

**Before the
Federal Communications Commission
Washington, DC 20554**

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

**OPPOSITION TO APPLICATION FOR REVIEW AND
EMERGENCY REQUEST FOR STAY**

Pursuant to Section 1.115(d) of the rules of the Federal Communication Commission (“Commission” or “FCC”), DISH Network Corporation (“DISH”) files this Opposition to the Application for Review and Emergency Request for Stay filed by certain programmers (collectively, the “Programmers”) in the above-captioned proceedings.¹ The Programmers challenge the Media Bureau’s *Order* adding a level of protection for certain confidential documents pursuant to the *Modified Joint Protective Orders* (“*Modified JPOs*”) in these proceedings. They argue that these protections are not enough because their research has

¹ Application for Review, CBS Corp., Discovery Communications LLC, 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., MB Docket Nos. 14-57, 14-90 (Oct. 14, 2014) (“Application for Review”); Emergency Request for Stay of Media Bureau Order and Associated Modified Joint Protective Orders, CBS Corp., Discovery Communications LLC, 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., MB Docket Nos. 14-57, 14-90 (Oct. 14, 2014) (“Request for Stay”).

uncovered no instance where these types of carriage agreements have been reviewed by third parties in a merger proceeding, and therefore that the Commission should not permit any parties' outside counsel or experts to review them here.² Rather, the Programmers claim that the FCC should read them without the benefit of any third party review and take them into account in reaching its decision on the proposed merger.³ But the central contention of the Programmers—that documents of this type have never before been produced for third party review—is false. Carriage agreements and similarly commercially sensitive documents have routinely been requested, and provided, in major media merger reviews. What is new and extraordinary is the level of protection that the Commission has afforded the documents under the *Modified JPOs*. In prior mergers, carriage agreements and related negotiation materials have been produced under the highly confidential designation without further or special protection. DISH understands the Programmers' concerns and does not begrudge the added protections. But for the Programmers to claim that these unprecedented protections are not enough is frivolous.

As for the idea of exclusive Commission review advocated by the Programmers, precedent establishes that parties cannot lawfully be deprived of access to decisionally significant material in the Commission's party-based proceedings. The Commission's review of Hart-Scott-Rodino ("HSR") documents under a waiver granted by the applicants provides no

² See Application for Review at 1; Request for Stay at i; see also Applications of Comcast Corp. and Time Warner Cable Inc. for Consent to Assign or Transfer Control of Licenses and Authorizations and AT&T, Inc. and DIRECTV for Consent to Assign or Transfer Control of Licenses and Authorizations, *Order*, MB Docket Nos. 14-57, 14-90, DA 14-1463 (Oct. 7, 2014) (the "*Order*"); Applications of Comcast Corp. and Time Warner Cable Inc. for Consent to Assign or Transfer Control of Licenses and Authorization, *Modified Joint Protective Order*, MB Docket No. 14-57, DA 14-1464 (Oct. 7, 2014) ("*MJPO 14-57*"); Applications of AT&T, Inc. and DIRECTV for Consent to Assign or Transfer Control of Licenses and Authorization, *Modified Joint Protective Order*, MB Docket No. 14-90, DA 14-1465 (Oct. 7, 2014) ("*MJPO 14-90*").

³ See generally *supra* note 1.

support for the Programmers' argument. The Commission cannot rely on HSR information unless it requests the production of such information in the FCC's own merger proceeding subject to the applicable protective order.

As for the Programmers' Request for Stay, it should be denied because the Programmers are unlikely to succeed on the merits of their objections, and they will not suffer irreparable injury absent the stay.

I. The Programmers Are Unlikely To Prevail on the Merits

The Programmers go to great lengths to set the stage for what, they allege, is an unprecedented departure from precedent by the Media Bureau. They take pages to explain the highly confidential and sensitive nature of their carriage agreements,⁴ their lack of control over the information submission process as non-applicants in these proceedings,⁵ and their proposal to allow the FCC (and only the FCC) to review their carriage agreements under the watchful eye of the Department of Justice.⁶ The Programmers then go on to (mis)characterize the procedures under the *Modified JPOs* as the "mass public disclosure" of their carriage agreements and related materials.⁷

But the central foundation of all of these claims – that the Media Bureau's actions go beyond what the FCC has ordered in the past – is false. The Programmers' and their counsels'

⁴ Application for Review at 2-3.

⁵ *Id.* at 4, 11-14.

⁶ *Id.* at 5.

⁷ *Id.* at 15. Of course, the FCC has not proposed to make these agreements and related materials available to the public. Consistent with past practice, the FCC has agreed to allow outside counsel and experts that are not involved in competitive decision-making to review the material over an online portal. Use of the information in the materials is limited to this proceeding, and each reviewing individual has certified to the Commission that he or she will abide by all terms of the *Modified JPOs*.

ignorance of the applicable precedent is no excuse.⁸ The Commission has, on multiple occasions, required merger applicants to provide, for review by *both* the FCC and interested parties, documents of the highest commercial sensitivity (including carriage agreements and related negotiation materials) under confidentiality procedures *that are less* than what the FCC has seen fit to afford the Programmers here. Stripped of the factual foundation for their argument, the Programmers cannot show that the Media Bureau erred, and therefore they are unlikely to succeed on the merits.

The recent past is replete with examples in which the FCC has required merger applicants to consent to review of some of their most sensitive commercial information by both the FCC and interested third parties. And in all of these proceedings the requested information included highly sensitive commercial agreements for which the counterparty was not an applicant before the Commission. In each case, the production and disclosure took place without incident and without giving rise to allegations of a breach.

Very recently, in Comcast/NBCU, the FCC required the applicants to produce carriage agreements and related negotiation materials with non-applicant third parties.⁹ Although the

⁸ *Id.* (“As far the [Programmers] are aware, the Commission has not previously compelled the mass public disclosure of Carriage Agreements and related negotiation materials involving nonparties to merger proceedings.”).

⁹ *See, e.g.*, Letter from William Lake, Chief, Media Bureau, FCC, to Michael Hammer, Counsel to Comcast Corp., MB Docket No. 10-56 (May 21, 2010), Information and Discovery Request for Comcast Corp., Request 20 (“Provide all agreements currently in effect and all agreements executed since January 1, 2006 between the Company and any other Person that grant online video distribution rights to the Company. Identify any agreements that grant exclusive online video distribution rights to the Company”), Request 44 (“Provide all agreements currently in effect and all agreements executed since January 1, 2006 that the Company has entered into with any provider of Video Programming which discuss cable network carriage, retransmission consent, program carriage, and distribution rights for Video Programming”); Letter from William Lake, Chief, Media Bureau, FCC, to Michael Hammer, Counsel to Comcast Corp., MB

Programmers note that they “believe that the Commission concluded that it was not necessary to make nonparty carriage agreements (much less negotiation materials) publicly accessible” in the Comcast/NBCU proceeding,¹⁰ they offer no support for this assertion. And the contrary is true: the Commission asked for “all agreements currently in effect and all agreements executed since January 1, 2006 that [Comcast] has entered into with any provider of Video Programming which discuss cable network carriage, retransmission consent, program carriage, and distribution rights for Video Programming.”¹¹ When Comcast asked for confidential treatment of its carriage agreements and related negotiation materials,¹² the Commission concurred, and made the information available to third parties under the terms of the second protective order in that proceeding, which restricted such information to outside counsel and experts not involved in competitive decision-making.¹³

Much of the same occurred in the Adelphia/Time Warner/Comcast transaction. There, the Commission requested highly proprietary information on video programming and made the

Docket No. 10-56 (Oct. 4, 2010), Second Information and Discovery Request for Comcast Corp., Requests 65-70.

¹⁰ Application for Review at 16.

¹¹ Letter from William Lake, Chief, Media Bureau, FCC, to Michael Hammer, Counsel to Comcast Corp. (May 21, 2010), Information and Discovery Request for Comcast Corp., Request 20.

¹² Specifically, Comcast asked for highly confidential treatment of “[i]nformation relating to the details of video programming and carriage agreements, programming rights, retransmission agreements, linear carriage agreements, video-on-demand agreements, and online distribution agreements, *including information regarding the details of the negotiation for such agreements; analyses of such agreements or negotiations.*” Letter from William Lake, Chief, Media Bureau Chief, FCC, to Michael Hammer, et al., Counsel to Comcast Corp., MB Docket No. 10-56 (June 11, 2010) (emphasis added).

¹³ *Id.*; see also Applications of Comcast Corporation, General Electric Company, and NBC Universal Inc., for Consent to Assign Licenses or Transfer Control of Licensees, *Second Protective Order*, MB Docket No. 10-56 (Mar. 4, 2010).

material available for review to third parties subject to the protections of a second protective order.¹⁴ Similarly, the FCC required the applicants in the EchoStar/Hughes/DIRECTV merger proceeding to produce and make available “video programming agreements” to parties under protective order procedures.¹⁵

Indeed, review of the programming agreements at issue here is such a standard practice for regulatory proceedings that the American Cable Association observed: “[I]t is common for programming agreements to include an exception to the contract’s non-disclosure agreement [] that permits them to be disclosed to government officials upon request.”¹⁶ Similar documents have also been routinely disclosed in other large transactions. For example, roaming agreements were produced and made available for review subject to confidentiality safeguards in such proceedings as Cingular/AT&T and AT&T/T-Mobile.¹⁷ As the FCC’s General Counsel and

¹⁴ Adelphia Communications Corp., Time Warner Cable, Inc. and Comcast Corp. for Consent to the Assignment and/or Transfer of Control of License, *Second Protective Order*, 20 FCC Rcd. 20073, 20075-76 ¶ 7 (2005); Letter from Donna Gregg, Chief, Media Bureau, FCC, to Brad Sonnenberg, Counsel to Adelphia Communications Corp., MB Docket No. 05-192 (Dec. 5, 2005).

¹⁵ Echostar Communications Corp, General Motors Corp., and Hughes Elec. Corp., *Order Adopting Second Protective Order*, 17 FCC Rcd. 7415, 7415 ¶¶ 2, 4 (2002) (referring to video programming agreements, and referencing the applicants’ assertion that such agreements were “the absolute fulcrum of competition between Applicants and [their] competitors”).

¹⁶ Comments of the American Cable Association, MB Docket No. 14-57 (Sept. 29, 2014).

¹⁷ See Letter from Douglas Brandon, Vice President, AT&T Wireless Services, Inc. to Marlene Dortch, Secretary, FCC, WT Docket No. 04-70 at 2 (July 22, 2004) (providing “both commercially and financially sensitive” information concerning “proprietary information” that would not “in the normal course of business [be] reveal[ed] to the public or their competitors”); Letter from John Muleta, Chief, Wireless Telecommunications Bureau, FCC, to David Jatlow, Vice President, AT&T Wireless Services, Inc. and David Richards, Chief Counsel, Cingular Wireless LLC, MB Docket No. 04-70 at 4 (June 30, 2004) (requesting that Applicants provide “all underlying data and analyses that address the possible effects of the merger on roaming charges”); Letter from John Scott, III, Vice President, Verizon, to Marlene Dortch, Secretary, FCC, WT Docket No. 11-65 at 1 (Nov. 1, 2011) (providing “Highly Confidential Information that is some of Verizon Wireless’ most sensitivity business information, is not available from

Chiefs of the Media and Wireline Competition Bureaus note, “the Commission has never refused to receive entire categories of information highly relevant to a pending merger”; they add that such a refusal to allow review of such documents would be a “radical departure” from FCC practice.¹⁸

II. The Video Programming Confidential Information Is Critical for DISH’s Participation in these Proceedings

As the FCC, DISH, and other commenters have made clear, review of the carriage agreements and related materials is critical to evaluating whether the proposed transactions will serve the public interest. DISH has argued that Comcast’s and Time Warner’s combined strength in the market would squeeze programmers’ margins, forcing programmers to recoup these same margins through higher prices extracted from smaller distributors.¹⁹ In return, Comcast and Time Warner have countered that “there can be no question of Comcast dominating the market for buying programming,” and that the merger is “unlikely to affect the relative bargaining position of Comcast and content companies.”²⁰ Similarly, DISH has argued that “the leverage the [AT&T-DIRECTV] transaction will create would distort competition, enabling AT&T to command steeply preferential treatment that will not only lower its own programming

publicly available sources,” disclosure of which would “have a serious negative effect on Verizon Wireless’ business and would place Verizon Wireless at a significant disadvantage in the marketplace and in negotiations”); Letter from David McAtee II, Counsel to AT&T Inc., to Marlene Dortch, Secretary, FCC, WT Docket No. 11-65 at 14, 46, 48- 49 (June 10, 2011) (providing information regarding roaming agreements).

¹⁸ Bill Lake, Chief, Media Bureau, Jon Sallet, General Counsel & Julie Veach, Chief, Wireline Competition Bureau, FCC, *Transaction Reviews and the Public Interest*, FCC Blog (Oct. 7, 2014), <http://www.fcc.gov/blog/transaction-reviews-and-public-interest> (“FCC Blog”).

¹⁹ DISH Network Corp. Petition to Deny, MB Docket No. 14-57, at 85 (Aug. 25, 2014).

²⁰ Opposition at 152, 156.

costs, but also substantially raise the programming costs of everyone else.”²¹ And as DISH pointed out when it commented on the Programmers’ initial objections to the disclosure of their information, numerous other parties have raised salient questions about the effect of the proposed transaction on the programming market.²² Finally, As the Media Bureau recognized when it approved the *Modified JPOs*, “review of [the transaction] requires analysis of issues directly implicated by the information contained in these materials, including competition in the video distribution market.”²³ Reasonable access to the carriage agreements and related materials, as provided for under the *Modified JPOs*, is necessary to resolve these issues. These issues cannot be joined, and that analysis cannot be conducted, without reasonable access to the relevant documents by both the FCC and outside counsel and experts for third parties whom are not involved in Competitive Decision-Making.

Nor is it enough for the FCC to review these materials in isolation. Review by DISH and other parties to this proceeding is a critical part of the FCC’s merger review. The process is a public one for a reason. DISH and other participants are enmeshed in the industry that the proposed transactions will affect and can offer unique insight to inform the Commission’s analysis. As the Commission stated in *Verizon-MCI*:

We find that [certain highly confidential] materials are necessary to develop a more complete record on which to base the Commission’s decision in this proceeding and therefore require their production. We are mindful of their highly sensitive nature, but *we must also protect the right of the public to participate in this proceeding in a meaningful way.*²⁴

²¹ DISH Network Corp. Petition to Impose Conditions, MB Docket No. 14-90, at 10 (Sept. 16, 2014).

²² Comments of DISH Network Corp., MB Docket No. 14-57 (Sept. 26, 2014).

²³ *Order* ¶ 13.

²⁴ Applications of Verizon Communications Inc. and MCI, Inc. for Approval of Transfer of Control, *Order*, 20 FCC Rcd. 10420, 10421 ¶ 3 (2005) (emphasis added).

III. The Programmers Cannot Show that They Will Suffer Irreparable Injury

The Programmers argue that they will suffer irreparable injury if their carriage agreements and related materials are made available under the *Modified JPOs*. They argue that “an MVPD that knows the terms of a [Programmer’s] [c]arriage [a]greements with the [applicants] would have an unfair advantage in negotiation its own distribution agreement with that [Programmer].”²⁵ They also argue that “other content producers and owners—direct competitors of Programmers” could use their knowledge of the Programmers’ agreements to “strategically [] price and [] market their own services and [] undermine the [Programmers].”²⁶ To reach these conclusions, however, the Programmers must both completely discount the value of the multiple protections the *Modified JPOs* afford their information, and presume that anyone gaining access to their information will violate their oaths to the Commission and use the information outside of the context of the current proceedings. But there is no evidence to support either position.

Under the *Modified JPOs*, access to the carriage information is to be provided over an online portal without the ability to print or copy.²⁷ And all persons wishing to access the information had to recertify under the *Modified JPOs*. As part of this recertification, each individual certified that they were not involved in competitive decision-making for their clients generally, and specifically that they were not involved in the negotiation of programming agreements on behalf of their clients.²⁸ And the Programmers have a means to challenge any

²⁵ Request for Stay at 14.

²⁶ *Id.*

²⁷ *MJPO* 14-57 ¶ 10; *MJPO* 14-90 ¶ 10.

²⁸ *MJPO* 14-57 ¶ 2; *MJPO* 14-90 ¶ 2.

particular individual if they have reason to believe that he or she is involved in Competitive Decision-Making.²⁹

Yet Programmers ignore these certifications, and allege that “these individuals . . . act on behalf of their clients in a variety of negotiation settings.”³⁰ Of course, if the Programmers possessed evidence that any of these individuals was involved in Competitive Decision-Making, the *Modified JPOs* include a procedure for the Programmers to challenge that individual’s access. As the Commission is aware, the Programmers have abused that procedure in what appears to be an effort to nullify the *Order* through the back door. They have filed objections to each and every outside counsel and expert seeking access to highly confidential information in these proceedings, and in almost all cases with no evidence whatsoever that the individual is involved in Competitive Decision-Making.³¹

For all of the above reasons, DISH opposes the Application for Review and Request for Stay filed by the Programmers in the above-referenced proceedings.

* * *

²⁹ Application for Review at 21.

³⁰ Request for Stay at 11.

³¹ See Amended Response of DISH Network Corp. to Programmers’ Objections, MB Docket Nos. 14-57, 14-90 (Oct. 24, 2014). Of course, even in those few cases where the Programmers purport to proffer evidence that outside counsel or experts are involved in Competitive Decision-Making, Programmers offer only inferences based largely on presumptions that the individuals have submitted false certifications to the Commission and will ignore their professional obligations. See generally *id.*

Respectfully submitted,

Jeffrey H. Blum
Senior Vice President &
Deputy General Counsel
Alison A. Minea
Director & Senior Counsel, Regulatory Affairs
Hadass Kogan
Associate Corporate Counsel
DISH NETWORK CORPORATION
1110 Vermont Avenue, NW, Suite 750
Washington, D.C. 20005
(202) 293-0981

/s/
Pantelis Michalopoulos
Stephanie A. Roy
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000

*Counsel for DISH Network
Corporation*

October 29, 2014

