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Federal Communications Commission
Office of Secretary

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

In The Matter Of

Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission	))))	GC Docket No. 96-55

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COMMENTS

Thompson Hine & Flory P.L.L. (TH&F), pursuant to Section 1.415 of the Commission's Rules, hereby files its Comments in the above-captioned proceeding concerning treatment of confidential information submitted to the Commission by regulated entities and others. In support thereof, TH&F states as follows:

1. Among the items which the Commission seeks public comment on is whether special disclosure policies should apply to different proceedings. Based on our experience in representing Commission licensees, a blanket confidentiality/disclosure policy, regardless of the type of proceeding involved, is clearly inequitable. We submit that the facts and circumstances surrounding each individual request for confidentiality must be examined in detail, with all due deference given to the submitting party, when the regulated entity or other party asserts that the information is competitively sensitive.

2. In that the Commission is dealing with licensees and others involved in highly competitive businesses, any non-public information the Commission receives from a party concerning the party's operations, charges, procedures, customers, etc., can be economically beneficial to competitors and harmful to the submitting party. Parties providing competitively sensitive

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information to the Commission need immediate certainty that the information they deliver will be accorded the highest degree of confidentiality. In that this may well clash with the Commission's regulatory and enforcement roles, the treatment of confidential business information must be delineated. Any guidelines established by the Commission must contain enough flexibility to enable the Commission to consider all circumstances surrounding each individual request for confidentiality.

3. The handling of competitively sensitive information is well recognized. As the Commission itself notes, the Trade Secrets Act, 18 U.S.C. § 1905, makes it a crime for a federal employee to divulge "trade secrets, processes, operations, style of work, or operations," except where legal authorization exists. Likewise, Exemption 4 to the Freedom of Information Act, 5 U.S.C. § 552(b)(4), limits a federal agency's disclosure obligations when the information requested involves "trade secrets" or "commercial or financial information." Consequently, we submit that the Commission should adopt a general policy that confidential information must be protected and that the Commission will take affirmative efforts, by agreements, protective orders, or documents under seal, to see to it that commercially sensitive information does not reach any competitors.

4. The Commission seeks comment (¶ 35) on the types of information that a party, requesting confidentiality under

Section 0.461(a) of the Commission's Rules, must submit in order to receive confidential treatment. The NPRM suggests six (6) components of the submission a party must make to receive such treatment.

5. In addition to the six (6) types of information suggested in the NPRM, parties requesting confidentiality, we believe, should also be encouraged to identify and describe in detail: (a) the nature of the Commission proceeding that the requestor is involved in; and (b) the person(s) or category of persons whom the requesting party believes should be denied access to the confidential information.

6. TH&F submits that the six (6) types of information in the NPRM, plus the two (2) additional items discussed above, will provide the Commission with both sufficient guidance and flexibility to analyze the individual circumstances surrounding each and every request for confidentiality from Commission licensees. Likewise, it will evidence to the Commission the potential harm to the submitting party from a release of such confidential information.

7. We submit that Section 0.457(d), upon which the Commission seeks comments (§34) is outdated and needs revisions. For example, Section 0.457(d)(i) refers to financial reports from broadcast stations that have not be required for many years. In place of this, the Commission should treat, as confidential, information pertaining to the finances, customers, business practices, plans, projections, and operating procedures of a

party. At a minimum, any non-public information that can offer a competitor an advantage over the submitting party should be treated as confidential and protected. We do not feel that this is over-inclusive, but that it serves to specify the relevant information to be protected.

8. The Commission also seeks (¶12) comment on whether a "persuasive showing" standard remains an acceptable standard for the disclosure of a licensee's trade secrets and confidential commercial or financial information. We are concerned that the term "persuasive" may allow a requesting party the ability to secure confidential information based on a subjective (how well the Commission is persuaded) rather than on objective (what overriding need is presented) standard. We suggest that the Commission define "persuasive" to be a documented showing that the requester is unable to secure the information by any other possible means, that there is a material need for the information in a Commission proceeding that the party is involved in or that has a direct impact on the party, and the need for production of the information by the Commission substantially and materially outweighs the detrimental impact on the submitting party.

9. Based on our experience representing Commission licensee's, TH&F submits that a party's trade secrets and confidential commercial or financial information should, except in rare instances, never be disclosed to third-parties. It is inconceivable that disclosure of the party's trade secrets and confidential information, such as a party's customer list, in

most instances promotes any public interest that the Commission is obligated to protect, since such confidential information, if disclosed to third-parties, will cause harm to the submitting party.

10. Finally, while TH&F commends the Commission's desire (¶ 39) to preserve scarce Commission resources, codifying a practice whereby the Commission defers acting on a request for confidentiality if no request for inspection has been made imposes an undue hardship on the submitting party. The Commission should be required to make a decision on a party's request for confidentiality before the party submits the confidential information. The most significant point in time for a party that has confidential information is prior to its submission. That is the proper time for the Commission to consider confidentiality protection and to allow the party, by administrative or judicial review, to have the issue fairly considered. Accordingly, the proposed rule concerning the timing

of a ruling on a party's request for confidentiality imposes an undue burden on the party and should not be adopted.

Respectfully submitted,

THOMPSON HINE & FLORY P.L.L.

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