Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of Applications	)	
	)	
Comcast Corp.,	)	MB Docket No. 14-57
Time Warner Cable Inc.,	)	
Charter Communications, Inc.	)	
and SpinCo	)	
	)	
AT&T, Inc. and DIRECTV	)	MB Docket No. 14-90
	)	
For Consent to Transfer Control of	)	
Licenses and Authorizations	)	

COMMENTS

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COMMENTS

The American Cable Association ("ACA") responds to the Commission's Public Notice, released September 23, 2014, seeking comment on issues described in a number of ex parte filings made recently in the above-captioned license transfer/assignment proceedings involving, respectively, applicants Comcast Corporation ("Comcast"), Time Warner Cable, Inc. ("Time Warner Cable"), Charter Communications ("Charter") and SpinCo, and AT&T, Inc. ("AT&T") and DirecTV (collectively "Applicants").[1] The Public Notice indicates that between September 11th

[1] *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*, Public Notice, MB Docket No. 14-57, DA 14-1383 (rel. Sept. 23, 2014) ("Public Notice"). In conjunction with the Public Notice, the Commission made available three ex parte filings and an internal Office of General Counsel Memorandum outlining the concerns giving rise to the inquiry. *See* Memorandum of Hillary Burchuk, Office of the General Counsel, Federal Communications Commission to Jonathan Sallet, General Counsel and William Lake, Chief, Media Bureau, Federal Communications Commission, MB Docket Nos. 14-57, 14-90 (filed Sept. 23, 2014) ("Burchuk Memorandum"); Letter from Mace Rosenstein, on behalf of CBS et al. to the Federal Communications Commission, MB Docket Nos. 14-57, 14-90 (filed Sept. 23, 2014) ("Cable and Broadcasting Group Letter"); Letter from Rebecca S. Bryan on behalf of Raycom Media to the Federal Communications Commission, MB Docket Nos. 14-57 and 14-90 (filed Sept. 17, 2014) ("Raycom Letter");

and September 23rd, the Commission received a number of ex parte communications from various programming interests (the "Programmers"), including the nation's largest cable programming concerns, national broadcast television networks and several major local broadcast station groups, expressing the viewpoint that their programming contracts with the various Applicants should not be submitted to the Commission and made available for review by interested parties to the proceedings, unlike the treatment of other highly confidential data and information that the Commission considers relevant in deciding whether to grant the respective applications involving Comcast-Time Warner Cable-Charter and AT&T-DirecTV that the Programmers claim is highly confidential.[2] The Programmers' justification for receiving such special treatment is their unrealistic fear that parties obtaining access to their contracts under the Commission's protective orders may violate the orders causing the Programmers harm despite the fact that such an occurrence is extremely rare and would subject an offender to meaningful penalties.

The public's right to participate in a license transfer or assignment proceeding is an integral part of any review, embodied in the Communications Act and the Administrative Procedure Act.[3] Interested parties, including industry members and public interest groups, assist the Commission in determining whether granting an application would serve the public interest by evaluating the applicants' claims and bringing to the Commission's attention facts and arguments known only to industry participants. As the Commission recognizes, certain highly confidential information is "necessary to develop a more complete record on which to base the Commission's decision," and the public has a right to review such information, with

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Letter from Joshua N. Pila on behalf of LIN Television Corp. et al. to the Federal Communications Commission, MB Docket No. 14-47 (filed Sept. 11, 2014) ("LIN Letter").

[2] *See* Burchuk Memorandum at 1.

[3] *See* 47 U.S.C. § 309; 5 U.S.C. § 554.

appropriate protections, to ensure participation in a transaction review "in a meaningful way."[4] By making categories of important data and information off-limits to interested parties, the Commission would significantly curtail the utility of public participation and set a very bad precedent. Such action will undermine the public trust that fair and open proceedings were being conducted.

For the reasons discussed below, the Commission should reject the Programmers' request that their programming contracts with the applicants be treated differently than any other highly confidential data and information that the Applicants are required to disclose at the request of the Commission.

I. PROGRAMMERS HAVE REQUESTED UNWARRANTED SPECIAL TREATMENT FOR THEIR COMMERCIAL AGREEMENTS

The Programmers ask the Commission to restrict access to the materials they deem highly sensitive, with Commission staff being permitted to review such materials at the Department of Justice, notwithstanding the fact that the Commission has issued protective orders in these proceedings designed to protect highly confidential information of this nature.[5] The Joint Protective Orders are standard orders the Commission has used successfully in all manner of proceedings wherein sensitive data must be reviewed by the Commission and interested parties.[6]

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[4] *Applications of Comcast Corporation and Time Warner Cable Inc., Charter Communications Inc. and SpinCo for Consent to Assign Licenses or Transfer Control of Licenses*, Joint Protective Order, MB Docket No. 14-57, ¶1 (rel. Apr. 4, 2014); *Applications of AT&T, Inc. and DIRECTV for Consent to Assign Licenses of Transfer Control of Licenses*, Joint Protective Order, MB Docket No. 14-90, ¶1 (rel. Jun. 11, 2014) (collectively, "Protective Orders").

[5] *See* Burchuk Memorandum at 1-3; Cable and Broadcasting Group Letter at 1-2; Raycom Letter at 1; LIN Letter at 1.

[6] *See, e.g.*, *Applications of Comcast Corp., General Electric Co. and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees,* Protective Order, 25 FCC Rcd 2133 (2010) ("Comcast-NBCU Protective Order"); *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 2133 (2010) ("Comcast-NBCU Second Protective Order"); *Applications of Cricket License Company, LLC, et al., Leap Wireless International, Inc., and AT&T Inc. for Consent To Transfer Control of Authorizations*, Second Protective Order, 28 FCC Rcd 11803 (2013). *See also Applications of*

None of the documents referenced in the Public Notice allege that either of the two Protective Orders contain any material changes from those used previously, nor does it appear that these Protective Orders contain any language that affords the Programmers any less protection than in prior proceedings involving media companies. If the Programmers' most extreme requests were granted, persons that have signed acknowledgements and agreed to be bound by their terms would not be permitted to access this highly relevant information at the Commission for use in their advocacy, nor would they be able to review these documents at the Department of Justice.

One group of major programmers proposed several options, described in the Burchuk Memorandum, that range from interested parties having no right to even inspect documents, to the creation of additional layers of administrative complexity to even see confidential material.[7] In attempting to explain why those normally afforded access to such material should be blocked here, the coalition, comprised of CBS Corporation, Discovery Communications, The Walt Disney Company, Twenty First Century Fox, Inc., Scripps Networks Interactive, Inc., Time Warner, Inc., Viacom Inc. and Univision, stated:

> [T]he protective mechanisms adopted in the Joint Protective Orders will jeopardize highly sensitive and confidential commercial arrangements that are critical to their business operations….[A]ccess to these materials by anyone not employed by the Commission risks reducing competition among both content owners and distributors, with corresponding harms to consumers and the public interest….[I]ndividuals would be in a position to share their knowledge with members of their firm or organization who have not executed an acknowledgement under a Joint Protective Order.[8]

Comcast Corp., General Electric Co. and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees, Letter from William Lake to Michael H. Hammer et al., 25 FCC Rcd 4404, 4405 (2010) (acknowledging that certain documents, including NBCU's Video Programming and Carriage Agreement Terms and Conditions, have "generally been allowed to be designated 'Highly Confidential' under the Commission's protective orders.").

[7] See Burchuk Memorandum at 2-3.

[8] See Cable and Broadcasting Group Letter at 2.

Others stated summary concerns about the "potential widespread dissemination of these extremely competitively sensitive documents."[9]

II. THE COMMISSION SHOULD NOT ACCEDE TO THE PROGRAMMERS' DEMANDS BASED ON THEIR ASSERTION THAT THE PROTECTIVE ORDERS AFFORD INSUFFICIENT COVERAGE OR THE OFF-CHANCE THE ORDER MAY BE VIOLATED

The Protective Orders in the Comcast-Time Warner-Charter and AT&T-DirecTV license transfer/assignment review proceedings are the product of the Commission's long experience and a tried and true means to protect the interests of entities such as the Programmers. The procedures for accessing and protecting confidential and highly confidential information established by the Commission and used time and time again in similar proceedings are sufficient. If a party who signs a Protective Order violates the terms of the Order, the party is subject to meaningful enforcement action.[10]

On the day the Public Notice was released, four television broadcast companies submitted a filing suggesting that the Protective Orders do not protect against disclosure of highly confidential information to "those that are involved in Competitive Decision Making to other parties to those MVPDs' agreements."[11] In other words, that the scope of the Commission's standard Protective Orders is insufficient to protect their interests. ACA disagrees. By their terms, the Protective Orders do not allow a Reviewing Party to share highly confidential information as suggested. Section 7 of each Protective Order limits access to

[9] See Raycom Letter at 1.

[10] Protective Orders, ¶ 19 ("The Commission retains its full authority to fashion appropriate sanctions for violations of this Joint Protective Order, including but not limited to suspension or disbarment of Counsel or Consultants from practice before the Commission, forfeitures, cease and desist orders, and denial of further access to Confidential or Highly Confidential Information in this or any other Commission proceeding. Nothing in this Joint Protective Order shall limit any other rights and remedies available to the Submitting Party at law or in equity against any person using Confidential or Highly Confidential Information in a manner not authorized by this Joint Protective Order.").

highly confidential information to "Outside Counsel of Record, Outside Consultants, and those employees of Outside Counsel and Outside Consultants described in paragraph 11."

Paragraph 11 of each Protective Order allows a Reviewing Party to share highly confidential information with the Commission, with another Reviewing Party, with the Submitting Party, and with:

> (1) paralegals or other employees of such Reviewing Party assisting them in this proceeding; and (2) employees of third-party contractors involved solely in one or more aspects of organizing, filing, coding, converting, storing, or retrieving documents or data or designing programs for handling data connected with this proceeding, or performing other clerical or ministerial functions with regard to documents connected with this proceeding.[12]

Accordingly, there is no lawful way for a person involved in competitive decision making activities of an MVPD, or the other party to a programming contract, to gain access to such information. Each proceeding's Protective Orders affords a second level of protection for highly confidential information that directly addresses the fears expressed by the programmers by severely limiting the range of persons able to access the highly confidential information, and prohibits those who sign the Protective Order from sharing that information with anyone who has not signed the Protective Order.

None of the Programmers suggest that the Protective Orders as drafted are insufficient in their obligations on signers to keep highly confidently data and information highly confidential. Notwithstanding the one letter by the four broadcast companies highlighted above, the main concern articulated appears to be that parties *will* violate the Protective Orders and share what they have obtained with individuals who will be engaged in negotiations with one or more of the Programmers in the future. This concern is wildly overblown.

First, violating a Protective Order in the manner suggested by the Programmers is a meaningful infraction. Such an act would subject a party to administrative sanctions, and in the

[12] *Id.,* ¶ 11.

case of an attorney it forms the basis for disciplinary action, including disbarment, severely affecting their livelihood. This alone is a significant deterrent for parties who sign the Protective Orders not to violate their terms.[13]

Second, the Programmers could come up with only "one alleged serious violation of a protective order" in a prior proceeding.[14] Taking the parties at their word, one violation over a period of decades is evidence that an alleged violation of a protective order is exceedingly rare, should not be a concern here, and cannot form the basis for special treatment of one class of commercial contracts.

III. THERE IS NOTHING SPECIAL ABOUT THE INFORMATION AT ISSUE THAT DESERVES EXTRAORDINARY TREATMENT

The Programmers state no reason why programming contracts and related data are any more confidential or commercially sensitive than the thousands of other contracts and documents that the Commission requests and the agency and interested parties review every year in connection with dozens of other proposed mergers that are made available through appropriate protective orders. Moreover, the Programmers do not even attempt to explain what about these proceedings and the parties signing the Protective Orders increases the likelihood that a participant would deliberately violate a Protective Order. That is because there is no reason. The programming contracts at issue here are no more commercially sensitive than the thousands of other similar contracts submitted in other proceedings, and the parties signing the Protective Order are no different than those in other proceedings.

ACA notes that it is common for programming agreements to include an exception to the contract's non-disclosure agreement ("NDA") that permits them to be disclosed to government officials upon request. This particular exception to the NDA highlights that parties to these

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[13] *Id.,* ¶ 19.

[14] See Burchuk Memorandum at 1.

agreements are sophisticated and understand that the government sometimes requests to review programming agreements. Given the widespread awareness that the MVPD industry has been consolidating for years, and is likely to consolidate more in the future, these sophisticated parties were surely aware when they entered into their programming contracts with the Applicants that there was a possibility that any of these companies would be involved in some license transfer proceeding at some future date where the government may request their agreements. Thus, the Programmers in entering into agreements understood and would have accounted for the risk that their contracts may be made available to the government, including most particularly the Commission, and that in the course of a license transfer/assignment proceeding some parties in the public may gain access to them through a first level (for confidential) or second level (for highly confidential) protective order. Given that the Programmers' concerns would reasonably have been understood and accounted for, there simply is no need for any additional special "third-level" procedures to put out of reach important data that parties need to assist the Commission in determining whether a grant of these applications would serve the public interest.

Moreover, even on the rare chance that a signer of the Protective Orders would deliberately violate their terms, the Programmers have not articulated exactly how this would harm them so much that the Commission should place these agreements entirely off limits to parties participating in the process.[15] In contrast, ACA and other parties to the proceedings would be greatly harmed in their ability to present their cases to the Commission should access be categorically denied.

[15] ACA rejects the notion that if an MVPD had access to contracts between Comcast and any of the Programmers that it would allow the trade association or any of its member companies to gain a significant advantage in the marketplace or in negotiations. None of the Programmers have even attempted to make the novel case that a small or medium-sized MVPD, for example, would suddenly have a significant advantage in the marketplace by knowing the rates that Comcast pays for its programming. To the contrary, allowing ACA's outside and in-house counsel access to such information will only have a direct bearing on the matters put in issue by the various transactions under review.

IV. LIMITING THE AVAILABILITY OF THE PROGRAMMERS' CONFIDENTIAL INFORMATION WOULD PREJUDICE THE PROCEEDING

In its Comments, ACA focused on how the Comcast-Time Warner Cable-Charter and the AT&T-DirecTV transactions would harm consumers and competition in the MVPD marketplace.[16] The programming contracts that the Applicants enter into with programmers and broadcasters are highly relevant to the review of the current transaction, considering that the two sets of Applicants serve approximately two-thirds of the entire MVPD marketplace. The Commission and the Department of Justice agree, considering that both agencies requested the same information from the parties. It should then not be surprising that parties to the review proceedings that are concerned about the deal's impact on consumers and competition in the pay television market would be equally interested. At this time, ACA can identify three specific reasons that it must have access to the agreements the Applicants have entered into with the Programmers. It is not an exhaustive list, and there is the possibility that upon inspection of the agreements, ACA will discover additional reasons why the transactions before the Commission are harmful to competition and consumers.

ACA has explained that a vertically integrated programmer has an economic incentive and ability to charge rivals to its affiliated MVPD higher fees for its programming. ACA has argued the pending transactions will increase the incentive of the programmers affiliated with the merged entities to hold out for even higher fees post-mergers than they do today. This will occur for many reasons. One relates to the merged entities lowering their programming costs as a result of their deals. To the extent their contracts with programmers permit it, Comcast, Charter, and AT&T will seek to bring all of their MVPD assets including those they acquire under

[16] *Applications of Comcast Corporation and Time Warner Cable Inc., Charter Communications Inc. and SpinCo for Consent to Assign Licenses or Transfer Control of Licenses*, Comments of the American Cable Association, MB Docket No. 14-57, at 17-37 (filed Aug. 25, 2014) ("ACA Comcast-TWC-Charter Comments"); *Applications of AT&T, Inc. and DIRECTV for Consent to Assign Licenses of Transfer Control of Licenses*, Comments of the American Cable Association, MB Docket No. 14-90, at 8-21 (filed Sept. 16, 2014) ("ACA AT&T-DirecTV Comments").

either their own programming contract or the contract of the acquired systems depending on which is better. By doing so, the Applicants can immediately benefit from lower programming costs when a transaction closes, whichin turn will increase their video profits.

As ACA has explained in its Comments in each proceeding, when the per video subscriber profits of a vertically integrated MVPD rise, so does its interest in raising its rivals' costs for its programming.[17] Accordingly, obtaining access to the terms of the Applicants programming deals with the programmers will allow the ACA to evaluate to what extent the Applicants have a contractual right to bring their acquired assets under their existing programming deal, or opt into the programming deal of the MVPD they are acquiring.[18] Moreover, knowing the programming fees paid by each of the Applicants pre-merger will allow ACA to quantify both how much the merged firms will be able to lower their programming costs and exactly how much their incentive to charge their rivals higher rates for their programming will grow post-merger.[19]

As another example, up until now, the ACA has been unable to determine to what extent the Applicants' use of "most favored nation" ("MFN") clauses in their programming agreements affects the ability of the National Cable Television Cooperative or its members to negotiate fair and reasonable rates, terms and conditions with these same programmers. By gaining access to the programming contracts of Comcast, ACA will be able to effectively determine whether the Applicant's use of these MFN clauses has impacted small and medium-sized MVPDs, and if so, make a determination of whether the merged entities' increased bargaining power over programmers as a result of the deal will make matters worse.

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[17] ACA Comcast-TWC-Charter Comments at 25-28; ACA AT&T-DirecTV Comments at 17-20.

[18] ACA Comcast-TWC-Charter Comments at 37-40.

[19] In its reply comments, Comcast relies upon specific inputs to demonstrate that their incentive to charge higher prices to its rivals is only slightly increased as a result of their proposed transaction. It would be unfair to prevent interested parties from responding with their own specific inputs based in part on market data that is available to Comcast, but not others.

Finally, the Applicants highlight how the proposed transactions will benefit consumers by allowing the merged firms to operate more efficiently than the firms could operate separately. In fact, AT&T specifically makes the argument that consumers will benefit from AT&T lowering its content cost per video subscriber:

> [T]his transaction will reduce AT&T's expected per subscriber content costs as a standalone company by at least 20%. Cost savings of the magnitude projected will enhance AT&T's competitiveness in video service and bundles that contain video. And, as Mr. Stankey explains in his Declaration, lower per-subscriber content acquisition costs will enable the combined company to offer consumers better service and to expand broadband deployment.[20]

Interested parties must have a right to verify AT&T's claims of significant cost savings. Otherwise, the Commission must not take into account this factor in determining whether the merger is in the public's interest.

If the Programmers succeed in blocking access to this important data, no interested party will have an opportunity to review these contractual terms and to analyze them independent of the federal government. With transactions this large, with many different types of harms affecting many industry sectors, it is important that the Commission have the benefit of a fulsome record and expert analysis from interested parties and industry participants.

V. TREATING THE PROGRAMMERS' INFORMATION DIFFERENTLY FROM ALL OTHER COMMERCIAL INFORMATION WOULD CAST DOUBT ON THE ABILTIY OF THE COMMISSION TO MAINTAIN ANY CONFIDENTIAL TREATMENT

The Programmers' concerns, if accepted by the Commission, would give rise to new concerns of any party now or in the future whose data or information is submitted under a Protective Order. Upon knowing that the Commission agrees with the Programmers that its Protective Orders are unreliable for protecting at least some types of highly confidential information, applicants, interested parties, and third parties who have submitted or agreed to

[20] *Applications of AT&T, Inc. and DIRECTV for Consent to Assign Licenses of Transfer Control of Licenses*, AT&T-DIRECTV Public Interest Statement, Declaration of Rick L. Moore, Senior Vice President, AT&T, MB Docket No. 14-90, at 8.

allow others to submit highly confidential data and information to the Commission in reliance on a Protective Order would now question whether they made the right decision and likewise deserve special treatment. Such a decision by the Commission would have a chilling effect on the willingness of parties to submit data and information to the Commission in the future, would likely lead to more instances of noncompliance and legal wrangling, and undermine the entire process that the Commission has relied upon for reviewing transactions for decades.

VI. CONCLUSION

If the Commission finds it must do something in response to the request of the Programmers, the Commission may wish to remind parties that severe sanctions can accompany a deliberate violation of a Protective Order, including the disbarment of an attorney from practicing before the Commission. In the end, either the oath of a person who signs an acknowledgement means something or it does not. If it does not, then even the multiple layers of protection offered by the Programmers would be insufficient to fully protect their information and the Commission would be forced to concede the Protective Orders it has employed countless times are, in fact, meaningless.

For all of the reasons set forth above, the Commission should reject the Programmers' request to block or restrict access to data that is no more sensitive than that which has been routinely submitted in license transfer/assignment proceedings for decades.

Respectfully submitted,

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