

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

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

**RESPONSE TO OBJECTIONS TO REQUEST FOR HIGHLY CONFIDENTIAL
INFORMATION AND VIDEO PROGRAMMING CONFIDENTIAL INFORMATION**

Free Press submits this response to objections filed by Discovery Communications, LLC¹; by CBS Corporation, Scripps Networks Interactive, Inc., The Walt Disney Company, Time Warner Inc., Twenty First Century Fox, Inc., Univision Communications Inc., and Viacom Inc.² (collectively, the “Content Companies”); to requests for access to Highly Confidential Information (“HCI”) and Video Programming Confidential Information (“VPCI”) by the following Free Press representatives: Matthew F. Wood, Policy Director; S. Derek Turner, Research Director, and Lauren M. Wilson, Policy Counsel (the “Free Press Signatories”).

¹ Objection to Request for Access to Highly Confidential Information and Video Programming Confidential Information of Discovery Communications LLC, MB Docket No. 14-57 (Oct. 20, 2014); Objection to Request for Access to Highly Confidential Information and Video Programming Confidential Information of Discovery Communications LLC, MB Docket No. 14-90 (Oct. 23, 2014)..

² Objection to Request for Access to Highly Confidential Information and Video Programming Confidential Information of CBS Corp., Scripps Networks Interactive, Inc., The Walt Disney Company, Time Warner Inc., Twenty First Century Fox, Inc., Univision Communications Inc. and Viacom Inc., MB Docket No. 14-57 (Oct. 20, 2014); Objection to Request for Access to Highly Confidential Information and Video Programming Confidential Information of CBS Corp., Scripps Networks Interactive, Inc., The Walt Disney Company, Time Warner Inc., Twenty First Century Fox, Inc., Univision Communications Inc. and Viacom Inc., MB Docket No. 14-90 (Oct. 23, 2014).

On October 7, 2014, the Federal Communications Commission issued *Modified Joint Protective Orders*³ in response to requests for special treatment of certain video programming information, and to encourage the submission of documents that would enable the agency to carefully assess the public interest impact of the pending Comcast/Time Warner Cable and AT&T/DIRECTV mergers. Pursuant to the terms of the *Modified Joint Protective Orders*, on October 15, 2014, Free Press filed with the Commission Acknowledgments of Confidentiality for the Free Press Signatories. On October 20 and October 23, Content Companies filed their Objections on the grounds that the Free Press Signatories do not qualify as “Outside Counsel” and that generally, the Commission should not permit any party to access the Content Companies’ HCI and VPCI. Accordingly, Free Press respectfully submits this response demonstrating that allowing Mr. Wood, Mr. Turner, and Ms. Wilson access to Content Companies’ information is consistent with both the letter and the spirit of the FCC’s *Modified Joint Protective Orders*.

The terms of the *Modified Joint Protective Order* governing access to Highly Confidential Information “limit[s] access to materials to Outside Counsel of Record and Outside Consultants.” Free Press is a non-commercial, non-profit public interest organization. With respect to non-commercial parties, the *Modified Joint Protective Order* defines “Outside Counsel of Record” as including “any attorney representing a non-commercial Participant in these proceedings, provided that such person is not involved in Competitive Decision-Making.” With

³ 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*”).

respect to non-commercial parties, “Outside Consultant includes any consultant or expert employed by a non-commercial Participant in this proceeding, provided that such consultant or expert is not involved in Competitive Decision-Making.”

Content Companies have failed to explain why Free Press’s representatives, who have been granted access to HCI in numerous past Commission proceedings, including the instant proceedings, suddenly do not qualify as Outside Counsel of Record and Outside Consultants. The entirety of the Content Companies’ argument is as follows: Mr. Wood, Mr. Turner, and Ms. Wilson serve as attorneys with Free Press, do not qualify as Outside Counsel, and therefore cannot gain access to HCI and VPCI under the *Modified Joint Protective Order*.

The paucity of the Content Companies’ fact-finding and analysis is evidenced by the very first premise of their conclusory argument: that Mr. Wood, Mr. Turner and Ms. Wilson are each attorneys. Mr. Turner is not an attorney and he has never held himself out to be an attorney. At Free Press, Mr. Turner is responsible for coordinating and executing the organization’s research and policy agenda. He has testified before Congress on several occasions⁴ and the Commission, along with other regulators, public interest representatives, and industry stakeholders regularly cite his work. In the past two years alone, Mr. Turner has authored reports on the broadcast⁵ and

⁴ See generally *Disapproving the Rule Submitted by the Federal Communications Commission With Respect to Regulating the Internet and Broadband Industry Practices: Hearing on H.J. Res. 37 Before the Subcomm. On Communications, Technology and the Internet of the H. Comm. On Energy and Commerce*, 112th Cong. (2011) (statement of S. Derek Turner, Research Director, Free Press); *The National Broadband Plan: Deploying Quality Broadband Services to the Last Mile Before the Subcomm. On Communications, Technology, and the Internet*, 111th Cong. (2010) (statement of S. Derek Turner, Research Director, Free Press); *Universal Service: Reforming the High-Cost Fund Before the Subcomm. On Communications, Technology, and the Internet of H. Comm. On Energy and Commerce*, 111th Cong. (2009) (statement of S. Derek Turner, Research Director, Free Press).

⁵ See generally S. Derek Turner, *Cease to Resist: How the FCC’s Failure to Enforce Its Rules Created a New Wave of Media Consolidation* (2014).

cable industries⁶ and has provided exhaustive research and analysis on the broadband market in the Open Internet⁷ proceeding.⁸ Also notably, Mr. Turner provided the first full accounting of media ownership diversity in the United States.⁹ Given the depth and influence of Mr. Turner's scholarship, one might assume that he has a law degree, but that assumption is inaccurate as his staff biography shows.¹⁰ In any event, given Mr. Turner's experience and expertise in Commission matters, he falls squarely within the definition of an Outside Consultant.

The Content Companies' carelessness also was on display in their analysis of the terms of the *Modified Joint Protective Order*. Because they have not provided any support for the conclusion that Free Press' attorneys and experts do not qualify as Outside Counsel or Outside Consultants, it is impossible to pinpoint exactly which term or terms in the *Modified Joint Protective Order* the Content Companies misunderstood. What part of relevant text possibly could have proved difficult for the companies to decipher? There are three factors that determine whether a person qualifies as an Outside Counsel of Record or an Outside Consultant: (1) whether that person is an attorney or an expert, respectively; (2) whether that person represents a non-commercial Participant in this proceeding; and (3) whether that person is involved in Competitive Decision-Making.¹¹ The first two factors present issues of fact that

⁶ See generally S. Derek Turner, *Combating the Cable Cabal: How to Fix America's Broken Video Market* (2013).

⁷ See Free Press, Free Press Builds Definitive Case for Net Neutrality (July 18, 2014), <http://www.freepress.net/press-release/106434/free-press-builds-definitive-case-net-neutrality>.

⁸ It may indeed be the case that Content Companies do not want Mr. Turner to gain access to their HCI and VPCI because of his expertise. Such a motivation might seem like good business to the Content Companies, but is not a basis for denying access pursuant to a protective order.

⁹ See generally S. Derek Turner, *Out of the Picture 2007: Minority & Female TV Station Ownership in the United States* (2007); S. Derek Turner, *Off the Dial: Female and Minority Radio Station Ownership in the United States* (2007).

¹⁰ Biography of S. Derek Turner, available at <http://www.freepress.net/person/154/s-derek-turner> (last visited Nov. 3, 2014).

¹¹ *MJPO 14-57 ¶ 2.*

should not be up for debate, and are clearly satisfied by Free Press and its representatives. Assessing whether Free Press's employees satisfy the third factor does require a modicum reading comprehension and deduction, but it is nonetheless obvious that Mr. Wood, Mr. Turner, and Ms. Wilson are not involved in Competitive Decision-Making.

Content Companies have acknowledged that Mr. Wood and Ms. Wilson are attorneys¹² and as established above, Mr. Turner is a media expert. Therefore Free Press's representatives satisfy the first factor of the test. Also, as stated above, Free Press is a non-commercial Participant in this proceeding. The Content Companies and their counsel have long been aware that Free Press is a non-profit public interest organization. They have participated in numerous Commission proceedings alongside Free Press, and have addressed Free Press's positions directly in past filings. That Free Press's representatives meet the second requirement for access to HCI and VPCI is unquestionable.

The final requirement for a person to gain access to HCI and VPCI under the *Modified Joint Protective Order* is that he or she not be involved in Competitive Decision-Making. "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 or with a Third Party Interest Holder."¹³ The *Order* implementing the *Modified Joint Protective Order* clarified that the purpose of the Competitive Decision-Making caveat is to "exclude persons whose activities on behalf of the clients would place them in a situation where their obligations under a protective order are likely

¹² Mr. Wood is member of the bars of District of Columbia and Massachusetts. Ms. Wilson is a member of the Illinois bar.

¹³ *MJPO 14-57* ¶ 2.

to be put at risk.”¹⁴ The Commission therefore concluded that persons involved in contract negotiations are likely involved in Competitive Decision-Making. This expanded interpretation makes it crystal clear that Free Press’s agents are not involved in Competitive Decision-Making and that their access to HCI and VPCI could not be used to gain an unfair advantage in negotiations or in the marketplace.

Mr. Wood, Mr. Turner and Ms. Wilson do not have clients in competition with or in a business relationship with any of the submitting parties or third party interest holders. In fact, Mr. Wood, Mr. Turner, and Ms. Wilson do not have any clients at all—not in their capacity as Free Press representatives or otherwise. Moreover as a non-commercial, non-profit public interest organization, Free Press is not a competitor to Comcast, Time Warner Cable, AT&T, DIRECTV, or any of the Content Companies, and Free Press does not negotiate contracts on its own behalf or on the behalf of any commercial entity. Nor does Free Press receive funding from the competitors of any Submitting Party or Third Party Interest Holder.¹⁵ As such, Mr. Wood, Mr. Turner, and Ms. Wilson do not give advice about or participate in the business decisions of the Content Companies’ competitors and would have no anticompetitive purpose in accessing companies’ HCI and VPCI.

Finally, by signing Acknowledgments of Confidentiality, Mr. Wood, Mr. Turner and Ms. Wilson have voluntarily agreed to bind themselves to the terms of the *Modified Joint Protective Orders*, the violation of which would subject them to “suspension or disbarment...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.”¹⁶

¹⁴ *Order* ¶ 8.

¹⁵ Free Press does not accept donations from government, political parties, or businesses.

¹⁶ *Order* ¶ 7.

Content Companies may also seek legal remedies against them. Therefore, given that Mr. Wood, Mr. Turner and Ms. Wilson have no incentive to disclose protected information or ability to use it for anticompetitive purposes, and given the severe penalties that could be enforced should they do so, Free Press is baffled as to Content Companies' rationale for objecting to its employees' access to such information. Free Press can only assume that Content Companies are resorting to dilatory tactics that would curb public interest parties' access to data in a timely manner or that would waste the Commission's time by forcing it to dedicate resources to evaluate frivolous objections. Yet Free Press will not allow any such tactics to hinder its full participation in these proceedings, or to impede its steadfast commitment to protecting consumers and the public interest. Furthermore, we encourage the Commission to swiftly reject any abuse of process during this important time at the agency, when staff are tasked with several contemporaneous decisions that will dictate the future of the media and broadband ecosystems.

In conclusion, given that Content Companies provide no argument as to why Mr. Wood, Mr. Turner and Ms. Wilson do not qualify under terms of the *Modified Joint Protective Orders*, and because Content Companies present no concerns as to competitive harm that could result from Free Press's employees' access to the data in question, Free Press requests that the Commission move immediately to deny Content Companies' Objection.

Respectfully Submitted,

/s/ Lauren M. Wilson

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CERTIFICATE OF SERVICE

I, Lauren Wilson, hereby certify that on this 3rd day of November, 2014, I caused true and correct copies of the foregoing response to be served by electronic mail on the following:

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/s/ Lauren M .Wilson

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