

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)
)
Applications of) MB Docket No. 15-149
)
Charter Communications Inc.,)
Time Warner Cable Inc.,)
Advance/Newhouse Partnership)
For Consent to Assign or Transfer Control of)
Licenses and Authorizations)

**REPLY IN SUPPORT OF PETITION FOR RECONSIDERATION FILED BY
CBS CORPORATION, CHAMBER OF COMMERCE OF THE UNITED STATES,
MOTION PICTURE ASSOCIATION OF AMERICA,
SCRIPPS NETWORKS INTERACTIVE, INC., THE WALT DISNEY COMPANY,
TIME WARNER INC., TWENTY FIRST CENTURY FOX, INC.,
UNIVISION COMMUNICATIONS INC., AND VIACOM INC.**

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I. INTRODUCTION

Twelve parties have urged the Commission to reconsider its September 11, 2015, Order adopting new standards to govern the Commission’s disclosure of sensitive information under a protective order or in response to Section 0.461 requests. Just three parties—DISH Network Corp. (“DISH”), the American Cable Association (“ACA”), and INCOMPAS, all of which could benefit commercially under the Order’s relaxed standards for accessing information—have opposed reconsideration and have asked the Commission to leave these new standards in place (the “Opposition”).

Nothing in the Opposition provides a reason to maintain the standards newly stated in the Order. As a threshold matter, the Opposition ignores many of the arguments justifying reconsideration of the Commission’s decision to change its disclosure standards. When the Opposition does respond to those arguments, it merely reiterates the reasoning set forth in the Order. For example, the Opposition does not explain how the Commission has statutory authority to promulgate the Order in the first place: 47 U.S.C. § 154(j) does not give the Commission authority to avoid notice-and-comment rulemaking or to release sensitive information simply because it is relevant. Similarly, the Opposition does not address the Commission’s unexplained decision to abandon the “persuasive showing” standard when disclosure occurs under a protective order and to neuter that standard when disclosure occurs under Section 0.461. Finally, the Opposition overstates the need for third-party access to sensitive information. The Commission has long issued decisions on the basis of sensitive information not made available to third parties, and there are sound reasons for continuing to do so when, as here, the parties insisting upon access stand to benefit commercially from access to sensitive information that would be disclosed under the Commission’s new standards.

II. THE COMMISSION SHOULD RECONSIDER AND VACATE THE ORDER.

A. The Order Violates The Trade Secrets Act.

The Petition described how the Trade Secrets Act prohibits the Commission from changing its standards governing the release of sensitive information or from making sensitive information available simply because it is relevant. (Pet. at 6-12.) Nothing in the Opposition demonstrates otherwise.

1. Section 4(j) of the Act Does Not Authorize The Commission To Disclose Trade Secrets.

As the Petition explained, the Trade Secrets Act prohibits the Commission from releasing sensitive information except under a regulation promulgated through notice-and-comment rulemaking. (Pet. at 6-8.) The Opposition does not dispute that the Commission has not promulgated a regulation authorizing the widespread disclosure contemplated by the Order. Instead, the Opposition adopts (Opp. at 4-5, 11-12) the Commission's novel interpretation that Section 4(j) of the Communications Act authorizes the Commission to change its confidential information policy without notice-and-comment proceedings and substantively authorizes the Order's new standards for the release of sensitive information.¹

Section 4(j) does no such thing. Contrary to the Opposition's assertion (Opp. at 11) that Section 4(j) provides "explicit authorization to control and set the standard for disclosure of confidential information in merger proceedings," Section 4(j) merely states that the Commission "may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice."² This "grant of authority to the agency to regulate its own affairs" is precisely the kind of "housekeeping statute" that the Supreme Court held in *Chrysler*

¹ As the Washington Legal Foundation noted, the Order was the "first time FCC has claimed authority to release confidential information separate from that authority granted by [47 C.F.R.] § 0.457." WLF Resp. at 11.

² 47 U.S.C. § 154(j).

Corp. v. Brown cannot authorize the release of commercially sensitive information.³ There is no merit to the suggestion that Section 4(j) is “different from the internal housekeeping statute at issue” in *Brown*;⁴ both statutes deal solely with an agency’s internal operations and the conduct of its business.⁵ Indeed, Section 4(j) is an even more generic grant of housekeeping authority than the statute at issue in *Brown*, and “there is nothing in the legislative history of” Section 4(j) “to indicate it is a substantive grant of legislative power to promulgate rules authorizing the release of trade secrets or confidential business information.”⁶

In arguing otherwise, the Opposition—like the Order—relies on *FCC v. Schreiber*. That reliance is misplaced. The Supreme Court itself recognized that *Schreiber* did not apply when, as here, questions are raised “regarding the applicability of” the Trade Secrets Act.⁷ The Opposition does not respond to this point.⁸

2. The New “Relevance” Standard Violates The Trade Secrets Act.

The Petition also explained how the Trade Secrets Act prohibits the release of confidential information upon a showing of “relevance.” (Opp. at 10-12.) Instead, “to justify disclosure” of sensitive information, “the information must be ‘necessary’ to the Commission’s

³ 441 U.S. 281, 310-12 (1979).

⁴ Order, ¶ 13 & n.41.

⁵ Compare 47 U.S.C. § 154(j) (“The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice.”) with 5 U.S.C. § 301 (“The head of an Executive department ... may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property.”).

⁶ See *Brown*, 441 U.S. at 310 (emphasis in original); see also *Qwest Comm’cns Int’l, Inc. v. FCC*, 229 F.3d 1172, 1178 (D.C. Cir. 2000) (courts must examine whether statute is “intended to provide authority for limiting the scope of the Trade Secrets Act”).

⁷ *Brown*, 441 U.S. at 315 n.45.

⁸ The Opposition cites *United States v. California Rural Legal Assistance* for the proposition that “it is the agencies, not the courts, which should, in the first instance, establish the procedures for safeguarding confidentiality.” But the very next sentence of that opinion provides that a court “may substantively alter confidentiality requirements imposed by an agency’s protective order if it finds that the agency abused its discretion by not requiring the additional protections”—as the Commission has done here. 722 F.3d 424, 429-30 (D.C. Cir. 2013).

review process” because “[o]therwise, Congress and the Commission have decided, the risk to the affected business will not be worth it.”⁹

The Opposition concedes that “any relevance standard that would make confidential information ‘routinely available for inspection’ . . . would be inappropriate.” (Opp. at 12.) This concession is fatal to the Opposition’s defense of the Order’s new standards for disclosure under a protective order. Even the Opposition does not dispute that the Order *would* make sensitive information routinely available for inspection in licensing proceedings or under a protective order. Nor could it; the Order instead makes clear that *irrelevant* sensitive information will presumptively be made available under protective orders.¹⁰ There is nothing in the Trade Secrets Act to suggest that its protections have less force when disclosure occurs under a protective order.

The Opposition’s defense of the Order’s new approach for disclosing information in response to a Section 0.461 request likewise lacks merit. For example, the Opposition contends (Opp. at 12-13) that the Commission did not adopt a “relevance” standard when disclosure occurs under Section 0.461. But the Order does just that by eliminating the “necessary link” component of the Commission’s “persuasive showing” standard and instead authorizing the release of sensitive information if that information is merely “relevant to a public interest issue before the Commission.”¹¹ Similarly, the Opposition’s suggestion that the Trade Secrets Act permits the release of information that is merely “relevant” so long as “the type of proceeding, . . . the nature of the information, and whether the requestor is a party to a proceeding” also are

⁹ *CBS Corp. v. FCC*, 785 F.3d 699, 707 (D.C. Cir. 2015).

¹⁰ Order at ¶ 20.

¹¹ Order ¶ 36.

considered ignores the D.C. Circuit’s holding in *CBS*.¹² To the contrary, *CBS* made clear that even when a “compelling public interest” has been identified and “the benefits of disclosure . . . outweigh the costs,” showing that information is “relevant”—or even “important” or “central”—is not enough to justify disclosure of information protected by the Trade Secrets Act.¹³

While conceding that a standard that “would make confidential information ‘routinely available for inspection’” does not satisfy the Trade Secrets Act, the Opposition asserts that the *CBS* court did not hold that “necessity” was the required standard and the Commission is “free” to consider other alternatives. (Opp. at 12.) The Opposition is mistaken. The D.C. Circuit did not, as the Opposition suggests (*see* Opp. at 6), give the Commission free rein to rewrite its *Confidential Information Policy* to overturn the presumption against disclosure created by the Trade Secrets Act. Instead, the court provided clear direction on what sort of standard would be consistent with Congress’s intent in passing the Trade Secrets Act:

- “We *must* read [the Trade Secrets Act]” to avoid a construction that would make confidential information “routinely available for inspection” on the basis of mere relevance, in order to be “faithful to *Congress’s plan* and to the Commission’s own historical approach.”¹⁴
- “[T]o justify disclosure, the information must be ‘necessary’ to the Commission’s review process. Otherwise, *Congress and* the Commission have decided, the risk to the affected businesses will not be worth it.”¹⁵
- “[B]y failing to explain why VPCI is a ‘necessary link’ . . . , the Commission has failed to overcome its—and *Congress’s* presumption—against disclosure of confidential information.”¹⁶
- “In order to vindicate the goals of the Trade Secrets Act,” the Commission must protect sensitive information from disclosure “unless it has a good reason to do so—

¹² Opp. at 13 (quoting Order at ¶ 38).

¹³ *CBS*, 785 F.3d at 701, 707.

¹⁴ *Id.* at 706 (emphasis added).

¹⁵ *Id.* at 707 (emphasis added).

¹⁶ *Id.*

namely, that it would benefit from third-party comment on information that is *necessary to the review process.*”¹⁷

These pronouncements make clear that Congress, not just the Commission, has required far greater protection for sensitive information than the “relevance” standard adopted by the Order. Whatever discretion the Commission may have to reconsider its policies, that discretion must be exercised in a manner consistent with Congress’s instructions. Notwithstanding the Opposition’s assertion to the contrary, the Commission does not have unfettered authority when it comes to the treatment of sensitive information.

B. The Order Violates the Administrative Procedure Act.

The Petition also explained how the Order violated the Administrative Procedure Act by arbitrarily abandoning the Commission’s application of its “persuasive showing” standard. (Pet. at 12-25.) In response, the Opposition largely repeats the same reasoning adopted in the Order.

For example, the Opposition repeats the assertion that the Order “does not represent a change in practice by the Commission.” (Opp. at 8.) But less than one year ago, the Commission recognized that before sensitive information may be disclosed to third parties in a merger review proceeding, “a ‘persuasive showing’ of the reasons in favor of its release” must be identified.¹⁸ The Commission vigorously defended its application of this standard in Court, explaining that when evaluating a decision to disclose sensitive information under a protective order, “we’re in a world where the persuasive-showing standard applies.”¹⁹

In arguing otherwise, the Opposition erroneously asserts (Opp. at 9) that the Order is consistent with an alleged past practice of making competitively sensitive information available

¹⁷ *Id.* (emphasis in original).

¹⁸ *Applications of Comcast Corp. and Time Warner Cable, Inc.*, 29 FCC Rcd. 13597, 13608-09 (Media Bur. 2014), *aff’d* 29 FCC Rcd. 14267, 14267-68 (2014).

¹⁹ *CBS*, 785 F.3d at 704.

for third-party review. Not even the Commission has embraced this position. Instead, the FCC “has processed transaction after transaction in the video market, including the Comcast-NBCU transaction . . . *without* supplying” competitively sensitive information like programming agreements to third parties.²⁰

The Opposition’s reference to the *Echostar/Hughes/DIRECTV* merger proceeding is especially surprising. There, DISH urged the FCC to keep competitively sensitive materials out of the public record because disclosure “would have a devastating effect on [DISH’s] business and place the companies at a significant competitive disadvantage.”²¹ The FCC apparently acquiesced in this request; the Opposition does not cite anything to suggest that competitively sensitive information was released to third parties in that proceeding. Nor does it provide any reason why DISH should have access to competitively sensitive materials when its own sensitive information was shielded from review in a prior merger proceeding. Certainly the Order provides no “adequate explanation to justify treating similarly situated parties differently.”²²

Next, the Opposition claims that the Order adequately justified the Commission’s change in position because third-party access to confidential information “serves the public interest” (Opp. at 6-8) and because granting access in a licensing proceeding would always satisfy the Commission’s “persuasive showing” standard. (*Id.* at 11.) But these assertions are contrary to D.C. Circuit precedent. To be sure, *CBS* observed that the potential benefits of third-party review to the Commission’s decision-making process could satisfy the “compelling public

²⁰ *Comcast*, 29 FCC Rcd. at 14270 (Dissenting Statement of Commissioner Pai). In arguing to the contrary, the Opposition cites information requests and protective orders submitted in the Comcast-NBCUniversal, Adelphia/Time Warner Cable/Comcast, and EchoStar/Hughes/DIRECTV transactions. (*See* Opp. at 9-10, nn.7-9.) None the materials cited establishes that sensitive information was actually made available to third parties.

²¹ *In the Matter of Consolidated Application of EchoStar Communications Corporation, General Motors Corporation and Hughes Electronics Corporation for Authority to Transfer Control*, Ex Parte Notice, CS Docket No. 01-348 (Apr. 22, 2002).

²² *Comcast Corp. v. FCC*, 526 F.3d 763, 769 (D.C. Cir. 2008).

interest” prong of the Commission’s “persuasive showing” standard.²³ But, as the D.C. Circuit has held repeatedly, “‘assistance’ is not enough” to justify disclosure of sensitive information.²⁴

Finally, the Opposition repeats the Order’s assertion that the risk of harm when disclosure occurs under a protective order “is small” (Opp. at 8), even though—as Commissioner O’Rielly has warned—“this finding will likely come to be viewed as hopelessly naïve, and the ‘safeguards’ proffered . . . will be insufficient to provide any real protection.”²⁵ As the Petition explained, the risk that competitively sensitive information will be disclosed can hardly be considered “small” when inadvertent disclosures of sensitive information can and do occur, when violations of Commission protective orders go unpunished, when the Model Protective Order contains less protection for sensitive information than the protective orders the Commission issued less than one year ago, and when the harm from disclosure cannot be undone. (Pet. at 23-25.) Neither the Order nor the Opposition addresses these problems. And the Opposition’s opinion on the level of acceptable risk is irrelevant, given that Congress has *already* balanced the risk of harm against the need for the protection of confidential information and determined that such information generally should be shielded from disclosure.

C. Access To Sensitive Information Is Not A Precondition to Meaningful Participation In Commission Proceedings.

The Opposition concludes by claiming that “[t]aking any steps to preclude access to confidential materials under protective orders would disserve the public interest and prevent interested parties from being able to fully and meaningfully evaluate the applicants’ arguments at issue in a proceeding.” (Opp. at 13.) This argument suffers from numerous flaws.

²³ *CBS*, 785 F.3d at 705.

²⁴ *CBS*, 785 F.3d at 706 (quoting *Qwest*, 229 F.3d at 1183).

²⁵ Order at 46.

First, both Congress and the Commission have embraced the “presumption against disclosure of confidential information.”²⁶ The *Confidential Information Policy* observes that information that simply “provide[s] a ‘factual context’ for the consideration of broad policy issues” need not be disclosed to third parties.²⁷ No court has held that the FCC, to create a legally sustainable order, is required to abdicate its role as an expert agency and dump all the information it receives into the record for third-party comment.²⁸ Instead, the Commission is empowered to—and has in fact—issued decisions based on its “careful review” of sensitive information not made available to third parties,²⁹ a practice intended “to ensur[e] that the fulfillment of [the FCC’s] regulatory responsibilities does not result in the unnecessary disclosure of information that might put its regulatees at a competitive disadvantage.”³⁰ These principles apply with special force when, as here, the parties that filed the Opposition and that aggressively insist on access to competitively sensitive information would benefit commercially if the policy adopted in the Order is allowed to remain in place.

Second, it simply is not the law that all interested parties must be afforded access to all information submitted to the Commission in order to participate meaningfully in the Commission’s proceedings. As the Petition explained, the Commission has broad discretion to shield confidential information from third-party review.³¹ The Commission is obligated to place only the “most critical factual material that is used to support the agency’s position on review”

²⁶ *CBS*, 785 F.3d at 707.

²⁷ *Confidential Information Policy*, 13 FCC Rcd. 24816, 24823 n.37 (1998) (citations omitted).

²⁸ See Order at 45 (Statement of Commissioner O’Rielly) (“[T]he assertion that allowing outside parties to review these materials will assist the Commission in its analysis is beyond plausibility, unless we are to assume that the work the Commission should be doing on its own needs to be farmed out.”).

²⁹ *In the Matter of Applications of AT&T Inc. & DirecTV*, 2015 WL 4556648, at *45 n.524.

³⁰ *Confidential Information Policy*, 13 FCC Rcd. at 24823.

³¹ See Pet. at 20-21 & nn.104-05.

into the record, not every document submitted by a party,³² and it can and has issued orders based on its review of documents not available to the parties.³³ A third party's generalized commercial or ideological interests cannot be used to justify access to information that is not "a necessary link in a chain of evidence that will resolve an issue before the Commission."³⁴

Finally, DISH and ACA's own experiences confirm that parties can meaningfully participate in proceedings even if they lack access to all information in the record. In the Comcast/Time Warner Cable and AT&T/DirecTV proceedings, DISH and ACA insisted they needed access to sensitive programming agreements in order to comment on those proposed mergers. The Commission ruled on DISH's and ACA's arguments in the AT&T/DirecTV matter even though third parties were not afforded access to certain competitively sensitive information,³⁵ and DISH and ACA did not seek judicial review of that decision.

III. CONCLUSION

The Opposition should be denied, the Petitions should be granted, and the Commission should vacate the Order.³⁶

³² *Ass'n of Data Processing Serv. Orgs v. Bd. of Governors*, 745 F.2d 677, 684 (D.C. Cir. 1984). *United States Lines, Inc. v. Fed. Mar. Comm'rs*, 584 F.2d 519 (D.C. Cir. 1978) and *Nat'l Ass'n of Regulatory Utility Comm'rs v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984), cited in the Opposition, are not to the contrary. *United States Lines* did not involve an agency's failure to disclose sensitive information, only its failure to disclose data that formed the basis for the agency's "critical" decisions. 584 F.2d at 533. As for *National Association of Regulatory Utility*, the Opposition misleadingly quotes that case as standing for the proposition that "denial of a fair opportunity to comment on [confidential materials] may fatally taint the agency's decisional process." (Opp. at 15.) The actual decision observes that a "denial of a fair opportunity to comment on a *key study* may fatally taint the agency's decisional process," 737 F.2d at 1121 (emphasis added); the study at issue was not the confidential third-party information implicated by the Order, but was rather a study prepared—and eventually released—by the FCC's staff.

³³ See Pet. at 20-21 & nn.104-05.

³⁴ *CBS*, 785 F.3d at 704-05 (quoting *Confidential Information Policy*, 13 FCC Rcd. at 24823).

³⁵ See *AT&T*, 2015 WL 4556648, at *45 n.524; see also Order at 38 (Statement of Commissioner Pai) ("Even though the programming contracts were never disclosed, neither the Commission nor staff had any problem reaching a decision regarding the merits of the transactions.").

³⁶ Petitioners agree with Comcast's proposal to "establish a separate docket where these important confidentiality issues can be fairly addressed through notice-and-comment rulemaking." Comcast Pet., at 1, 4, 13.

October 30, 2015.

Respectfully Submitted,

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I, Mace Rosenstein, hereby certify that on this 30th day of October, 2015, I caused true and correct copies of the foregoing Reply In Support of Petition for Reconsideration to be served by Federal Express and/or electronic mail to the following:

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