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October 22, 2014

VIA ELECTRONIC FILING

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *MB Docket No. 14-57, Applications of Comcast Corp., Time Warner Cable Inc., Charter Communications, Inc., and SpinCo for Consent to Assign or Transfer Control of Licenses and Authorizations*

Dear Ms. Dortch:

CBS Corporation, Discovery Communications LLC, Scripps Networks Interactive, Inc., The Walt Disney Company, Time Warner Inc., Twenty First Century Fox, Inc., Univision Communications Inc. and Viacom Inc. (collectively, the “Content Companies”) hereby respond to the letter filed in the referenced proceeding on October 20, 2014, by Comcast Corporation, Time Warner Cable Inc., and Charter Communications, Inc. (collectively, “Applicants”).¹

I. The Applicants and the Content Companies Agree That The FCC Can Review The Proposed Transaction Without Placing VPCI In The Public Record.

As the Applicants correctly observe, the Content Companies do not seek to prohibit the Commission from reviewing Highly Confidential Information (“HCI”) and Video Programming Confidential Information (“VPCI”) in connection with the Commission’s review of their proposed transactions. Nor do the Content Companies seek to delay the transaction review process.

Instead, the Content Companies, which are not parties to the proposed transaction, seek only to protect their affiliation and distribution agreements and related negotiation materials from being disclosed to third parties. As the Commission has long recognized, “disclosure of programming contracts between multichannel video and programmers can result in substantial

¹ Letter from Kathryn A. Zachem, Comcast Corporation, et al., to Marlene H. Dortch, Secretary, FCC, MB Docket No. 14-57 (Oct. 20, 2014) (the “Letter”).

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competitive harm to the information provider.”² For the reasons explained in the Content Companies’ Application for Review and the accompanying Emergency Request for Stay, the Content Companies believe that the Modified Joint Protective Orders require additional safeguards in order to adequately protect the confidentiality of the Content Companies’ most sensitive information.³

The Applicants and the Content Companies agree that the Media Bureau can review the proposed transactions by employing review procedures that previously have been approved by the Commission and upheld by the D.C. Circuit.⁴ For example, the Applicants and the Content Companies agree that the Bureau can accomplish its stated objectives by accessing and reviewing VPCI from the Department of Justice or through *in camera* review.⁵ If the Bureau believes that any information considered in this review should be included in the record and referenced in its decision on the proposed transactions, the Applicants and the Content Companies agree that the Bureau should include only relevant, redacted, and anonymized information in the public record.⁶ Not only will these procedures better protect the Content Companies’ highly sensitive confidential information, but they also will enable the Commission to complete its review of this transaction without undue delay.

² *In the Matter of Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, FCC 98-184, 13 FCC Rcd. 24816, 24852 (1998).

³ *See, e.g.*, Application for Review of the Content Companies, *Applications of Comcast Corp. and Time Warner Cable Inc., Charter Commc’ns Inc. and SpinCo for Consent to Assign Licenses or Transfer Control of Licenses*, MB Docket Nos. 14-57, 14-90 (Oct. 14, 2014) (“*Application for Review*”), at 9-14; Emergency Request for Stay of Media Bureau Order and Associated Modified Protective Orders of the Content Companies, *Applications of Comcast Corp. and Time Warner Cable Inc., Charter Commc’ns Inc. and SpinCo for Consent to Assign Licenses or Transfer Control of Licenses*, MB Docket Nos. 14-57, 14-90 (Oct. 14, 2014) (“*Emergency Request for Stay*”), at 9-13.

⁴ *See, e.g.*, *Consumer Fed’n of Am. v. Fed. Commc’ns Comm’n*, 348 F.3d 1009, 1012-14 (D.C. Cir. 2003); *In the Matter of Applications for Consent to the Transfer of Control of Licenses from Comcast Corp. and AT&T Corp. to AT&T Comcast Corp.*, MB Docket No. 02-70, FCC 02-301 ¶ 16 (Nov. 6, 2002).

⁵ *Letter* at 4; *Application for Review* at 10-11.

⁶ *Letter* at 4; *Application for Review* at 10-11. The Applicants’ assertion that it is “unworkable” to prepared redacted or anonymized versions of the VPCI that have been filed, *Letter* at 5 n.11, is in tension with their suggestion that the Content Companies’ VPCI can be segregated from the HCI of other entities, *id.* at 11. Nevertheless, the redaction and anonymization procedures that the Content Companies have proposed (and that the Applicants have embraced in theory) can be more easily accomplished if the Bureau scales back the volume of information it requests or seeks to place in the public record.

II. The Content Companies' Objections To the Acknowledgments Of Confidentiality Are Proper.

The Applicants take issue with the fact that the Content Companies have filed objections to many Acknowledgements of Confidentiality.⁷ The Applicants' criticisms of the Content Companies' objections are misguided.

First, the Modified Joint Protective Orders' objection procedures are "intended to ensure that objections by third parties as well as by the Submitting Parties are heard and addressed *prior to* the disclosure of any ... Highly Confidential Information to a particular individuals."⁸ The substance of the Content Companies' objection to access to their VPCI under the Modified Joint Protective Order is set forth in the Content Companies' pending Application for Review.⁹ Under the Modified Joint Protective Order, the Content Companies are entitled to have the substance of their objection be "resolved by the Commission and, if appropriate, by any court of competent jurisdiction" before any individual may access the Content Companies' VPCI.¹⁰

Second, both the Commission and the Bureau have acknowledged the significant risk to the Content Companies' proprietary interests and the competitive marketplace if access to VPCI is not tightly controlled.¹¹ In properly recognizing that VPCI is entitled to heightened protections as compared to other HCI, the Modified Joint Protective Order imposes additional restrictions on *how* VPCI may be accessed.¹² However, as the Content Companies explained in

⁷ *Letter*, at 9-11.

⁸ *Applications of Comcast Corp. and Time Warner Cable Inc. for Consent to Assign or Transfer Control of Licenses and Authorizations*, Order, DA 14-1463, ¶ 5 (MB Oct. 7, 2014) (emphasis added) ("*Order*").

⁹ *See Application for Review*, at 14-25.

¹⁰ *Applications of Comcast Corp. and Time Warner Cable Inc. for Consent to Assign or Transfer Control of Licenses and Authorizations*, Order, DA 14-1464, ¶ 8 (MB Oct. 7, 2014) ("*Modified Joint Protective Order*"). This outcome is also consistent with the relief requested in the Emergency Request for Stay filed the same day as the Application for Review. *See, e.g., Emergency Request for Stay*.

¹¹ *See, e.g., Order*, ¶ 11; *Modified Joint Protective Order*, ¶ 10; Bill Lake, et al., Transaction Reviews and the Public Interest, The Official FCC Blog, at 2 (Oct. 7, 2014, 2:57 PM), available at <http://www.fcc.gov/blog/transaction-reviews-and-public-interest> ("Access to the Applicants' contracts could allow someone to obtain a detailed, industry-wide overview of the current and future programming market. Indeed, because the AT&T and Comcast transactions are pending simultaneously, the ability to capture an understanding of the programming marketplace is greater, and potentially more troublesome, than if only one were before us.").

¹² *See Modified Joint Protective Order*, ¶ 10.

their Application for Review, the Modified Joint Protective Order fails to take the next logical step of imposing additional restrictions on *who* may access VPCI.¹³

It cannot be the case that every lawyer and every consultant who has requested access HCI—to date, more than 300 people—also has a particularized need to access VPCI in connection with the Commission’s review of the proposed transactions. Because the risk of improper use of VPCI increases with every individual who is granted access to that information, the Content Companies are entitled to object to any individual’s request to access VPCI if that individual failed to make a particularized showing why his or her need to access VPCI promotes the public interest and assists the Commission with its review of the proposed transactions.

III. The Modified Joint Protective Order Can Be Clarified To Permit Access To Non-VPCI HCI.

The Applicants express concern that their Outside Counsel and Outside Consultants cannot access HCI until the Content Companies’ objections have been resolved.¹⁴

If given the option, the Content Companies would object to Acknowledgments of Confidentiality only to the extent that a requesting individual seeks access to VPCI. For example, the Content Companies have not objected to any individuals who only seek access to Confidential Information, because such individuals by definition cannot access VPCI.

However, the Modified Joint Protective Order does not appear to permit this approach. Instead, under the Modified Joint Protective Order, any individual who seeks access to HCI is also entitled to access VPCI.¹⁵ The form of Acknowledgment under the Modified Joint Protective Order does not permit requesting individuals to clarify whether they seek access to VPCI or whether they only seek access to other, non-VPCI, HCI. As a result, to prevent the risk of disclosure of their highly sensitive programming agreements and related negotiation materials, under the Modified Joint Protective Order the Content Companies find themselves in the position of having to object to each individual who requests access to HCI, even if that individual has no intention of accessing VPCI.

¹³ See *Application for Review*, at 13-14.

¹⁴ *Letter*, at 9-10.

¹⁵ See *Modified Joint Protective Order*, ¶ 2 (defining VPCI to include, among other things, any information that is HCI); *Order*, ¶ 11 (“Once an individual has executed an Acknowledgment under the Modified Joint Protective Orders and any objections have been resolved, permitting access to [HCI], the individual will also be permitted to review VPCI”).

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The Content Companies therefore welcome the proposal suggested by Cogent Communications Group for “trifurcation” of confidential information.¹⁶ While the Content Companies continue to object to permitting any third party to access their VPCI,¹⁷ the Content Companies have no similar categorical objection with regard to third-party access to their non-VPCI HCI.

If this approach is adopted, the Content Companies will withdraw the objections they have asserted against such individuals that have the effect of preventing those individuals from accessing non-VPCI HCI. This commitment is conditioned on the assumption that the Applicants have implemented—as they suggest they have¹⁸—a procedure that would prohibit any third-party individuals from accessing VPCI but would permit individuals to access other, non-VPCI HCI.¹⁹

Respectfully submitted,

/s/ Mace Rosenstein

Mace Rosenstein

Counsel for the Content Companies

¹⁶ See Response to Objection to Request For Access To Highly Confidential Information and Video Programming Confidential Information filed by Cogent Communications Group, Inc., MB Docket Nos. 14-57, 14-90 (Oct. 21, 2014), ¶ 7.

¹⁷ As explained more thoroughly in their Application for Review, allowing *any* individual access to the Content Companies’ VPCI under the Modified Joint Protective Order would violate both the Trade Secrets Act and the Commission’s rules. *Application for Review*, at 14-25. Even if third-party access to VPCI is permitted at all—which the Content Companies maintain should not occur—such access should not be permitted unless (1) the VPCI has been deemed necessary by the Commission to be placed in the public record and has been redacted and anonymized, and (2) Outside Counsel or Outside Consultants who are not engaged in Competitive Decision-Making and who seek access to VPCI have made a particularized, good-faith showing why their need to access VPCI promotes the public interest and assists the Commission with its review of the captioned transactions. *Id.* at 13-14.

¹⁸ See *Letter*, at 4.

¹⁹ The Content Companies would continue to stand by the particularized objections they have asserted.

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cc: Francis Buono, Esq. (counsel for Comcast Corp.)
Melanie Medina, Esq. (counsel for Comcast Corp.)
Matthew Brill, Esq. (counsel for Time Warner Cable, Inc.)
John L. Flynn, Esq. (counsel for Charter Communications, Inc.)