

September 26, 2014

VIA ECFS

Marlene H. Dortch, Esq.
Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: Applications of AT&T Inc. and DIRECTV for Consent to Assign or Transfer Control of Licenses and Authorizations, MB Docket No. 14-90

Dear Ms. Dortch:

AT&T Inc. (“AT&T”) and DIRECTV (collectively, the “Applicants”) hereby file these comments in response to the Staff’s request¹ for input on possible additional protections to programming-related documents that the Applicants are ready to produce in response to the Commission’s Information and Discovery Requests.² The Applicants urge the Commission to reach a prompt resolution of these issues so that they may respond to the Commission’s Information Requests without further delay, and the Commission may continue its review of the transaction as expeditiously as possible. Resolving these issues rapidly will avoid unnecessarily reducing the time the Staff and third parties have to review the documents before the end of the Commission’s 180-day period for considering the transaction.

¹ See generally *Media Bureau Seeks Comment on Issues Raised by Certain Programmers and Broadcasters Regarding the Production of Certain Documents in Comcast-Time Warner Cable-Charter and AT&T-DIRECTV Transaction Proceedings*, MB Dkt Nos. 14-57 and 14-90, Public Notice, DA 14-1383 (rel. Sept. 23, 2014) (“Public Notice”). On Wednesday, September 24, 2014, Hank Hultquist and Jim Wade of AT&T; AT&T outside counsel Maureen Jeffreys and Peter Schildkraut of Arnold & Porter LLP; Keith Landenberger of DIRECTV; and DIRECTV outside counsel William Wiltshire of Harris, Wiltshire & Grannis LLP had a teleconference with Jim Bird, Hillary Burchuk, Jamillia Ferris, and Joel Rabinovitz of the Office of General Counsel to discuss the issues raised in the Public Notice. The substance of that teleconference is summarized in these comments.

² *Applications of AT&T Inc. and DIRECTV for Consent to Assign or Transfer Control of Licenses and Authorizations*, MB Dkt No. 14-90, Information and Discovery Requests for AT&T (Sept. 9, 2014); *Applications of AT&T Inc. and DIRECTV for Consent to Assign or Transfer Control of Licenses and Authorizations*, MB Dkt No. 14-90, Information and Discovery Requests for DIRECTV (Sept. 9, 2014) (together, the “*Information Requests*”). The FCC requested that the Applicants respond to the Information Requests by September 23, 2014. The Applicants were prepared to submit responses, including document productions, to the Commission on that date. However, the Staff asked the Applicants to defer submission of the Information Requests responses, including the production of documents, pending the Commission’s consideration of the issues raised in the Public Notice.

The overwhelming majority of highly sensitive information in the docket pertains to the Applicants, so the Applicants have their own independent stake in appropriately safeguarding such information. Over three months ago, the Commission issued the *Joint Protective Order* establishing the ground rules for the submission of Confidential and Highly Confidential Information in the AT&T/DIRECTV docket.³ Since that time, the Applicants have designed and implemented their review, production, and third-party access procedures according to those initial rules. Those ground rules have facilitated secure and efficient third-party access to the Confidential and Highly Confidential Information that the Applicants have submitted into the docket to date.

If the Commission decides to change those ground rules at this advanced stage—which Applicants consider to be unnecessary—it should do so in a way that minimizes the disruptions to all parties’ participation in this proceeding, allows the Applicants to submit their responses to the Information Requests to the Commission promptly (even if additional time is needed to implement additional procedures for third-party access), and does not impede the timely completion of the Commission’s review of the transaction. Anything else would be inconsistent with the Commission’s “obligation to review proposed transactions as expeditiously as possible.”⁴

To minimize delay and confusion, any new protections should thus be applied to all Highly Confidential Information, rather than applying a “third level” of protection to discrete classes of Highly Confidential Information. As detailed below, segregating Highly Confidential Information into two categories entitled to different protections would be highly complex and impose an undue burden on the Applicants to re-designate (and, in DIRECTV’s case, essentially rerun) their productions for confidentiality after a voluminous production has been prepared for submission under the existing ground rules. Moreover, this segregation would risk embroiling the Applicants and the Staff in disputes over where to draw the line between the two categories of Highly Confidential Information.⁵ While implementing new protections inevitably will take

³ *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 (MB 2014) (“*Joint Protective Order*”).

⁴ *Id.*, Order, DA 14-1253 ¶ 6 (MB rel. Aug. 28, 2014) (citing *Applications of Comcast Corp., Gen. Elec. Co. & NBC Universal, Inc. for Consent to Assign Licenses or Transfer Control of Licenses*, Order, 25 FCC Rcd 3101, 3103 ¶ 5 (MB 2010)); *Applications of Comcast Corp., Time Warner Cable Inc., Charter Communications, Inc., & SpinCo for Consent to Assign or Transfer Control of Licenses and Authorizations*, MB Dkt No. 14-57, Order, DA 14-1226 ¶ 7 (MB rel. Aug. 22, 2014) (citing same); see also Federal Communications Commission, Strategic Plan 2014-2018, at 13 (2014) (stating that a key Commission strategic objective is to “[e]nsure expeditious and thorough review of proposed transactions” and that “[t]he FCC’s goal is a faster and more consistent review and analysis of applications”), available at <http://www.fcc.gov/document/fcc-strategic-plan-2014-2018>.

⁵ By applying any new protections to all Highly Confidential Information, the Commission will not have to respond to any claims by other parties that their particular type of Highly Confidential Information deserves a higher level of protection than other third parties’ materials.

some time, it is in the Commission's, the Applicants', and the public's interest to avoid procedures that amount to a standing invitation to further delays.

Were the Commission nevertheless to require segregation of documents into a new, higher level of confidentiality, it would have to consider at least the following issues:

- The Applicants should be allowed to submit their complete responses to the pending Information and Discovery Requests, including Highly Confidential Information, to the Commission immediately, even if additional time is needed to implement additional procedures for third-party access.
- The Commission should state clearly that, for purposes of any third-level protections for certain categories of information, segregating Highly Confidential Information through search terms, without human review, is sufficient under the circumstances.⁶ Given the massive volume of documents the Applicants have been requested and are prepared to produce into the docket, any segregation effort is going to be imperfect.⁷ Just as the law does not compel the impossible,⁸ the Commission should not demand more than a reasonable, good-faith effort to segregate documents into a new, higher level of confidentiality.⁹ Moreover, given the volume of documents involved, requiring human review to segregate certain Highly Confidential Information would impose an undue burden and expense on the Applicants and would cause substantial delays in the Applicants' submission. This, in turn, would unnecessarily reduce the time the Staff and third parties have to review the documents before the end of the Commission's 180-day period for considering the transaction.
- The Commission also should be clear that failure to segregate a document that is subject to third-level protection is not a violation of the Commission's order, provided that the submitting party had taken reasonable steps designed to remove the relevant documents from the materials produced to third parties under the *Joint Protective Order* (e.g., through the use of search terms). In addition, the Commission

⁶ The Commission also should provide clear guidance on whether the segregation should apply to the Applicants' narrative responses and non-document exhibits, to document exhibits, or just to documents in the custodial production.

⁷ For example, search terms would not be able to distinguish executed and draft contracts from other documents related to such contracts. Because of the undue burden and delay associated with human review, the Applicants urge the Commission not to require them to segregate the documents to this level of specificity. Imposing this level of segregation also would disrupt "family relationships" among documents, contrary to the instructions in the Information Requests.

⁸ See, e.g., *In re Grand Jury Proceedings*, 744 F.3d 211, 212-13 (1st Cir. 2014) ("A venerable legal Latinism, *lex non cogit ad impossibilia*, teaches that the law does not compel the impossible.").

⁹ Any Commission order should be clear that it does not create any such duty of care – or otherwise create a liability – that does not already exist.

should obligate third parties that receive inadvertently produced materials to comply with reasonable requests to enable the submitting party to recover the materials.

- In the Public Notice, the Commission asks, “Could the Commission implement a process whereby any person that has executed an affirmation is able to review these confidential documents only through applicant’s counsel either in counsel’s offices or through a remote access document review platform? Should the copying of such documents be prohibited?” This proposed process presents several significant concerns. Given the volume of documents and the number of individuals who have signed acknowledgments of confidentiality, it would be burdensome to require third parties to review the productions in counsel’s office. Alternatively, if the Commission decided to require the Applicants to make the documents available through a remote access review platform, the limitations of the technology would not prevent inappropriate disclosure. While such platforms could prevent copying or printing, they cannot thwart the printing of screen shots or the photographing of each page of a document displayed on the screen.
- If the Commission requires review to occur at the offices of the Applicants’ outside counsel, to minimize the number of disputes, it should specify in advance reasonable access rules: how many terminals should be required; access should be required only during normal business hours; and it is unreasonable to require such access to be provided in more than one location, notwithstanding that there are parties from outside the Washington, D.C. area.
- The *Joint Protective Order* sets a standard of making materials submitted under the *Joint Protective Order* available to other parties within two business days of submission to the FCC.¹⁰ The Applicants will need a reasonable amount of time to implement any new procedures the Commission may establish, and the Commission should recognize that requiring additional confidentiality protections or procedures for certain categories of materials will add to the time needed to make each subsequent submission available to other parties.

To summarize, three months after having established the procedures for access to proprietary information, the Commission risks wading into a morass with huge potential for uncertainty, delay, and distractions from the substance of this proceeding. In reaching its decision, the Commission should respect the law of unintended consequences and avoid imposing undue burdens on the Staff and the Applicants. If any additional procedures are implemented, those procedures should be designed to minimize any further delay, enable the Applicants to promptly submit their responses to the Information Requests, and facilitate

¹⁰ *Joint Protective Order* ¶ 8.

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expeditious completion of the review of this transaction within the Commission's 180-day time period.

Respectfully submitted,

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