

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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

APPLICATION FOR REVIEW

Mace Rosenstein
C. William Phillips
Andrew Soukup
Laura Flahive Wu

COVINGTON & BURLING LLP
1201 Pennsylvania Ave., N.W.
Washington, DC 20004-2401
(202) 662-6000

*Attorneys for CBS Corporation, 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.*

Dated: November 7, 2014

SUMMARY

On October 7, 2014, the Media Bureau issued orders providing unprecedented third-party access to highly sensitive carriage agreements and competitive information relating to the negotiation of those agreements between programmers and broadcasters and the parties to the instant transactions. These orders were issued in violation of the Trade Secrets Act and the Commission's rules, which recognize that the agreements are entitled to the highest level of protection in the Commission's merger review proceedings. The validity of the orders is the subject of an Application for Review and an accompanying Stay Request filed by the Content Companies on October 14, 2014. Both are pending before the Commission.

In its October 7 Orders, the Bureau recognized, consistent with Commission and D.C. Circuit precedent, that no third party should be entitled to access programmers' highly sensitive commercial information while an objection to a disclosure decision was pending. But on November 4, 2014, on its own *ex parte* motion, the Bureau reversed itself and ordered disclosure—even though the Commission has not had an opportunity to review the Bureau's disposition of particular disclosure objections, even though the Commission is continuing to consider the validity of the underlying October 7 Orders, and even though the Commission and the D.C. Circuit both have observed that it is improper to permit third-party access to confidential materials under these circumstances. In short, the Bureau has effectively usurped the Commission's exclusive authority to rule on the merits of the Content Companies' pending Application for Review.

The Bureau's November 4 Orders should be set aside while the Commission considers the pending Application for Review. First, the Bureau acted on its own motion to revise orders that currently are under review by the Commission, even though the Commission's procedures do not permit the Bureau to revisit orders that are the subject of a pending application

for review. Second, the Bureau's decision to disclose confidential information to third parties while the Application for Review is pending is contrary to well-established Commission and D.C. Circuit precedent, and risks precisely the public interest harms that the Commission is evaluating in its consideration of the Application for Review. As the Commission recognized more than 15 years ago, "disclosure pending review would effectively moot any applications for review because it would place the assertedly confidential information in the hands of all parties signing the protective order without first granting the objecting party the opportunity to seek Commission or judicial review of the disclosure decision."¹

The Bureau has changed the rules in the middle of the game. The November 4 Orders have vitiated the Content Companies' due process rights, usurped the Commission's statutory prerogatives, and caused precisely the public interest harms that the Content Companies have described in their pending Application for Review. The November 4 Orders therefore should be set aside.

¹ *In re Examination of Current Policy Concerning the Treatment of Confidential Info. Submitted to the Comm'n*, 14 FCC Rcd. 20128, 20130 (1999) (the "1999 Reconsideration Statement").

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APPLICATION FOR REVIEW

Pursuant to Section 1.115 of the Commission’s Rules, CBS Corporation, 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., together and respectively on behalf of their affiliated businesses (collectively, the “Content Companies”), hereby respectfully request that the Commission vacate the Media Bureau’s (the “Bureau”) Orders, DA 14-1601 and DA 14-1605, and direct the Bureau to further clarify or modify the associated Amended Modified Joint Protective Orders, DA 14-1604 (MB Docket No. 14-57) and DA 14-1602 (MB Docket No. 14-90), released concurrently in the captioned proceedings on November 4, 2014.²

² *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- (continued...)

INTRODUCTION

As discussed below, the Orders deprive the Commission of an opportunity to review prior rulings of the Bureau that are the subject of the Content Companies' pending Application for Review³ and accompanying Emergency Request for Stay.⁴ As explained in those filings, the Bureau's October 7, 2014 decision to permit access to the Content Companies' affiliation and retransmission agreements and related negotiation materials ("VPCI") violates the Trade Secrets Act and the Commission's rules. The Bureau has arrogated to itself the Commission's exclusive authority to rule on the Content Companies' Application for Review by unilaterally making the Content Companies' VPCI accessible to third parties as early as November 13, 2014—a decision that deprives the Commission of a meaningful opportunity to review the Bureau's underlying decision to permit disclosure. Review is warranted because the Orders are in conflict with statute, regulation, case precedent, and established Commission

1601 (Nov. 4, 2014) (the "Reconsideration Order"); *Applications of Comcast Corp. and Time Warner Cable Inc. for Consent to Assign or Transfer Control of Licenses and Authorization*, Am. Modified Joint Protective Order, MB Docket No. 14-57, DA 14-1604 (Nov. 4, 2014) ("Amended Modified Joint Protective Order 14-57"); *Applications of AT&T, Inc. and DIRECTV for Consent to Assign or Transfer Control of Licenses and Authorization*, Am. Modified Joint Protective Order, MB Docket No. 14-90, DA 14-1602 (Nov. 4, 2014) ("Amended Modified Joint Protective Order 14-90"); *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 14-1605 (Nov. 4, 2014) (the "Objection Order"). Because Amended Modified Joint Protective Order 14-57 and Amended Modified Joint Protective Order 14-90 are substantively identical, they are referred to collectively as the "Amended Modified Joint Protective Orders." The Reconsideration Order, the Objection Order, and the Modified Joint Protective Orders are collectively referred to as the "Orders."

³ Application for Review, filed by Content Cos., MB Docket Nos. 14-57, 14-90 (Oct. 14, 2014) ("Application for Review").

⁴ Emergency Request for Stay of Media Bureau Order & Associated Modified Protective Orders, filed by Content Cos., MB Docket Nos. 14-57, 14-90 (Oct. 14, 2014).

policy and because the Orders cause prejudicial procedural error. *See* 47 C.F.R. § 1.115(b)(2)(i), (v).

This Application for Review does not seek to prevent the Commission or its staff from reviewing the Content Companies' VPCI in connection with the proposed transactions. Nor does it compel any delay in the Commission's review of the proposed transactions.⁵ The Content Companies ask only that the Commission adhere to its prior precedent and prohibit any third party from accessing the Content Companies' highly sensitive commercial information while the Content Companies' challenge to the Bureau's decision to make that information accessible to third parties is pending.

QUESTIONS PRESENTED

1. Did the Bureau act without observance of procedure required by law by unilaterally modifying its prior orders, when those orders were the subject of an application for review pending before this Commission and no petition for reconsideration had been filed before the Bureau?
2. Did the Bureau act arbitrarily and capriciously in authorizing third parties to access the Content Companies' VPCI effective November 13, 2014, when an application for review of the Bureau's decision permitting disclosure of VPCI is pending and the Commission has previously observed that it is improper to permit access to confidential information in similar circumstances?

BACKGROUND

A. The Bureau's Initial Decision To Permit Third-Party Access To The Content Companies' VPCI.

In connection with its review of the captioned transactions, the Bureau issued Information and Data Requests ("IDRs") to Comcast Corporation ("Comcast"), Time Warner

⁵ Although the October 7 Orders required the Content Companies to assert objections to any individual's request to access HCI, the Content Companies repeatedly explained that they would withdraw any objections they asserted that had the effect of preventing these individuals from accessing non-VPCI HCI. *See infra* at 16.

Cable Inc. (“TWC”), and Charter Communications Inc. (“Charter”) (in MB Docket 14-57 on August 21, 2014), and to AT&T, Inc. (“AT&T”) and DIRECTV (in MB Docket 14-90 on September 9, 2014).⁶ As the Bureau acknowledged, its IDRs “seek, among other things, certain types of contracts (*e.g.*, programming and retransmission consent agreements) whose key terms have historically been treated as especially sensitive from a competitive standpoint and involve highly confidential information.”⁷

On September 23, 2014, the FCC sought public comment on the concerns raised by the Content Companies and other programmers about permitting third-party access to these highly confidential materials.⁸ Twenty-six parties, filing either jointly or individually, opposed disclosure of these materials.⁹ Instead, commenters supported the Content Companies’ position

⁶ See Letter from William T. Lake, Chief, Media Bureau, to Kathryn A. Zachem, Senior Vice President, Regulatory and State Legislative Affairs, Comcast Corp. & Information and Data Request to Comcast Corporation, MB Docket No. 14-57 (Aug. 21, 2014); Letter from William T. Lake, Chief, Media Bureau, to Steven Teplitz, Senior Vice President, Gov’t Relations, Time Warner Cable Inc. & Information and Data Request to Time Warner Cable Inc., MB Docket No. 14-57 (Aug. 21, 2014); Letter from William T. Lake, Chief, Media Bureau, to Catherine Bohigian, Exec. Vice President, Gov’t Affairs, Charter Commc’ns, Inc. & Information and Data Request to Charter Commc’ns, Inc., MB Docket No. 14-57 (Aug. 21, 2014); Letter from William T. Lake, Chief, Media Bureau, to Robert W. Quinn Jr., Senior Vice President, Fed. Regulatory & Chief Privacy Officer, AT&T Services, Inc. & Information and Discovery Requests to AT&T, MB Docket No. 14-90 (Sept. 9, 2014); Letter from William T. Lake, Chief, Media Bureau, to Stacy Fuller, Vice President, Regulatory Affairs, DIRECTV & Information and Discovery Requests to DIRECTV, MB Docket No. 14-90 (Sept 9, 2014).

⁷ *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), ¶ 2.

⁸ *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 Nos. 14-57, 14-90, DA 14-1383 (Sept. 23, 2014), at 1; see also *id.*, Attach. 3 (DA-14-1383A4) & Attach. 4 (DA-14-1383A5).

⁹ See, *e.g.*, Comments, filed by Content Companies, MB Docket Nos. 14-57, 14-90 (Sept. 29, 2014); Comments, filed by Content Companies, MB Docket Nos. 14-57, 14-90 (Oct. 3, 2014); Comments filed by Sportsman Channel, MB Docket Nos. 14-57, 14-90 (Sept. 29, 2014); (continued...)

that the confidentiality of highly sensitive VPCI could be assured only by segregated review by Commission personnel at the Department of Justice—a procedure the Commission has followed in numerous other proceedings—or by anonymization and/or redaction of price and other confidential terms and conditions of any materials placed in the record of the Proceedings.

Only three commenters supported third-party access to raw, unredacted Carriage Agreements and related negotiation materials.¹⁰ Each of these commenters—which are purchasers of (or represent purchasers of) the Content Companies’ programming—would benefit commercially from access to information about rates paid and other terms. One commenter, DISH Network, is a large purchaser of the Content Companies’ programming and justified its need to review carriage agreements on the ground that it intended to “view and analyze” prices paid by the Content Companies to the commenter’s competitors.¹¹

On October 7, 2014, the Bureau issued three orders permitting third parties to access the Content Companies’ VPCI.¹² Under the October 7 Orders, among other terms,

Comments filed by Hemisphere Media Co., MB Docket Nos. 14-57, 14-90 (Sept. 29, 2014); Comments filed by Uplifting Entm’t, MB Docket Nos. 14-57, 14-90 (Sept. 29, 2014); Comments filed by Starz Entm’t, MB Docket Nos. 14-57, 14-90 (Sept. 29, 2014).

¹⁰ Comments, filed by Dish Network Corp., MB Docket Nos. 14-57, 14-90 (Sept. 26, 2014); Comments, filed by CenturyLink, MB Docket Nos. 14-57, 14-90 (Sept. 29, 2014); Comments, filed by American Cable Association (“ACA”), MB Docket Nos. 14-57, 14-90 (Sept. 30, 2014) (“ACA Comments”).

¹¹ Comments, filed by Dish Network Corp., MB Docket Nos. 14-57, 14-90, at 3 (Sept. 26, 2014).

¹² *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 “VPCI 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) (“Modified Joint Protective Order 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) (“Modified Joint Protective Order 14-90”). Because Modified Joint Protective Order 14-57 and Modified Joint Protective Order 14-90 are substantively identical, (continued...)

anyone who certified that they were an Outside Counsel of Record¹³ or an Outside Consultant¹⁴ was permitted to access the Content Companies' VPCI under certain terms and conditions.

Because of the sensitivity of the information to be disclosed, however, the Bureau ensured that the Content Companies would have the right to object and to have their objections considered by the Commission—and, if necessary, the courts—before disclosure would be made to any requesting person. This was a critical element of the Orders, which enabled the Content Companies to exercise their statutory rights to have a full review of the propriety of inspection by those seeking access to VPCI before disclosure would be made. Thus, the Modified Joint Protective Orders issued on October 7 expressly provided that the Content Companies, along with any other third party whose highly sensitive information would be disclosed under the Modified Joint Protective Orders, “shall have an opportunity to object to the disclosure of its Confidential Information or Highly Confidential Information to any potential Reviewing Party.”¹⁵ Under the Modified Joint Protective Orders, the objection would prohibit any

they are referred to collectively as the “Modified Joint Protective Orders.” The VPCI Order and the Modified Joint Protective Orders are collectively referred to as the “October 7 Orders.”

¹³ “Outside Counsel of Record” includes “attorney(s), firm(s) of attorneys, or sole practitioner(s), as the case may be, retained by a Participant in this proceeding, provided that such attorneys are not involved in Competitive Decision-Making.” Modified Joint Protective Orders, ¶ 2. A person is involved in “Competitive Decision-Making” if the “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.” *Id.*

¹⁴ “Outside Consultant” is defined to include “a consultant or expert retained for the purpose of assisting Outside Counsel or a Participant in this proceeding, provided that such consultant or expert is not involved in Competitive Decision-Making.” *Id.*

¹⁵ Modified Joint Protective Orders, ¶ 8.

individual from having access to HCI (including VPCI) until the “objection is resolved by the Commission and, if appropriate, by any court of competent jurisdiction.”¹⁶

B. The Content Companies Seek Commission Review of the October 7 Orders.

On October 14, 2014, the Content Companies filed the Application for Review, explaining that their confidential information is covered by the Trade Secrets Act, which prohibits government agencies from disclosing sensitive business data unless “authorized by law” to do so. The Content Companies also explained that both the Commission’s rules and the D.C. Circuit have placed a heavy burden on the Commission to explain why disclosure of a company’s sensitive business information is necessary *before* that information may be disclosed to third-parties.¹⁷ The Application for Review described in considerable detail how the Orders failed to satisfy the high burden to make a “persuasive showing” why non-parties access to VPCI is necessary here.¹⁸ The Application for Review was accompanied by an Emergency Request for Stay. The Commission has yet to rule on either the Application for Review or the Emergency Request for Stay.

To prevent access to the VPCI until the Commission completed its consideration of the Application for Review, the Content Companies exercised their right under the Modified Joint Protective Orders to file objections to more than 260 individuals who submitted requests to access the Content Companies’ VPCI in these proceedings. Each of those objections noted that none of the individuals seeking access to the Content Companies’ VPCI had made a “particularized” showing why third-party access to VPCI is necessary. Because the Modified

¹⁶ *Id.*

¹⁷ Application for Review at 19 (citing 47 C.F.R. § 0.457(d)(1)(iv); *Qwest Commc’ns Int’l Inc. v. F.C.C.*, 229 F.3d 1172, 1183-84 (D.C. Cir. 2000)).

¹⁸ Application for Review at 14-25.

Joint Protective Orders permitted any individual entitled to access HCI a corresponding right to access VPCI,¹⁹ the Modified Joint Protective Orders placed the Content Companies 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. The Content Companies repeatedly told the Commission, given the option, they would object only to individuals who seek access to VPCI, and would not object to any individual's request to access non-VPCI HCI.²⁰

The Content Companies were not alone in asserting categorical objections to the disclosure of their most sensitive competitive data. For example, Hilton Worldwide repeatedly asserted categorical objections to any request for third-party access to its highly sensitive pricing information, and—like the Content Companies—urged the Commission to make only aggregated, anonymized data available in the public record.²¹ These objections were consistent with the views of three of the Transaction Parties, who expressly supported the Department of

¹⁹ Modified Joint Protective Orders at 3.

²⁰ *E.g.*, Letter from Mace Rosenstein to Marlene H. Dortch, Secretary, MB Docket Nos. 14-57, 14-90 (Oct. 22, 2014), at 2; Letter from Mace Rosenstein to Marlene H. Dortch, Secretary, MB Docket Nos. 14-57, 14-90 (Oct. 29, 2014), at 2; Content Companies' Comments Regarding Cogent Communications Group's Response to Objection To Request for Access To Highly Confidential Information and Video Programming Confidential Information, MB Docket Nos. 14-57, 14-90 (Oct. 22, 2014), at 3-4.

²¹ Reply of Hilton Worldwide Inc. to ACA's Opp'n to Objection, MB Docket No. 14-90 (Oct. 30, 2014), at 1 (“[E]ven the slightest chance that such information is leaked by a participant in this proceeding raises an unacceptable risk of substantial competitive harm to Hilton.”); *see also* Objection of Hilton Worldwide Inc., MB Docket No. 14-90 (Oct. 24, 2014), at 5; Objection of Hilton Worldwide Inc., MB Docket No. 14-90 (Oct. 22, 2014), at 5; Objection of Hilton Worldwide Inc., MB Docket No. 14-90 (Oct. 17, 2014), at 5. Indeed, in response to Hilton's categorical objections, the Bureau agreed not to make Hilton's confidential information available in the public record. Letter from Maureen R. Jeffreys to Marlene H. Dortch, Secretary, MB Docket No. 14-90 (Oct. 31, 2014).

Justice review procedures embraced by the Content Companies because that approach “can adequately balance the various competing interests at issue.”²²

C. The Bureau Grants Its Own Motion for Reconsideration.

On November 4, 2014—while the Application for Review and the Emergency Request for Stay were pending before the Commission—the Bureau issued the Reconsideration Order and the Amended Modified Joint Protective Orders. With the exception of a change (discussed below) to Paragraph 8 of the protective orders—which in fact heightens the risk of imminent, unlawful disclosure to third parties—the Amended Modified Joint Protective Orders are identical to the Modified Joint Protective Orders. Those Orders were issued on the Bureau’s “own motion” for reconsideration;²³ no party has asked the Bureau to reconsider any of the October 7 Orders. The Bureau also issued the Objection Order, which disposed of objections the Content Companies had filed against 245 individuals.

The immediate effect of the Orders is that the Bureau will grant 245 third-party individuals access to “hundreds of thousands of pages” of VPCI on November 13, 2014, even though an Application for Review and an Emergency Request for Stay challenging that disclosure decision are pending before the Commission. The operative protective orders, as revised on November 4, no longer prohibit disclosure of the Content Companies’ VPCI while a challenge to third parties’ right to access that material is under review by the Commission or a court. Instead, access is permitted within “five (5) business days after any objection is resolved by the Bureau in favor of the person seeking access.”²⁴ The Objection Order also denied each of

²² See Letter from Kathryn A. Zachem et al., to Marlene H. Dortch, Secretary, MB Docket No. 14-57 (Oct. 20, 2014) (“Transaction Parties Letter”), at 4.

²³ Reconsideration Order, ¶ 1.

²⁴ *Id.*, ¶ 36.

the categorical objections the Content Companies had asserted. As a result, more than 240 individuals will have the right to access the Content Companies' VPCI beginning on Thursday, November 13.²⁵

ARGUMENT

I. THE ORDERS WERE ADOPTED WITHOUT OBSERVING THE COMMISSION'S PROCEDURES.

The Commission's rules give the Commission—not the Bureau—authority to rule on an application for review.²⁶ In a tacit acknowledgment that the October 7 Orders that are the subject of the Application for Review are flawed, the Bureau acted on its “own motion” to rehabilitate those Orders. The Bureau did so even though no party has asked it to reconsider the October 7 Orders, even though the validity of those Orders is now before the Commission, and without any notice to any party that it was doing so. Because the Commission's rules do not permit the Bureau to make additional findings and conclusions to defend an order that is the subject of an application for review, the Orders should be set aside.

²⁵ The Bureau implemented these modifications on its own accord because it believed the change was necessary to prohibit a party's ability “to suspend indefinitely another party's (or every other party's) effective participation in the proceeding simply by filing an objection.” *Id.* Of course, no one has sought to suspend any aspect of these proceedings “indefinitely.” The Content Companies seek only to preserve their right to effective review of the Bureau's October 7 Orders and the disclosure decisions. Commission review of the transactions can continue unimpeded as it has full access to all the documents at issue here, and the Content Companies have not objected to Commission staff review of those documents. Moreover, as the Content Companies repeatedly explained before the Orders were issued, the October 7 Orders required the Content Companies to assert objections to any individual's request for HCI, even though the Content Companies seek to object only to requests to access their VPCI. Response to Objection, filed by Cogent Commc'ns Grp., MB Docket Nos. 14-57, 14-90 (Oct. 21, 2014) (“Cogent's Response to Objections”), ¶ 7. The Content Companies embraced the proposal made by Cogent Communications for “trifurcation” of confidential information, and proposed to withdraw any categorical objections they had asserted that had the effect of preventing individuals from accessing non-VPCI HCI. The Orders make no mention of the Cogent “trifurcation” proposal or of the Content Companies' proposal.

²⁶ 47 C.F.R. § 1.115(g); *see also* 47 C.F.R. § 1.104(b) (providing that an “application for review will *in all cases* be acted upon by the Commission.” (emphasis added)).

Nothing in the Commission’s rules or precedent gives the Bureau authority to reconsider on its own motion an order that is the subject of an application for review. For example, while the Commission has said that it can act on its own motion to modify orders issued by the Commission or a designated authority,²⁷ there is no comparable grant of authority that authorizes the Bureau *sua sponte* to revisit prior decisions that are before the Commission.²⁸ Similarly, the Commission has said that requests to reconsider interlocutory orders like the October 7 Orders “will not be entertained.”²⁹

Although precedent indicates that the Bureau may treat an application for review as a petition for reconsideration if the application for review raises new issues,³⁰ that is not the case here. None of the Orders assert that the Application for Review presented any new questions of fact or law. To the contrary, the Bureau expressly declined to treat the pending Application for Review as a petition for reconsideration, acknowledging instead that the Application for Review and the Emergency Request for Stay “remain pending before the Commission.”³¹

The Orders thus subvert the Commission’s exclusive authority to rule on both the Application for Review and the Emergency Request to Stay by making the Content Companies’ VPCI available to third parties on November 13, 2014. If access to this VPCI is permitted—as

²⁷ 47 C.F.R. §§ 1.108, 1.117.

²⁸ In fact, another division has acted on its own motion to stay the effect of its own decision pending Commission action on an application for review. *See, e.g., In the Matter of Century Southwest Cable TV Beverly Hills, California*, Order, 10 FCC Rcd 9340, 9341 (1995). The Bureau here has done the opposite by accelerating the effect of its decision in a way that deprives the Commission of a meaningful opportunity to consider the Application for Review.

²⁹ 47 C.F.R. § 1.106(a)(1).

³⁰ *See, e.g.,* Letter from Barbara A. Kreisman, Chief, Video Division, Media Bureau, to Malcolm G. Stevenson, Counsel for Mid-South Pacific Commc’ns Found., 25 FCC Rcd. 17042 (2010).

³¹ Reconsideration Order, ¶ 9.

the Bureau proposes to do—the Bureau will have effectively deprived the Commission of its opportunity to review the propriety of the October 7 Orders. Yet “[t]here is no authority for the proposition that a lower component of a government agency may bind the decision making of the highest level,” as the Orders will effectively do here.³²

II. THE ORDERS ARBITRARILY AND CAPRICIOUSLY DEPART FROM COMMISSION PRECEDENT PROHIBITING THIRD-PARTY ACCESS TO CONFIDENTIAL INFORMATION WHILE A CHALLENGE TO DISCLOSURE IS PENDING.

The Orders are also arbitrary and capricious because they give third-parties access to the Content Companies’ VPCI pending Commission consideration of a challenge to the propriety of that disclosure decision. The Bureau’s decision to permit such access is contrary to both Commission and the D.C. Circuit precedent.

For more than 15 years, the Commission has recognized that no third party should be entitled to access confidential documents when the merits of a disclosure decision are before the Commission. For example, in a 1998 order setting out general policies governing the handling of confidential information, the Commission recognized that “disclosure of programming contracts between multichannel video program distributors and programmers can result in substantial competitive harm to the information provider.”³³ Those policies were later challenged on the ground that access to confidential information should be permitted under a

³² *Community. Care Foundation v. Thompson*, 318 F.3d 219, 227 (D.C. Cir. 2003); *see also Vernal Enters. v. F.C.C.*, 355 F.3d 650, 660 (D.C. Cir. 2004); *Jelks v. F.C.C.*, 146 F.3d 878, 881 (D.C. Cir. 1998) (per curiam); *Amor Family Broad. Grp. v. F.C.C.*, 918 F.2d 960, 962 (D.C. Cir. 1990).

³³ *In re Examination of Current Policy Concerning the Treatment of Confidential Info. Submitted to the Comm’n*, 13 FCC Rcd. 24816, 24852 (1998).

protective order while a challenge to the decision to permit access to that information was pending before the Commission.³⁴ The Commission soundly rejected that argument:

[D]isclosure pending review would effectively moot any applications for review because it would place the assertedly confidential information in the hands of all parties signing the protective order without first granting the objecting party the opportunity to seek Commission or judicial review of the disclosure decision.³⁵

The Commission reached this conclusion even though “disclosure may be delayed pending the appeals process.”³⁶

The Commission’s precedent is consistent with the D.C. Circuit’s approach to the disclosure of confidential information. The D.C. Circuit has recognized that it is appropriate to stay a decision to make confidential documents accessible to third parties while the merits of that decision are under review.³⁷ Significantly, the D.C. Circuit has done so even when it ultimately concluded that confidential documents should be made available.³⁸

The November 4 Amended Modified Joint Protective Orders abruptly depart from these well-established principles. Whereas the Modified Joint Protective Orders prohibited any individual from accessing the Content Companies’ most sensitive information until any “objection is resolved by the Commission and, if appropriate, by any court of competent

³⁴ 1999 Reconsideration Statement, 14 FCC Rcd. at 20129.

³⁵ *Id.*, ¶ 4.

³⁶ *Id.*

³⁷ *Qwest Commc’ns Int’l v. F.C.C.*, 229 F.3d 1172, 1176 n.12 (D.C. Cir. 2000) (noting that stay request was granted while petition for review was filed challenging FCC disclosure decision).

³⁸ *United States v. Microsoft Corp.*, 165 F.3d 952, 954 (D.C. Cir. 1999) (noting that stay request was granted, even though petition for review was ultimately denied); *Bartholdi Cable Company v. FCC*, 114 F.3d 274, 279 (D.C. Cir. 1997) (same).

jurisdiction,”³⁹ the Amended Modified Joint Protective Orders no longer contemplate the possibility of Commission or judicial review of a disclosure decision. Instead, individuals may access the Content Companies’ VPCI within “five (5) business days after any objection is resolved by the Bureau in favor of the person seeking access.”⁴⁰

The Orders thus make it impossible for any party that has objected to a request to access VPCI—even on the basis that the individual seeking access is engaged in Competitive Decision-Making—to seek meaningful Commission review of that decision.⁴¹ The Orders also deviate from the Commission’s decades-long practice—reflected in every protective order the Bureau cited in its Orders—of prohibiting individuals from accessing confidential information while a challenge to their right to access that information was pending.

The only explanation the Bureau offers for this abrupt departure from Commission precedent is a determination that the language in the Modified Joint Protective Orders—language that was entirely consistent with the Commission’s precedent—had the effect of “suspend[ing] indefinitely ... effective participation in the proceeding.”⁴² But the Commission has already noted that confidentiality interests take priority over providing

³⁹ Modified Joint Protective Orders, ¶ 8.

⁴⁰ Reconsideration Order, ¶ 36; *see* Amended Modified Joint Protective Orders, ¶ 8.

⁴¹ As an example, numerous parties have objected to various individual requests to access HCI and VPCI on the grounds that those individuals are engaged in Competitive Decision-Making. *See, e.g.*, Objections filed by Tribune Media, Raycom Media, Inc., Gray Television, Inc., Gannet Co. & Graham Media Grp., MB Docket No. 14-57 (Oct. 14, 2014), at 3-5; Objections filed by Tribune Media, Raycom Media, Inc., Gray Television, Inc., Gannet Co. & Graham Media Grp., MB Docket No. 14-90 (Oct. 14, 2014), at 3-5; Objection of Hilton Worldwide Inc., MB Docket No. 14-90 (Oct. 24, 2014), at 5; Objection of Hilton Worldwide Inc., MB Docket No. 14-90 (Oct. 22, 2014), at 5; Objection of Hilton Worldwide Inc., MB Docket No. 14-90 (Oct. 17, 2014), at 5. If the Bureau overrules these objections, these individuals will now be permitted prompt access to HCI and VPCI unless the parties file applications for review and requests to stay that are granted by the Commission within five days of the Bureau’s decision.

⁴² Reconsideration Order, ¶ 36.

disclosure to third parties even if “disclosure may be delayed pending the appeals process.”⁴³

And the Bureau ignores that in one of the proceedings, it had stopped the informal 180-day shot clock even before the October 7 Orders (and the accompanying Application for Review) were filed.⁴⁴ Finally, honoring the Content Companies’ request would not cause delay because the Commission and its staff could still review VPCI and continue to work on their review of the proposed mergers without interruption. In short, the Bureau’s “unexplained departure from precedent must be overturned as arbitrary and capricious.”⁴⁵

The Bureau also overlooks the fact that the inability of certain individuals to access non-HCI VPCI pending consideration of objections to those individuals is a problem of the Bureau’s own making. Under the protective orders, any individual who seeks access to HCI also is entitled to access VPCI.⁴⁶ In addition, the form Acknowledgment does not permit requesting individuals to clarify whether they seek access to VPCI or whether they seek access only to other, non-VPCI, HCI.⁴⁷ To prevent the unlawful disclosure of their VPCI, the Modified Joint Protective Orders placed the Content Companies 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. The Content Companies repeatedly told the Commission, given the option, they would object only to individuals who seek access to VPCI.⁴⁸

⁴³ 1999 Reconsideration Statement, 14 FCC Rcd. at 20129.

⁴⁴ Letter from William T. Lake, Chief, Media Bureau, to Kathryn A. Zachem et al., MB Docket No. 14-57 (Oct. 3, 2014).

⁴⁵ *Comcast Corp. v. F.C.C.*, 526 F.3d 763, 769 (D.C. Cir. 2008).

⁴⁶ *See* Amended Modified Joint Protective Orders at 3.

⁴⁷ *See* Amended Modified Joint Protective Orders, Attach. B.

⁴⁸ *E.g.*, Letter from Mace Rosenstein to Marlene H. Dortch, Secretary, MB Docket Nos. 14-57, 14-90 (Oct. 22, 2014), at 2; Letter from Mace Rosenstein to Marlene H. Dortch, Secretary, MB Docket Nos. 14-57, 14-90 (Oct. 29, 2014), at 2; Content Companies’ Comments Regarding (continued...)

The Content Companies welcomed the proposal by Cogent Communications for “trifurcation” of confidential information and offered to withdraw any objection that would permit third parties to access non-VPCI HCI if that proposal were implemented.⁴⁹ The Bureau wholly ignored this proposal, even though “[t]he failure of an agency to consider obvious alternatives has led uniformly to reversal.”⁵⁰ Indeed, the Bureau’s silence is surprising, given that the Cogent proposal would enable third parties to access non-HCI VPCI while simultaneously protecting the Content Companies’ confidentiality interest in their VPCI while their Application for Review is pending.

III. THE AMENDED MODIFIED JOINT PROTECTIVE ORDERS SHOULD BE MODIFIED.

As the Content Companies explained in the Application for Review, the Modified Joint Protective Orders fail to adequately protect the Content Companies’ confidentiality interests.⁵¹ Consistent with Commission precedent and practice, the Content Companies asked for their highly sensitive materials to be given provisional review by Commission personnel either in the custody of the Department of Justice or *in camera*.⁵² Only those materials determined as a result of that review to be relevant to the Commission’s consideration of the transactions should be placed in the Commission’s record of these proceedings, after those materials have been redacted and anonymized.⁵³ Moreover, because the Bureau itself has

Cogent Communications Group’s Response to Objection To Request for Access To Highly Confidential Information and Video Programming Confidential Information, MB Docket Nos. 14-57, 14-90 (Oct. 22, 2014), at 3-4.

⁴⁹ Cogent’s Response to Objections, ¶ 7.

⁵⁰ *Yakima Valley Cablevision, Inc. v. F.C.C.*, 794 F.2d 737, 746 n.36 (D.C. Cir. 1986).

⁵¹ Application for Review, at 7-8.

⁵² Application for Review, at 10.

⁵³ Application for Review, at 11.

recognized that VPCI is especially sensitive, the Commission should make VPCI available only to those reviewers who make particularized showings why they need access to such information.⁵⁴

The Amended Modified Joint Protective Orders retain all of the deficiencies identified in the Application for Review. For the reasons set forth therein, the Commission should require the Bureau to refrain from placing any VPCI in the record and instruct the Bureau instead to review these materials *in camera* or at the Department of Justice. Alternatively, if any of the Content Companies' highly sensitive information is deemed necessary to include in the record, the Commission should require the Bureau to modify the Modified Joint Protective Orders to place only demonstrably relevant information in the record, to redact and/or anonymize the most highly sensitive information to the maximum extent possible, and to implement the other protections described in the Application for Review.

CONCLUSION

For all of the foregoing reasons, the Commission should vacate the Reconsideration Order and the Objection Order, and direct the Bureau to further clarify or modify the associated Amended Modified Joint Protective Orders.

⁵⁴ Application for Review, at 13-14.

**SCRIPPS NETWORKS INTERACTIVE,
INC.**

By: _____/s/_____
Kimberly Hulsey
Vice President, Legal and Government
Affairs
5425 Wisconsin Avenue, 5th Floor
Chevy Chase, Maryland 20815
(301) 244-7609

THE WALT DISNEY COMPANY

By: _____/s/_____
Susan L. Fox
Vice President
425 Third Street, S.W.
Suite 1100
Washington, D.C. 20024
(202) 222-4780

TIME WARNER INC.

By: _____/s/_____
Susan A. Mort
Assistant General Counsel
800 Connecticut Avenue, N.W.
Suite 1200
Washington, D.C. 20006
(202) 530-5460

TV ONE, LLC

By: _____/s/_____
Endi Piper
Senior Vice President, Business and Legal
Affairs
1010 Wayne Avenue, 10th Floor
Silver Spring, Maryland 20910
(301) 755-2869

TWENTY FIRST CENTURY FOX, INC.

By: _____/s/_____
Jared S. Sher
Vice President & Associate General
Counsel
400 N. Capitol Street, N.W., Suite 890
Washington, D.C. 20001
(202) 824-6500

UNIVISION COMMUNICATIONS INC.

By: _____/s/_____
Christopher G. Wood
Senior Vice President/Associate General
Counsel – Governmental and
Regulatory Affairs
5999 Center Drive
Los Angeles, CA 90045
(310) 348-3696

VIACOM INC.

By: _____/s/_____
Keith R. Murphy
Senior Vice President, Government
Relations and Regulatory Counsel
1501 M. Street, N.W., Suite 1100
Washington, D.C. 20005
(202) 785-7300

Dated: October 14, 2014.

CERTIFICATE OF SERVICE

I, Mace Rosenstein, hereby certify that on this 7th day of November, 2014, I caused true and correct copies of the foregoing Application for Review to be served by Federal Express and electronic mail to the following:

Matthew A. Brill
LATHAM & WATKINS LLP
555 11th Street, NW, Suite 1000
Washington, DC 20004
matthew.brill@lw.com
Counsel for Time Warner Cable, Inc.

Francis M. Buono
WILLKIE FARR & GALLAGHER LLP
1875 K Street, NW
Washington, DC 20006
fbuono@willkie.com
Counsel for Comcast Corp.

John L. Flynn
JENNER & BLOCK
1099 New York Ave., NW
Washington, DC 20001
jflynn@jenner.com
Counsel for Charter Communications, Inc.

William M. Wiltshire
Harris, Wiltshire & Grannis LLP
1919 M Street NW
Washington, DC 20036
wwiltshire@hwglaw.com
Counsel for DIRECTV

Maureen R. Jeffreys
Arnold & Porter LLP
555 Twelfth Street NW
Washington, DC 20004
maureen.jeffreys@aporter.com
Counsel for AT&T

/s/ Mace Rosenstein
Mace Rosenstein