

October 27, 2014

VIA ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th 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 “Applicants”) oppose the Application for Review¹ and the Emergency Request for Stay of the Media Bureau Order and Associated Modified Protective Orders² filed by certain content companies (the “Petitioners”) in the above-referenced proceeding. In these filings, Petitioners make two fundamental assertions that are contrary to the facts. First, Petitioners assert that Applicants are less motivated than Petitioners to protect their Video Programming Confidential Information (“VPCI”), and as a result, Applicants will not take appropriate steps under the Bureau’s Modified Joint Protective Order (the “MJPO”)³ and VPCI Order⁴ to protect the confidentiality of that information. Second, Petitioners suggest that, despite the unique and unprecedented confidentiality protections established by these orders, Petitioners’ VPCI will be “publicly available,” resulting in competitive harm to Petitioners. For the reasons described below, both of these assertions are

¹ *Applications of Comcast Corp. and Time Warner Cable Inc. and AT&T Inc. and DIRECTV for Consent to Assign or Transfer Control of Licenses and Authorizations*, MB Dkt Nos. 14-57 and 14-90, Application for Review of CBS Corp., Discovery Communications, Scripps Networks Interactive, Inc., The Walt Disney Company, Time Warner Inc., TV One, LLC, Twenty First Century Fox, Inc., Univision Communications Inc., and Viacom Inc. (filed Oct. 14, 2014) (“Application for Review”).

² *Id.*, Emergency Request for Stay of Media Bureau Order and Associated Modified Protective Orders of CBS Corp., Discovery Communications, Scripps Networks Interactive, Inc., The Walt Disney Company, Time Warner Inc., TV One, LLC, Twenty First Century Fox, Inc., Univision Communications Inc., and Viacom Inc. (filed Oct. 14, 2014) (“Emergency Stay Request”).

³ *Applications of AT&T Inc. and DIRECTV for Consent to Assign or Transfer Control of Licenses and Authorizations*, MB Dkt No. 14-90, Modified Joint Protective Order, DA 14-1465 (MB rel. Oct. 7, 2014) (“MJPO”).

⁴ *Applications of Comcast Corp. and Time Warner Cable Inc. and AT&T Inc. and DIRECTV for Consent to Assign or Transfer Control of Licenses and Authorizations*, MB Dkt Nos. 14-57 and 14-90, Order, DA 14-1463 (MB rel. Oct. 7, 2014) (“VPCI Order”).

incorrect. Because Applicants' interest in protecting the confidentiality of its VPCI is at least as great as Petitioners', Applicants have spent thousands of hours (and over \$1,000,000) isolating their VPCI, and the unambiguous protections established by the Bureau's orders will preserve the confidentiality of that VPCI when it is reviewed by the exceptionally few individuals who will have access to it.

Relevant Background

It is the customary practice of the Commission to issue protective orders to facilitate the filing of highly confidential information. These orders strike a careful balance between preserving the confidentiality of competitively-sensitive information and permitting the public to participate meaningfully in Commission proceedings.⁵ Over the past 20 years, there are few companies that have relied on the Commission's protective orders more than AT&T. Beginning with SBC Communications' acquisition of Ameritech in 1998, and continuing through subsequent acquisitions of AT&T Wireless, AT&T Corp., BellSouth, and many other companies, AT&T has routinely produced its most sensitive documents to the Commission for review by staff and qualified third parties. Originating from the files of AT&T's most senior executives, these documents have addressed critical topics such as strategic planning, current and future plans to compete for customers, pricing, marketing, merger and acquisition valuation, and many other subjects that are universally recognized as competitively-sensitive. During that entire period, AT&T is unaware of a single instance of a third party misusing confidential information obtained pursuant to the Commission's protective orders.

In addition, this is not the first time the Commission has requested that merging parties submit carriage agreements and related information into the record of a docketed proceeding. For example, in the transaction in which Comcast Corporation and Time Warner, Inc. sought to acquire cable systems from Adelphia Communications, each of the applicants was asked to provide "the current affiliation contracts, including all amendments," for eleven video programming networks, including networks controlled by Fox (Fox News Channel), Time Warner (CNN and Turner Classic Movies), and Viacom (BET).⁶ They were also asked to

⁵ See MJPO ¶ 1; *Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, Report and Order, 13 FCC Rcd 24,816, 24,823-824, 24,831 ¶¶ 9, 21 (1998) ("FCC Policy Concerning Treatment of Confidential Information Report and Order"); cf. *Fed. Open Market Comm. of the Fed. Reserve Syst. v. Merrill*, 443 U.S. 340, 362 (1979) ("The courts have not given trade secrets automatic and complete immunity against disclosure, but have in each case weighed their claim to privacy against the need for disclosure. Frequently, they have been afforded a limited protection.") (quoting Advisory Committee's Notes on Fed. Rule Civ. Proc. 26, 28 U.S.C. App., p. 444; 4 J. Moore, *Federal Practice* ¶ 26.75, pp. 26-540 to 26-543 (1970)).

⁶ See *Applications for Consent to the Assignment and/or Transfer of Control of Licenses Adelphia Communications Corp., Assignors, to Time Warner Cable Inc., Assignees, Adelphia Communications Corp., Assignors and Transferors, to Comcast Corp., Assignees and Transferees, Comcast Corp., Transferor, to Time Warner Inc., Transferee, Time Warner Inc.,*

provide “the current monthly per Subscriber fee paid by the Company” for a list of 40 video programming networks, including networks controlled by Disney (ESPN Classic and ESPNNews), Discovery (Discovery Health), and Scripps (DIY Network).⁷ The applicants – including Time Warner, Inc. – produced the information requested.⁸ Indeed, at the staff’s request, Time Warner, Inc. produced additional programming agreements on at least four more occasions during that proceeding.⁹

Similarly, in the transaction involving Liberty Media’s acquisition of an interest in DIRECTV from News Corporation, the Commission asked News Corporation to “provide one copy of each affiliation agreement with DIRECTV, Liberty, and EchoStar, including all amendments and ancillary agreements,” for each network the company owned, controlled, or in which it had a financial, positional, or other interest; and to “provide a copy of the retransmission consent agreement with Liberty, DIRECTV, and EchoStar, including all amendments and ancillary agreements,” for broadcast stations in which News Corporation had an attributable interest.¹⁰ News Corporation produced the requested documents in that proceeding.¹¹ Moreover, it had previously produced copies of *all* of the retransmission consent contracts for its broadcast television stations in 2003, during the proceeding in which it acquired that interest in DIRECTV.¹²

Transferor, to Comcast Corp., Transferee, MB Dkt No. 05-192, Information and Document Request at 6 (rel. Dec. 5, 2005).

⁷ See *id.* at 6, 11.

⁸ See *id.*, Letter from Arthur H. Harding to Marlene H. Dortch at 12-13 (filed Dec. 19, 2005) (responses of Time Warner, Inc.); *id.*, Letter from Martha E. Heller to Marlene H. Dortch, Attachment at 24-25 (filed Dec. 22, 2005) (responses of Comcast Corporation).

⁹ See *id.*, Letter from Arthur H. Harding to Marlene H. Dortch at 1 (filed Jan. 10, 2006) (producing materials related to the rates paid for carriage of BET and Outdoor Life); *id.*, Letter from Arthur H. Harding to Tracy Waldon at 3 (filed Jan. 26, 2006 (providing “[c]opies of the agreements covering the three Fox College Sports networks”); *id.*, Letter from Arthur H. Harding to Marlene H. Dortch at 4-5 (filed Mar. 2, 2006) (providing final versions of affiliation agreements with SportsTime Ohio and SportsNet New York); *id.*, Letter from Arthur H. Harding to Marlene H. Dortch at 1 (filed Mar. 23, 2006) (confirming production of agreements related to Carolinas Sports and Entertainment Television, including the final carriage agreement).

¹⁰ See *News Corp. and The DIRECTV Group, Inc., Transferors, and Liberty Media Corp. Transferee; For Authority to Transfer Control*, MB Dkt No. 07-18, Information and Document Request for News Corporation at 4-5 (rel. Jun. 15, 2007).

¹¹ See *id.*, Letter from John C. Quale et al., to Marlene H. Dortch, Attachment at 13, 16 (filed Jul. 10, 2007).

¹² See *General Motors Corp. and Hughes Electronics Corp., Transferors, and The News Corp. Limited, Transferee, for Authority to Transfer Control*, MB Dkt No. 03-124, Initial Information and Document Request at 3 (rel. Jul. 8, 2003); *id.*, Letter from William M. Wiltshire to Marlene H. Dortch, Attachment at 24-25 (filed Jul. 28, 2003).

In each of these proceedings, programming agreements and related materials were produced under the protection of a confidentiality order comparable to the original Joint Protective Order in this proceeding.¹³ Yet, Petitioners have not alleged, much less provided any evidence to show, that disclosure of such programming-related materials to third parties in those proceedings harmed the programmers' interests in any way. With the MJPO and the VPCI Order, the Media Bureau has afforded Petitioners and other content companies even more protection than would routinely be permitted in Commission proceedings¹⁴ or even in litigation between competitors.¹⁵

Petitioners' Objections Concern Only 25 Individuals, But They Are Delaying The Transaction's Benefits for Millions

The Bureau's orders in this docket require individuals seeking access to VPCI to file new Acknowledgments of Confidentiality, even if they have already signed Acknowledgments under the original Joint Protective Order.¹⁶ Setting aside those representing Applicants,¹⁷ there are

¹³ See *General Motors Corp. and Hughes Electronics Corp., Transferors, and The News Corp. Limited, Transferee, for Authority to Transfer Control*, Order, 18 FCC Rcd 15,198 (MB 2003); *Applications for Consent to the Assignment and/or Transfer of Control of Licenses Adelphia Communications Corp., Assignors, to Time Warner Cable Inc., Assignees, Adelphia Communications Corp., Assignors and Transferors, to Comcast Corp., Assignees and Transferees, Comcast Corp., Transferor, to Time Warner Inc., Transferee, Time Warner Inc., Transferor, to Comcast Corp., Transferee*, Order, 20 FCC Rcd. 20,073 (MB 2005); *News Corp. and The DIRECTV Group, Inc., Transferors, and Liberty Media Corp. Transferee; For Authority to Transfer Control*, Protective Order, 22 FCC Rcd. 12,797 (MB 2007).

¹⁴ VPCI Order ¶¶ 4, 11-12 (describing additional procedures and additional protections for VPCI materials); MJPO ¶ 10 (same).

¹⁵ Typically, protective orders restrict access to "the attorneys, the parties, parties' experts, actual or proposed witnesses, and other persons whom the attorneys deem necessary to review the documents for the prosecution or defense of this lawsuit." Federal Judicial Center, Manual for Complex Litigation, Fourth Ed., § 40.27(e) (2004), available at [http://www.fjc.gov/public/pdf.nsf/lookup/mcl4.pdf/\\$file/mcl4.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/mcl4.pdf/$file/mcl4.pdf) (model protective order). In cases involving competitors and sensitive commercial information, courts may employ a two-tiered order imposing extra safeguards to prevent the parties themselves from gaining access to their competitors' highly confidential materials. But the MJPO is restrictive even compared to the typical orders in those situations, in that it imposes, for example, a third tier of protection, which precludes in-house counsel from any access whatsoever, see, e.g., *U.S. Steel Corp. v. United States*, 730 F.2d 1465, 1468 (Fed. Cir. 1984) ("Whether an unacceptable opportunity for inadvertent disclosure exists, however, must be determined...by the facts on a counsel-by-counsel basis, and cannot be determined solely by giving controlling weight to the classification of counsel as in-house rather than retained."), and expansively defines "competitive decision-making," disqualifying even certain outside counsel from access to highly confidential materials. MJPO ¶ 2.

¹⁶ VPCI Order ¶¶ 9-10.

only 32 individuals who have signed Acknowledgments of Confidentiality to access VPCI in this proceeding. Of those 32 individuals, seven Cogent representatives have already stated that they will not access VPCI.¹⁸ Thus, only 25 individuals are seeking access to VPCI in this docket, and the vast majority of those individuals are lawyers with strict ethical and professional obligations to comply with orders from federal regulators.

To these 25 individuals, Petitioners have raised baseless objections simply because Petitioners object to the protections outlined in the Bureau's orders.¹⁹ As a result of these objections, the Media Bureau has now stopped the 180-day time clock and suspended the pleading cycle for this merger.²⁰ Petitioners' objections are therefore obstructing the Commission's efforts to complete a prompt review of the transaction and are delaying the substantial synergies associated with the combination of these assets. These synergies, which include significant cost savings in Applicants' contracts with Petitioners, will benefit consumers through increased competition, lower prices, improved services, and expanded broadband deployment to over 15 million households mostly in rural areas with little or no broadband service today.

Applicants Have Properly Isolated Petitioners' VPCI

There is simply no basis for the suggestion that Applicants' efforts to identify and segregate VPCI will be half-hearted and porous. Applicants are the counterparties to the very contracts that are at issue in Petitioners' filings. Applicants have a strong interest in protecting the confidentiality of competitively-sensitive information in these contracts and the materials relating to them, which are, after all, Applicants' documents, residing in Applicants' files.²¹ For

¹⁷ Petitioners have sought to block outside counsel and outside consultants who represent Applicants from obtaining access to VPCI, even though the only VPCI that has been submitted in the docket or has been requested to be submitted into the docket is Applicants' own VPCI. Petitioners have not asserted any specific objections to any of Applicants' representatives. Petitioners' broad objections are meritless and should be dismissed.

¹⁸ See *Applications of Comcast Corp. and Time Warner Cable Inc. and AT&T Inc. and DIRECTV for Consent to Assign or Transfer Control of Licenses and Authorizations*, MB Dkt Nos. 14-57 and 14-90, Response to Objections to Request for Access to Highly Confidential Information and Video Programming Confidential Information of Cogent Communications Group, Inc., at 2 (filed Oct. 21, 2014).

¹⁹ To the extent that Petitioners also have asserted particularized objections to certain of these 25 individuals, the Bureau should address these individual objections pursuant to the terms of the MJPO in due course as it routinely does in other proceedings.

²⁰ *Id.*, Order, DA 14-1523 (MB rel. Oct. 22, 2014) ("Clock Stop Order").

²¹ See *Applications of AT&T Inc. and DIRECTV for Consent to Assign or Transfer Control of Licenses and Authorizations*, MB Dkt No. 14-90, Comments of AT&T Inc. and DIRECTV (filed Sept. 26, 2014); *id.*, Notice of Oral *Ex Parte* Presentation of AT&T Inc. and DIRECTV (filed Oct. 16, 2014).

this reason, Applicants have gone to significant lengths to segregate VPCI from their respective productions as directed by the Bureau.

AT&T's response to the Commission's Information Request includes a 289-page narrative, more than 2,400 exhibits and more than 790,000 documents, totaling more than 3.3 million pages, from 37 current and former AT&T employees. DIRECTV's response to the Information Request includes an 86-page narrative, more than 500 exhibits, and more than 1,000,000 documents, totaling approximately 4.1 million pages, from 35 current and former DIRECTV employees. To identify VPCI in these productions, Applicants used a multipronged approach that included human review of massive numbers of documents, and multiple rounds of broadly inclusive electronic searches fine-tuned with significant attorney review. Reviewers were carefully trained and specifically instructed to designate documents as VPCI if they are video programming distribution agreements or a part of an agreement or if they contain a detailed description of one or more provisions of such an agreement, including, but not limited to, price terms or information relating to the negotiation of such an agreement.²² The review process applying these standards was intensive and thorough, requiring hundreds of attorney reviewers and support from experts at Applicants' document vendors who provided sophisticated and modern electronic capabilities to ensure compliance with the provisions of the VPCI Order. In all, Applicants estimate that they have spent, to date, approximately 4,500 hours and over \$1,000,000 isolating VPCI as described above.

The Bureau's Orders Protect the Confidentiality of Petitioners' VPCI

Nor is there any basis for Petitioners to assert that, under the Bureau's order, their VPCI would be "publicly" disclosed. The MJPO significantly limits which individuals may access VPCI and imposes extraordinary protections on the use of such information by the narrow set of individuals who qualify for access. To begin with, the only individuals who are entitled to access to VPCI are outside counsel and consultants for parties to the proceeding, and as described above, there are only 25 such individuals beyond those representing Applicants. *No employees of any customer or competitor* of Petitioners may have access to such information.²³

²² See MJPO ¶ 2 ("Video Programming Confidential Information" means information that is Highly Confidential Information, *and* is an agreement, or any part thereof, for distribution of any video programming (including broadcast programming) carried by an Applicant's (i) MVPD service and/or (ii) OVD service; a detailed description of one or more provisions of such an agreement, including, but not limited to, price terms; and information relating to the negotiation of such an agreement.") (emphasis in original).

²³ *Id.* ¶ 7. "Outside Counsel of Record" and "Outside Consultant" include attorneys representing and consultants employed by a non-commercial party to the proceeding so long as they are not involved in competitive decision-making. *Id.* ¶ 2. See also *id.* ¶ 13 (permitting employees of Outside Counsel and Outside Consultants access in limited circumstances).

Likewise, *no outside counsel or consultant who engages in “competitive decision-making” for clients may have access.*²⁴

In addition, per the terms of the MJPO, the few individuals who access VPCI are subject to strict limitations on how they use the material. They are strictly prohibited from printing, copying or transmitting such materials.²⁵ They are allowed to use such materials *only for purposes of this proceeding.*²⁶ They may not disclose such materials to anybody who has not executed an Acknowledgment of Confidentiality confirming his or her eligibility to view such material.²⁷ These restrictions on use and disclosure do not terminate at the end of the proceeding, but instead “remain in perpetuity.”²⁸

Conclusion

The number of individuals who could access Petitioners’ VPCI is extremely limited, and the Bureau’s orders remove any realistic risk of competitive harm to Petitioners. The record before the Commission establishes that the merger will achieve significant synergies, including significant content cost savings, that will benefit consumers through increased competition, lower prices, improved services, and expanded broadband deployment. Yet, solely because of Petitioners’ unsupported objections, the Commission has stopped the 180-day transaction clock and suspended the pleading cycle,²⁹ preventing Applicants from delivering these public interest benefits and hampering the Commission in meeting its “obligation to review proposed transactions as expeditiously as possible.”³⁰

²⁴ *Id.* ¶ 2 (“Competitive Decision-Making” is defined as “a person’s activities, association, or relationship with any of his clients involving advice about or participation in the relevant business decisions or the analysis underlying the relevant business decisions of the client in competition with or in a business relationship with the Submitting Party.”). The VPCI Order interpreted “Competitive Decision-Making” broadly: “In the context of the types of contracts the programmers and broadcasters have identified, the high commercial sensitivity of the contracts leads us to conclude that any individual who participates in the negotiation of such contracts likely has been involved in ‘Competitive Decision-Making.’” VPCI Order ¶ 8.

²⁵ VPCI Order ¶ 11 & n.31; MJPO ¶ 10. Highly Confidential Documents also may be designated as “Additional Copying Restricted” to limit the number of copies of such materials. MJPO ¶ 6.

²⁶ MJPO ¶¶ 12, 16.

²⁷ *Id.* ¶¶ 7, 13, 15.

²⁸ VPCI Order ¶ 6.

²⁹ Clock Stop Order ¶ 4.

³⁰ *Applications of AT&T Inc. and DIRECTV for Consent to Assign or Transfer Control of Licenses and Authorizations*, MB Dkt No. 14-90, 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.,*

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Applicants urge the Commission to dismiss or deny Petitioners' requests so that it may restart its 180-day timeline, resume the pleading cycle, and complete its review of the transaction.

Respectfully submitted,

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& 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>.

CERTIFICATE OF SERVICE

I hereby certify that on this 27 day of October, 2014, I caused true and correct copies of the foregoing Letter of AT&T Inc. and DIRECTV to be served by electronic mail and by FedEx upon:

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/s/ Lauren E. Manning
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