millions of comments, thousands of pages of expert testimony and declarations, and hundreds of substantive analyses and submissions with detailed economic, legal, and policy arguments, both supporting and opposing the Commission’s proposals. Indeed, the Commission has twice before considered many of the same open Internet regulatory questions and policy matters on the basis of such a record and without the benefit of the confidential and highly confidential information INCOMPAS now seeks to add.¹⁹

II. INCOMPAS’S “SUPPORTING” PRECEDENT IS INAPPOSITE.

INCOMPAS cites two instances in which the Commission permitted confidential information submitted in one proceeding to be used in a different proceeding to argue that its

¹⁸ *CBS Corp.*, 785 F.3d at 705-06 (emphasis added).

¹⁹ See *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).

Motion “accords with Commission precedent.”²⁰ These cases, however, do not support the weight INCOMPAS gives them and are readily distinguished from the instant case.

INCOMPAS relies heavily on the Commission’s Business Data Services (“BDS”) proceeding in which the Commission collected confidential information pursuant to protective orders from participants in a large rulemaking involving services that all price-cap carriers offered.²¹ The Commission subsequently initiated an investigation of a limited set of tariffed discounts for those services that just four of those carriers offered. There, the Commission allowed confidential data from the BDS proceeding to be introduced into the more limited adjudicatory proceeding.²² Here, INCOMPAS proposes the opposite. INCOMPAS wants the Commission to take materials submitted for limited purposes in adjudicatory proceedings and allow those materials to be used in an unrelated rulemaking and disclosed to potentially millions of commenters who previously had no access to that material.

INCOMPAS also points to a case in which the Commission used confidential carrier-specific telephone number assignments and local number portability data in the context of reviewing spectrum license transactions.²³ The proceedings involved a relatively small number of

²⁰ Motion at 12-13.

²¹ *See id.* at 12 (citing Motion of AT&T Inc., Verizon, CenturyLink, and Frontier to Modify Protective Orders, WC Docket Nos. 15-247, 05-25 (filed Oct. 23, 2015)).

²² *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 (2015).

²³ *See* Motion at 12 (citing *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 (2015)).

entities all of whom had substantial experience operating under Commission protective orders. Thus, as with the tariff investigation situation discussed above, introducing the confidential data into the transaction proceedings did not materially increase the risk of improper disclosure of sensitive business information.

These cases stand in stark contrast to what INCOMPAS is proposing here. The two cases cited by INCOMPAS involved circumstances that did not increase the risks of improper disclosure. But here, INCOMPAS proposes to expose sensitive business and other confidential information in a manner that could exponentially increase the risk of improper disclosure.

III. CONCLUSION

INCOMPAS has offered no legal justification sufficient to warrant a Commission decision to vitiate the protective orders from MB Docket Nos. 15-149, 14-90, and 14-57. Indeed, because it is filed only in the *Restoring Internet Freedom* proceeding, the Motion is not even sufficient from a procedural perspective to bring these protective orders from different proceedings properly before the Commission. The Commission should deny the Motion.

Respectfully submitted,

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