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

In the matter of	)	
	)	
Applications of Comcast Corporation,	)	
General Electric Company	)	MB Docket No. 10-56
And NBC Universal, Inc.	)	
	)	
For Consent to Assign Licenses and	)	
Transfer Control of Licensees	)	
	)	

REQUEST FOR STAY OF MEDIA BUREAU ORDER DA 12-1950

Submitted by:

CBS Corporation

News Corporation

Sony Pictures Entertainment Inc.

Time Warner Inc.

Viacom Inc., and

The Walt Disney Company

Dated: December 18, 2012

Table of Contents

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REQUEST FOR STAY OF MEDIA BUREAU ORDER DA 12-1950

CBS Corporation, News Corporation, Sony Pictures Entertainment Inc., Time Warner Inc., Viacom Inc., and The Walt Disney Company (together and on behalf of their affiliated businesses, the "Content Companies") request an immediate stay of the Media Bureau (the "Bureau") order in the above-captioned proceeding released on December 4, 2012 (the "Order"),[1] pending action by the Commission on the Content Companies' Application for Review of the Order.

SUMMARY

Forced into this matter through no act of their own, the Content Companies now face severe and imminent threats to their interests should the Order be implemented. The Content Companies are not parties to negotiations between the joint venture of Comcast Corporation ("Comcast") and NBCUniversal Media, LLC (collectively "C-NBCU") and any Online Video Distributor ("OVD"), and yet now find themselves filing this request to prevent the

1 *Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees*, DA 12-1950, 2012 WL 6039368 (Order by the Chief, Media Bureau, released December 4, 2012).

disclosure of their own highly confidential and extremely sensitive business contracts. As demonstrated herein, the Order will not simply result in irreparable harm to the Content Companies and the marketplace for programming, but would contravene sound Commission precedent as well as Federal law designed to protect private business information against the threat of undue disclosure.

The Request for Stay should be granted because the circumstances fully satisfy the *Holiday Tours*[2] factors recognized by the Commission and the United States Court of Appeals for the District of Columbia Circuit. *First*, the Content Companies are likely to prevail on the merits of their application for review of the Order. *Second*, the Order will cause irreparable harm to the Content Companies if a stay is not granted. *Third*, no other party will be harmed if the stay is granted. *Fourth*, the Commission already has determined that the Merger Decision, without the changes imposed in the Order, serves the public interest.

Regarding the merits, the Order includes procedural defects such as the untimeliness of C-NBCU's request for reconsideration of the Merger Decision, as well as the Bureau's lack of power to legitimately grant a request of this nature. Substantively, the Order subverts the negotiation process deliberately designed by the Commission; it abrogates private contracts absent any statutory authority; and it constitutes a regulatory taking by depriving content owners of the economic value of confidential contract terms. In addition, in analogous situations, courts and federal rules do not automatically mandate disclosure of confidential information by non-parties. Finally, the Order violates the Trade Secrets Act. The Order thus exceeds statutory and constitutional authority, and is arbitrary and capricious.

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[2] *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (DC Cir. 1977) ("*Holiday Tours*"); *see, e.g.*, *Revisions to Broadcast Auxiliary Service Rules in Part 74*, 18 FCC Rcd 7032 (April 15, 2003) (Request for Temporary Stay filed by the Society of Broadcast Engineers).

Accordingly, the Commission should stay the effect of the Order pending resolution of the application for review and until the Content Companies have exhausted all remedies with the Commission.

I. BACKGROUND AND REASONS WHY STAY IS NECESSARY

In approving the joint venture of Comcast Corporation and NBC Universal, Inc. (the "Merger Decision"),[3] the Commission imposed a range of conditions it viewed as necessary to protect against potential anti-competitive and abusive effects.[4] With regard to online video distribution, the FCC was concerned that the vertically integrated joint venture could have the incentive and the ability to hinder competition. The Commission thus adopted several conditions with a stated goal of promoting online video distribution.[5] These conditions included the "Benchmark Condition."[6]

Under the Benchmark Condition, a qualified OVD may request that C-NBCU provide online video programming at prices, terms, and conditions that are the economic equivalent of what the OVD pays for "Comparable Programming" in a peer programming agreement.[7] The conditions explicitly provide that, if negotiations fail to result in a mutually acceptable set of price, terms, and conditions, the qualified OVD may submit the dispute to commercial arbitration in accordance with specified procedures and pursuant to a protective

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3 *Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees*, Memorandum Opinion and Order, MB Docket No. 10-56, 26 FCC Rcd 4238 (January 20, 2011).

4 Merger Decision, ¶ 4.

5 Content Companies have previously raised concerns with the Commission about this type of condition. *See, e.g.*, Letter from Susan L. Fox, The Walt Disney Company, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 10-56 (filed Jan. 14, 2011).

6 Merger Decision, App. A., § IV, A.2.b

7 *Id.*

order.[8] If confidential information of OVDs or their programming partners is to be disclosed during the proceeding, the arbitrator must consider such proposed disclosure and may, in its discretion, direct production of contracts.[9] Generally, arbitrators making these types of determinations will consider disclosure in the particular context of arbitration, assess the actual need for the disclosure and whether less intrusive means are available to satisfy the need for information. Likewise, arbitrators typically limit the scope and use of the disclosures, as appropriate to that context. The FCC adopted a model protective order designed to protect highly confidential information in this arbitration context.[10]

On February 17, 2012, C-NBCU requested "clarification" from the Media Bureau that the Benchmark Condition actually permits C-NBCU agents to have automatic and immediate access to the underlying highly confidential programming agreements between OVDs and other content companies outside the carefully controlled confines of an arbitration if an OVD merely invokes the Benchmark Condition and seeks to begin negotiations with C-NBCU. The Content Companies formally opposed the "clarification."

On December 4, 2012, the Bureau issued the requested Order, thereby modifying the Benchmark Condition. As C-NBCU requested, the Order now requires any OVD invoking the Benchmark Condition to disclose the relevant highly confidential peer programming agreements to C-NBCU representatives, notwithstanding any contractual confidentiality or nondisclosure provisions that restrict or prohibit such disclosure. The Order requires an OVD to disclose these agreements when it first invokes the Benchmark Condition, even before

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8 *Id.*

9 Merger Decision, App. A, VIII. 4.

10 Merger Decision, A.. E.

negotiations. In contrast, the Merger Decision specifically reserved the potential disclosure of this highly confidential material to the fact-finding, judgment, discretion, and order of the impartial arbitrator during arbitration, a process that occurs after negotiations fail.[11] Although the Order placed some limitations on distribution of the agreements, it included the crux of the C-NBCU request: **C-NBCU's agents will now routinely have access to the actual commercial agreements of its direct content competitors.** This routine access will be granted without: (1) any showing of necessity of disclosure by C-NBCU; (2) any creation of a factual record demonstrating the necessity of disclosure; (3) any weighing of that record by a neutral third party arbitrator; and (4) any decision by a neutral third party arbitrator. The process established by the Order is thus radically different from that formulated by the Commission in approving the C-NBCU merger.

Most fundamentally, the Order stands the Benchmark Condition on its head. A condition adopted by the Commission to guard against potential anti-competitive conduct by C-NBCU now would become a powerful – and unprecedented – weapon providing a unique competitive advantage to C-NBCU vis-à-vis the six named Content Companies, none of which were parties to the transaction or consulted during the condition-drafting process. Indeed, because the Order enables disclosure at a much earlier point in the negotiation process, there will likely be a greater volume of disclosures than the Commission originally anticipated at the arbitration stage. The protective order adopted in the Order – which mirrors the model order established by the Commission *for arbitration* if the arbitrator finds the order appropriate to adopt in a particular situation – does not take these considerations into account, including as it

[11] Merger Decision App. A., § VIII. (4).

relates to the significant role of C-NBCU's agents, and their possible future employment in other situations adverse to a C-NBCU competitor.

This request for a stay of the Order satisfies the four factors that the Commission uses to determine whether a stay is appropriate. *First*, the Content Companies are likely to prevail on the merits of their application for review of the Order. *Second*, the Order will cause irreparable harm to the Content Companies if a stay is not granted. *Third*, no other party will be harmed if the stay is granted. *Fourth*, the Commission already has determined that the Merger Decision serves the public interest. Accordingly, a stay that simply preserves the Decision without the new modification, while the Commission considers the far-reaching impact of the Order, serves the public interest.

II. THE COMMISSION SHOULD GRANT A STAY MAINTAINING ITS CAREFULLY CRAFTED CONDITIONS WHILE CONSIDERING THE BUREAU'S MODIFICATION TO THOSE CONDITIONS.

The Content Companies request the Commission to stay the effect of the Media Bureau's Order while the Commission considers the application for review that the Content Companies will file within the period for requesting review. Consistent with past Commission precedent and the four factors established in *Holiday Tours*, a stay is both appropriate and necessary to prevent the irrevocable release of sensitive commercial information.

A. <u>The Content Companies are Likely to Prevail on the Merits.</u>

For all the reasons detailed in Part III, the Content Companies are likely to win on the merits. These points are briefly summarized below.

At the outset, the C-NBCU proposal is properly viewed as an untimely petition for reconsideration, not a request for clarification. Comcast and NBCU consummated their transaction in 2011 on the basis of a Merger Decision that clearly and unequivocally provided for binding commercial arbitration as the solution to a bargaining impasse. C-NBCU's efforts to now make adjustments are wholly out-of-time, given that a petition for reconsideration of the Merger Decision was due February 21, 2011, nearly a year before C-NBCU's February 17, 2012 submission.

In addition, although the Bureau characterizes its Order as a "clarification,"[12] the forced disclosure of confidential commercial agreements fundamentally changes the clearly delineated negotiation-and-arbitration process designed by the Commission in the Merger Decision. Rather than allowing orderly negotiation followed by well-regulated arbitration with qualified OVDs pursuant to the condition, the Bureau's Order preemptively arms C-NBCU with a powerful weapon that upends and distorts the process: immediate access to the details of a deal that an OVD has been able to negotiate for content from a peer programmer.[13] In short, competitors with C-NBCU's distribution side are stripped of any opportunity to leverage a better bargain for carriage of product that comes from the content side of C-NBCU. Moreover, the relief C-NBCU sought was beyond what the Bureau has power to provide; since the Merger Decision was a full Commission decision, any action to set aside or alter the fundamental terms of the Merger Decision can be taken only by the full Commission.

Further, the Order asserts the right to override confidentiality or nondisclosure provisions or agreements involving highly confidential information of third parties, such as the Content Companies, who did not seek benefits from the C-NBCU joint venture and who did not agree to accept any conditions tied to the Commission's consent. The Commission, and even

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[12] Order, ¶1.

[13] *See* Section III. A. below, pages 15-17.

less so the Media Bureau, has no authority to abrogate private contracts except where specifically given the power by statute, which neither has in this context.[14]

In forcing this abrogation of contracts, the Order extracts value from the programming agreements of the Content Companies and others. This creates a regulatory taking which, without just compensation, violates the Fifth Amendment.[15] The type of disclosure required under the Order also far exceeds what would be permitted in civil court proceedings, which traditionally protect the value of third-party confidential information by providing a mechanism for the careful protection of their interests.[16] The confidentiality-destroying Order is also in clear violation of the Trade Secrets Act.[17] In sum, the Order did not – and could not – maintain that the Commission's Merger Decision explicitly provides for this startling transformation of the Benchmark Condition into an unprecedented weapon giving C-NBCU access to the crown jewel secrets of its competitor Content Companies.

Instead, the Order, issued by the FCC's Media Bureau, not the full Commission, maintained that the Benchmark Condition "implicitly" supports forcing disclosure of peer programming agreements to C-NBCU in the earliest stages of negotiations.[18] But, in the full 279 pages of the Commission's Merger Decision, complete with appendices, tables, and formulae, the Commission provided explicit details of the conditions under which it approved the C-NBCU venture. This disclosure was not included. As Chairman Genachowski noted at that time, "These conditions include carefully considered steps to ensure that competition drives innovation

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14 *See* Section III. B. below, pages 17-19.

15 *See* Section III. C. below, pages 19-21.

16 *See* Section III. D. below, pages 21-22.

17 *See* Section III. E. below, pages 23-24.

18 Order, ¶ 8.

in the emerging online video marketplace."[19] If an obligation to hand over highly sensitive third-party contractual information before arbitration had been contemplated, the Commission certainly would have noted that unprecedented requirement in its carefully considered framework. It did not.

B. The Order Will Cause Irreparable Harm If a Stay is Not Granted.

If allowed to remain in place, the Order will inflict significant and irreparable harm on the Content Companies and competition in the marketplace. And, under the terms of the Order, that harm is imminent – an OVD seeking negotiations for C-NBCU content today could be compelled to disclose the highly sensitive and confidential agreements with the Content Companies.

Recognizing the competitive sensitivity and importance of programming arrangements, the Content Companies typically ensure the highest possible level of confidentiality for their programming agreements. Among other protections, Content Companies routinely restrict disclosure to third parties and sometimes even limit the number of counterparty employees who may review the agreements within the bilateral relationship. The Commission itself has long acknowledged that these precautions are warranted and serve compelling interests: "disclosure of programming contracts between multichannel video program distributors and programmers can result in substantial competitive harm to the information provider."[20]

The Order would place this highly confidential information in the hands of C-NBCU agents, transforming the Benchmark Condition into a potential new advantage for C-NBCU. Under the Order, C-NBCU's outside counsel and experts would be permitted to review

[19] Merger Decision, 273, Statement of Chairman Julius Genachowski.

[20] *See Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, 13 FCC Rcd 24816, 24852 (August 4, 1998) (the "*1998 Policy Statement*").

programming agreements between the Content Companies and OVDs and then subsequently assist C-NBCU in determining whether its own contracts are comparable. Knowledge of the terms of third parties' agreements with OVDs would grant C-NBCU an unprecedented advantage both as a programming distributor seeking access to content owned by the Content Companies and as a content licensor seeking to compete with the Content Companies and other content licensors. That the Content Companies are not parties to any controversy between C-NBCU and an OVD that might lead to a C-NBCU request for access makes the Order even more inequitable.

Competition and antitrust laws, of course, discourage and prevent the sharing of confidential contractual terms among competitors to avoid agreements in restraint of trade.[21] These laws guard against sharing sensitive business information with competitors in order to promote competition. The Order would permit C-NBCU to subvert these principles by allowing its representatives to demand confidential information from OVDs that antitrust laws would otherwise bar if sought directly from the Content Companies.[22] The fact that these representatives are limited to C-NBCU's outside counsel and outside experts in no way ameliorates the harmful impact of the Order. These outside agents regularly counsel, advise, and represent C-NBCU on its range of agreements. It is sheer fiction, and utterly unrealistic, to think that the knowledge of these outside agents will not benefit C-NBCU even if these outside agents proceed in good faith to try not to disclose what they have learned. The Order ignores the

[21] *See* 15 U.S.C. § 1; *see also e.g.*, *United States v. Container Corp. of Am.*, 393 U.S. 333 (1969) (holding exchange of price information violated the Sherman Act).

[22] "The basic concerns of any exchange of information among rivals are collusion or collusion-like behavior, and exclusion. . . . Ad hoc competitor-to-competitor 'exchange' of particularized price information, such as the price offered or made to a particular customer, should ordinarily be considered a naked or nearly naked restraint. . . ." 13 Philip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶¶ 2111c, 2111g(5) (3d ed. 2012).

significant role these individuals play for C-NBCU, as well as the possibility that these agents may transition someday from outside the company to inside counsel and experts for C-NBCU.

It is not only the Content Companies who would be harmed by the Order; competition will suffer as well. Because the Order would allow C-NBCU to demand access to the relevant peer contract each time an OVD invokes the Benchmark Condition, it would render the good faith negotiation and arbitration procedures established in the Merger Decision a dead letter. With direct access to the OVDs' peer contracts at such an early stage in the process, C-NBCU's incentives to negotiate and avoid arbitration would disappear. As a result, OVDs would have no opportunity to achieve more favorable terms from C-NBCU. Such a result would directly subvert the Commission's stated goal of protecting OVDs through the establishment of the Benchmark Condition.[23]

All content producers, particularly Content Companies named as "peer" programmers, may be reluctant to license their content to OVDs, particularly smaller OVDs and new entrants, given the potential for disclosure of their highly confidential information to their competitor, C-NBCU. In addition, unlike its content competitors who will not know what price to accept for rights, Comcast will have perfect information and therefore the ability to avoid accepting less than its competitors. As a result, C-NBCU will enjoy an unfair advantage as its competitors will not have access to this same information, creating an imbalance in the marketplace. By overhauling the Benchmark Condition, the Order would itself create the adverse effects on competition that the Commission hoped to prevent.

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[23] "We find that, as a vertically integrated company, Comcast will have the incentive and ability to hinder competition from other OVDs, both traditional MVPDs and standalone OVDs, through a variety of anticompetitive strategies. . . . We impose a set of measures carefully tailored to safeguard against these potential harms." Merger Decision, ¶¶ 61-62 (footnote omitted).

The competitive harm resulting from disclosure of OVDs' and content providers' programing agreement terms and conditions would be irreparable. Even with a mandate from the Commission that this confidential commercial information be used for limited, non-competitive purposes, and even with the threat of *ex post facto* sanctions for violations, the Commission could never repair the damage to the Content Companies' business. Indeed, it may never know the full extent of damage from this difficult to detect non-competitive behavior. Whether the disclosure of Content Companies' confidential information is intentional ultimately is immaterial. Once an individual gains access to confidential information, that knowledge cannot be erased. Even an individual's best intended efforts cannot prevent him or her from being influenced by the information obtained from viewing confidential materials. Federal courts have emphasized that once a person sees information, there is a high risk of inadvertent use because a person cannot "perform a prefrontal lobotomy on himself or herself."[24] This is as true for Comcast's outside counsel and experts – who may act for Comcast in many different negotiation settings – as for anyone else.

Any of the irreparable harms that would be caused by the Order – those to the Content Companies, those to the OVDs, or those to consumers – is sufficient to support an immediate stay of the Order.

C. Other Interested Parties Will Not Be Harmed If a Stay is Granted.

A stay pending the Commission's consideration of the merits would keep the status quo in place, without the radical change established by the Order, and would harm no

[24] *AMP, Inc. v. Fleischhacker*, 823 F.2d 1199, 1201 (7th Cir. 1987), citing *MBL (USA) Corp. v. Dickman*, 112 Ill.App 3d 229, 236-37 (1st Dist. 1983); see also *Fleming Sales Co., Inc. v. Bailey*, 611 F. Supp. 507, 514 (N.D. Ill. 1985); and *Autotech Tech. Ltd. P'ship v. Automationdirect.com, Inc.*, 237 F.R.D. 405, 408 n.3 (N.D. Ill. 2006).

one.[25] Indeed, far from a stay harming other parties, the *lack* of a stay would harm the OVDs, the intended beneficiaries of the Benchmark Condition. The Order will force them to surrender the small negotiating advantage they have: confidential knowledge of the details of their own peer programming agreements. The Order forces the OVD to share its most sensitive information with C-NBCU well before the arbitration procedure, weakening their negotiation posture. A stay pending the Commission's consideration of the merits would keep the status quo in place, resulting in no harm to OVDs.

Nor will a stay injure C-NBCU. C-NBCU admits that it has been able to negotiate numerous OVD license agreements without resort to arbitration.[26] C-NBCU has a decades-long history of negotiations and contracts with many types and sizes of video programming distributors from which it may formulate negotiating strategies and ultimate pricing targets. Since C-NBCU acceded to the original condition prior to closing its transaction, it presumably did not view it as problematic. Depriving C-NBCU of the immediate right to this unprecedented competitive advantage while this Commission considers the issue hardly constitutes a "harm." Indeed, the only harm cited by the company's "Request for Clarification" is a purported lack of efficiency.[27]

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[25] The two-step negotiation and arbitration process has already been tested. *See, e.g.*, *Project Concord, Inc. v. NBCUniversal Media, LLC*, Order on Review, DA 12-1958, MB Docket No. 10-56, 2012 WL 6085351 (November 13, 2012) (Media Bureau review of arbitrator's decision). After unsuccessful negotiations over licensing of NBCU programming, the parties entered into arbitration under the Benchmark Condition. *Id*., ¶ 8. In doing so, "[t]he parties engaged in extensive document discovery," and submitted Phase 1 and Phase 2 briefing. *Id*., ¶¶ 9-11.

[26] Comcast-NBCUniversal, Annual Report of Compliance with Transaction Conditions, 12-13 (Feb. 28, 2012); "Reply Comments of Comcast Corporation and NBCUniversal Media, LLC" in MB Docket No. 10-56 (April 17, 2012), 9.

[27] "Request for Clarification Regarding Implementation of the Benchmark Condition," Letter from David P. Murray, Counsel for C-NBCU, to William T. Lake, Chief, Media Bureau, FCC, MB Docket No. 10-56, at 1 (February 17, 2012) (noting the need of Bureau guidance ". . . to ensure that OVDs can make efficient use of the Benchmark Condition . . .").

D. The Public Interest Favors Grant of the Stay.

In their "Joint Opposition," the Content Companies provided several compelling reasons why the modifications to the Benchmark Condition that had been proposed by C-NBCU were contrary to the public interest.[28] The Commission determined, after a thorough and lengthy review, that the transaction would serve the public interest,[29] subject to a number of targeted, transaction-related conditions, including the Benchmark Condition, and a number of voluntary commitments made by the applicants.[30] As such, a stay preserving the status quo post-transaction would be *de facto* in the public interest, based on the Commission's earlier determination in approving the transaction with conditions.

The Benchmark Condition, as now modified by the Order, however, is contrary to the public interest because it will enable and facilitate potential anti-competitive conduct. The full Commission has not determined that the "clarified" process established in the Order would serve the public interest. Regardless of how it is characterized in C-NBCU's request, the Order does not "clarify" the Benchmark Condition. The Order substantially *modifies* a condition upon which the Commission as a whole based its consent, and, at the very least, it would represent a substantial change in the current conduct of negotiations between C-NBCU and OVDs. Accordingly, a stay of the Order pending resolution of the Content Companies' application for review of the Order is in the public interest.

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28 "Joint Opposition to Comcast-NBCU Request for Clarification Regarding the Benchmark Condition," submitted by CBS Corporation, News Corporation, Sony Pictures Entertainment, Inc., Time Warner Inc., Viacom Inc., and The Walt Disney Company, in MB Docket No. 10-56 (filed April 3, 2012) (the "Joint Opposition").

29 Merger Decision, ¶ 8.

30 *Id.*, ¶¶ 4, 284.

III. ON REVIEW, THE COMMISSION IS LIKELY TO OVERTURN THE ORDER BECAUSE OF ITS NUMEROUS INFIRMITIES.

The Order is fundamentally flawed on multiple grounds and the Commission is likely to overturn the Order because of its numerous infirmities. It is beyond the Bureau's – and the Commission's -- statutory and constitutional authority; it also is arbitrary and capricious, and falls far short of the requirements of reasoned decision-making.

First, the C-NBCU request is properly viewed as an untimely petition for reconsideration, not a request for clarification. Second, the Order subverts the negotiation process and gives a powerful advantage to C-NBCU, not just in its negotiations with other content distributors, but also in negotiations with OVDs – at both the distribution and content levels. Third, the Bureau does not have the power to grant the request sought by C-NBCU. Fourth, the Bureau – indeed, the Commission – has no authority to abrogate contracts without specific statutory authority. Fifth, the Order creates a regulatory taking subject to the Fifth Amendment. Sixth, the amount and type of information about non-parties that the Order gives to C-NBCU at an early stage in negotiations exceeds that available to litigants under statutes and court rules. And, seventh, the Order is in clear violation of the Trade Secrets Act, which carefully protects confidential business information as a matter of federal law.

A. The C-NBCU Request is an Untimely Petition for Reconsideration, not a Request for Clarification.

C-NBCU 's February 17, 2012 letter to the Bureau, styled as a "Request for Clarification Regarding Implementation of the Benchmark Condition," is as an out-of-time petition for reconsideration of the Merger Decision. C-NBCU sought a complete transformation of the limited right of access to highly confidential information that the FCC contemplated in the

Merger Decision. For at least two reasons, the Bureau lacks the power to grant C-NBCU's request.

First, the Communications Act (the "Act") mandates that petitions for reconsideration of a final Commission action *must* be filed *with the Commission* within 30 days following public notice of the action in question.[31] As the United States Court of Appeals for the District of Columbia Circuit has noted, Section 405's time limit is mandatory, and can be extended only in extraordinary circumstances such as "where the late filing is in some sense attributable to a procedural violation by the Commission."[32] Here, C-NBCU claimed no procedural defect by the FCC to justify the late filing – attempting instead to circumvent this limitation by mischaracterizing its submission.

Second, C-NBCU's request can be construed no other way than as a petition for reconsideration of the Merger Decision. The caption on its request notwithstanding, C-NBCU's application for relief does not seek a mere "clarification." There is no ambiguity about the Benchmark Condition in the Merger Decision or the full Commission's expectations that could require clarification.[33] In the C-NBCU merger and in a long line of Commission decisions, programming agreements are classified as highly confidential materials. The FCC expressly set forth the circumstances in which highly confidential materials may be produced in the context of

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31 *See* 47 U.S.C. § 405(a) (petition for reconsideration of order is filed "only to the authority making or taking the order . . . [and] *must* be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of.") (emphasis added); 47 C.F.R. § 1.106(f) (same).

32 *Nat'l Black Media Coalition v. FCC*, 760 F.2d 1297, 1299 (D.C. Cir. 1985); *see also Reuters Ltd. v. FCC*, 781 F.2d 946, 950, 952 (D.C. Cir. 1986) (noting that 30-day period for filing reconsideration petitions with FCC is mandated by statute and regulation and "it is elementary that an agency must adhere to its own rules and regulations").

33 The "Request for Clarification" states with particularity the respects in which C-NBCU believes the Merger Decision should be changed and states specifically the relief sought (requiring access to the peer deal when the OVD invokes the Benchmark Condition), which are the requirements of a petition for reconsideration. 47 C.F.R. § 1.106(d)(1).

arbitration: by the careful, context-specific determination of an impartial arbitrator – *not* at the request of C-NBCU outside of an arbitration proceeding.

In truth, C-NBCU sought a substantive change from the procedure already established in the Merger Decision. However, with its request untimely by nearly one full year, C-NBCU is not entitled to the relief it sought. It has not demonstrated, and in truth cannot, that there has been any material change in circumstances, nor any facts that it was unable to discover and present to the Commission during the exhaustive review of the C-NBCU transaction. As such, C-NBCU's proposal should be rejected by the Commission on this basis alone.

B. <u>The Order Subverts the Negotiation Process Designed by the Commission.</u>

The Order radically changes the negotiation and arbitration provisions found in the Merger Decision. As detailed in Appendix A, C-NBCU and the OVD begin by attempting to negotiate a mutually acceptable set of price, terms, and conditions. If these negotiations fail, the OVD may submit the dispute to commercial arbitration subject to procedures specific to OVD arbitrations.[34] Each party must present the arbitrator with "final offers." The final offer, first, is for the scope of the Comparable Programming if that is an issue. Then, after the arbitrator has resolved any dispute about the scope of programming, each party submits its final offer of an agreement to cover the subject programming.[35] Within the arbitration proceeding, the arbitrator *may* require the production of peer programing agreements containing confidential information, which may, at the request of a party, and upon the order of the arbitrator, be disclosed only to the

[34] Joint Opposition, citing to arbitration procedures in Merger Decision App. A, §§ VII-VIII. *See also, e.g.,* procedures specific to arbitration requested by OVD in §§ VII, C and VIII (4).

[35] Merger Decision App. A. § VII. C (2).

arbitrator, outside counsel, and outside experts.[36] If a contract prohibits disclosure absent an order from the Commission, the arbitrator may issue an order with the effect of a Commission order. Notably, the Commission did not include any provision compelling disclosure of agreements or confidential commercial information between the parties absent an order by the arbitrator.

In contrast, the Order modifying the Benchmark Condition now requires any OVD invoking the Benchmark Condition to disclose the peer programming agreement to C-NBCU representatives at the time of its initial request, *before* any negotiation or arbitration election, *without* any order having the effect of a Commission order, and *notwithstanding* any confidentiality or nondisclosure provisions that might exist.[37] Moreover, it does so without a neutral arbitrator's review of the necessity of requested disclosure. The Order radically changes the procedure designed in the Merger Decision.

The modification of the Benchmark Condition request effectively undercuts arbitration as a meaningful remedy. The Commission crafted a roadmap for negotiation between OVDs and C-NBCU that included arbitration should the parties reach an impasse. It was this mechanism that encouraged parties to reach accord prior to arbitration to avoid the expense and risk that accompany it. The Order subverts the Commission's effort and undermines the OVDs' bargaining positions because C-NBCU will now obtain the same types of agreements and confidential commercial information absent any arbitration burdens or risks.

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36 In light of what C-NBCU requested and the Bureau's subsequent Order, it is now clear that the provision requiring production of peer contracts in the Benchmark Condition itself is unacceptable and should be removed, as it requires disclosure of the Content Companies' highly confidential business materials without sufficient justification. The Content Companies reserve their right to argue that even an arbitrator in this context would lack authority to abrogate the confidentiality provisions of private contracts, particularly contracts of third parties who are not participants in the arbitration.

37 Merger Decision, App. A., § VII. (4).

The Order takes these far-reaching steps without adequate explanation, and, indeed, without even recognizing the nature or significance of the changes they represent. Such a lack of a reasoned explanation – and the failure to acknowledge, much less explain, a substantial change reflects arbitrary and capricious decision-making.[38]

The Order also conflicts with the clear intent of the Commission's Merger Decision. As noted above, failed negotiations between the OVD and C-NBCU allowed the OVD to submit the dispute to commercial arbitration subject to procedures specific to OVD arbitrations.[39] Under these provisions, the Commission explicitly considered when and how the disclosure of agreements and confidential information should occur.[40] It left no ambiguity that this exchange of information was specific to arbitration, and explicitly recognized the "commercially sensitive nature" of information that would be included.[41]

C. <u>The Relief C-NBCU Sought is Beyond What the Bureau has Power to Provide.</u>

Since the Merger Decision was a full Commission decision, any action to set aside or alter the fundamental terms of the Merger Decision can be taken only by the full Commission. Moreover, the Act makes clear that the Bureau can exercise only those functions that have been delegated to it by the Commission.[42] The FCC's rules implementing the Act

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38 *FCC v. Fox Television Stations, Inc.* 556 U.S. 502, 515 (2009) ("To be sure, the requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position. An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books. *See United States v. Nixon,* 418 U.S. 683, 696, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974). And of course the agency must show that there are good reasons for the new policy").

39 Joint Opposition, citing to arbitration procedures in Merger Decision, App. A, §§ VII-VIII. Procedures specific to arbitration requested by OVD are in § VII, C.

40 Merger Decision, App. A., § VIII. (4).

41 *Id*.

42 *See* 47 U.S.C. § 155(c).

stress that the Bureau must refer to the full Commission "[m]atters that present novel questions of law, fact or policy that cannot be resolved under existing precedents and guidelines."[43] Neither the Act nor the FCC's rules permit the Bureau to take an action that would modify an order issued by the Commission sitting *en banc.*[44]

Here, C-NBCU requested that the Bureau command OVDs to produce their private commercial agreements with the Content Companies at the time that the OVDs avail themselves of the Benchmark Condition – to C-NBCU personnel outside the context of any arbitration. In the Merger Decision, however, the full Commission already had required that good faith negotiations be the starting point for C-NBCU and OVDs that seek to use the Benchmark Condition, and that the production of peer contracts could only be required in the arbitration proceeding. Notably, the FCC said nothing about compelling an OVD to produce highly confidential programming agreements during these initial negotiations. Plainly put, the Bureau does not have the power to set aside a decision made by the full Commission and its Order should be overturned.

Even if the Bureau did have the power to set aside a decision made by the full Commission – and, again, it unequivocally does not – the Bureau's approach is a radical and unexplained departure from the approach the Commission developed and explicitly presented in the Merger Decision less than two years ago. The Bureau does not acknowledge, let alone explain, this departure from the Commission's instructions, even though there are no new circumstances within this two-year period that could justify contravening the procedure already

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[43] 47 C.F.R. § 0.283(c).

[44] *See In re Sandwich Isles Commc'ns, Inc.*, 20 FCC Rcd 8999 (2005) ("The Bureau does not have the authority to alter the Commssion's finding"); *In re Mintz, Levin, Cohn, Ferris, Glovsky, and Popeo, P.C.*, 17 FCC Rcd 16100, 16102 (2002) ("It is axiomatic that a delegated authority decision cannot conflict or otherwise reverse the decision of the full Commission.") (footnote omitted).

laid out by the full Commission. Indeed, C-NBCU itself documented no need for "clarification" in contending with any OVDS or the Benchmark Condition in its first Annual Report of Compliance with Transaction Conditions.[45] As such, the Bureau's departure from the Commission's Merger Decision is arbitrary and capricious and merits being overturned by the Commission.[46]

D. The Commission Cannot Abrogate Contracts Without Statutory Authority.

The Content Companies and other programming suppliers, as well as programming distributors, protect highly confidential information related to the rates and terms of program distribution agreements through confidentiality or non-disclosure provisions or separate agreements. The Order recognized this fact, but treated it as an obstacle to be overcome, rather than the protected right of private companies to enter mutually acceptable binding agreements.[47] The Order cited no specific authority for the ability to run roughshod over these non-parties' private agreements and, indeed, there is none.

The Commission's authority arises from statutes.[48] Courts have consistently held that Commission regulation in the absence of specific statutory authority falls outside its

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45 "Some OVDs have specifically sought to obtain online video programming distribution licenses under the terms of the Conditions. The majority of these OVDs have relied on the so-called 'Benchmark Condition.' A minority have sought a 'Full Freight' or 'MVPD Price' offer. In other cases, OVDs have made requests outside the context the Conditions. In fact, NBCUniversal has negotiated and executed license agreements with several OVDs on mutually agreeable commercial terms without resort to the specific processes of the Conditions." Comcast-NBCUniversal, Annual Report of Compliance with Transaction Conditions, 12-13 (Feb. 28, 2012); *see also* "Reply Comments of Comcast Corporation and NBCUniversal Media, LLC" in MB Docket No. 10-56 (April 17, 2012), 9.

46 *See, e.g., Prometheus Radio Project v. FCC,* 373 F.3d 372, 389-90 (3rd Cir. 2004) (noting that in a review under the "arbitrary and capricious" standard, courts must ensure that an agency examined the relevant data and articulated a satisfactory explanation for its action, including a rational connection between the facts found and the choice made).

47 Order, ¶ 12.

48 *Am. Library Ass'n v. FCC*, 406 F.3d 689, 691, 698 (D.C. Cir. 2005).

jurisdiction. For example, because pole attachments do not constitute wire or radio communications, the Commission had been precluded from regulating them until Congress took action.[49] Likewise, prior to the Telecommunications Act of 1996, physical colocation of a competitor's equipment in a local exchange carrier's central office was found to be a "physical taking" without express statutory authority.[50]

It has long been established that the Communications Act does not give the Commission authority to directly affect or determine the validity of contracts between private parties.[51] The Commission may impose conditions on regulated parties that must be met before the parties are granted licenses, "but the imposition of the conditions cannot directly affect the applicant's responsibilities to a third party dealing with the applicant."[52]

The Order abrogates contractual provisions requiring confidentiality of the agreements. If an OVD attempts to invoke the Benchmark Condition, the Order would require it to disclose the peer programming agreement in direct breach of the confidentiality requirements of the agreement. The Bureau has no authority to invalidate such contractual provisions, and in doing so engages in arbitrary and capricious decision-making.[53]

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49 *California Water and Tel. Co., et. al.*, Mem. Op. and Order, 64 F.C.C.2d 753 ¶ 17 (1977) (noting that the power to regulate private contractual agreements, even where they directly affect communications activities, "must be conferred by Congress. [It] cannot be merely assumed by administrative officers.").

50 *Bell Atlantic Telephone Companies v. FCC*, 24 F.3d 1441, 1446 (D.C. Cir. 1994) ("without express delegation of such authority from Congress, the Commission may not order a regulated entity to provide a competitor access to its facilities.").

51 *Regents of the University System of Georgia v. Carroll*, 338 U.S. 586, 602-03 (1950) (finding that although the Commission can require an applicant to repudiate a contract as a condition of receiving a license renewal, that condition did not invalidate the contract under state law).

52 *Id.*, 600.

53 *See, e.g., Judulang v. Holder*, 132 S.Ct. 476, 490 (2011) (applying the "arbitrary and capricious" standard of the Administrative Procedure Act, "We must reverse an agency policy when we cannot discern a reason for it.").

E. The Order Constitutes a Regulatory Taking by Depriving Content Providers of the Economic Value of Confidential Contract Terms.

The Order interferes with the rights of programming providers, who will suffer a "regulatory taking" under the Fifth Amendment.[54] The Commission has relied on an examination of three factors to identify a taking forbidden by the Fifth Amendment: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action.[55]

First, with regard to "economic impact," the Order would transfer the programming providers' sensitive and highly confidential information to one of their fiercest and strongest competitors. In doing so, the Order would have a severe economic impact on the Content Companies (as well as on other companies providing content). The economic impact is particularly striking because the Commission does not generally regulate companies that are engaged simply in content creation; the substantial economic harm here is collateral damage, completely unexpected, and in the nature of "friendly fire" coming from a government agency charged with fostering diverse channels of communication in the public interest.

Second, the regulation interferes with investment-backed expectations. Quality video programming is expensive to produce and distribution rights are expensive to acquire. Programming companies build financial models to determine whether the investments in new programs or channels will be rewarded with adequate revenues. These models are based on a continuation of the current contract negotiation regime, where deals are confidential and based

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[54] U.S. Const., amend V ("nor shall private property be taken for public use, without just compensation.").

[55] *Exclusive Service Contracts for Provision of Video Services*, 22 FCC Rcd 20235, ¶ 56, citing *Connolly v. Pension Ben. Guaranty Corp.*, 475 U.S. 211, 224-25 (1986).

on the value of programming as perceived by the producer and distributor, not on what another party has agreed to pay. The Order will inevitably transfer detailed knowledge of peer programming contracts to a uniquely positioned competitor and will significantly interfere with the existing models.

Third, the character of the Bureau's action in the Order is "extraordinary."[56] It abrogates the contractual rights of private parties and interferes with their ability to protect the bargains that they strike. The action was taken without statutory authority, and even without action by the full Commission. It was not inescapably dictated by any part of the Merger Decision. Even under the Bureau's rendering, it was merely "implicit."[57]

Thus, the Order, if not stayed and rescinded, will result in an unconstitutional taking of the property rights of the Content Companies.[58]

F. <u>In Analogous Situations, Courts and Federal Rules Do Not Automatically Mandate Disclosure of Confidential Information by Non-Parties.</u>

In analogous civil litigation scenarios, federal courts carefully guard against mandating disclosure of confidential information by non-parties. Courts recognize both that an entity's status as a nonparty, as well as the harm inherent from exposing confidential commercial information, weigh against such disclosure. Indeed, the risk to a non-party is obvious because "it would be divorced from reality to believe that either party . . . would serve as the champion of its

[56] *See, e.g., Cienega Gardens v. U.S.*, 331 F.3d 1319, 1338 (Fed. Cir. 2003) (citing *Hodel v. Irving*, 481 U.S. 704, 715-16 (1987) which found that government action abrogating a common law right to devise even a small amount of property was a taking, even absent a showing of the other two factors: economic harm or interference with investment-backed expectations, because the character of the government action was "extraordinary").

[57] Order, ¶24.

[58] Additionally, these disclosure requirements impose a burden on speech and consequently will also not survive without furthering a governmental interest unrelated to the suppression of free expression. *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622 (1994). An incidental restriction on First Amendment freedoms must be no greater than is essential to the furtherance of that interest. *Id*.

[non-party competitor] either to maintain the confidentiality designation or to limit public disclosure as much as possible. . . ."[59] In the same vein, the Federal Rules protect non-parties by authorizing courts to quash or modify a subpoena if the subpoena directs the non-party to produce confidential commercial information.[60]

In civil litigation, courts are required to balance the need for discovery against the burdens imposed when ordering the production of information or materials.[61] In so balancing, the status of an entity as a non-party weighs against the burden of disclosure.[62] Indeed, courts understand that non-parties should not be subject to the same burdens of discovery as parties.[63]

In addition to avoiding the burden on non-parties, courts in civil litigation also consider whether the non-party information includes confidential commercial information that should not be disclosed.[64] Ordinarily, confidential commercial information warrants special protection in civil discovery.[65] Courts may deny access to confidential business information,

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[59] *Micro Motion, Inc. v. Kane Steel Co.*, 894 F.2d 1318, 1325 (Fed. Cir. 1990).

[60] Fed. R. Civ. P. 45(c)(3)(B)(i) ("To protect a person subject to or affected by a subpoena, the issuing court may, on motion, quash or modify the subpoena if it requires disclosing a trade secret or other confidential research, development, or commercial information."); *see also Education Logistics, Inc. v. Laidlaw Transit, Inc.*, No. 3-11-MC-036-L-BD, 2011 WL 1348401, at *2 (N.D. Tex. Apr. 8, 2011) (applying Rule 45).

[61] *Echostar Commc'ns Corp. v. News Corp. Ltd.*, 180 F.R.D. 391, 394 (D. Colo. 1998) (denying motion to compel production of nonparties' materials).

[62] *See, e.g.*, *Mannington Mills v. Armstrong World Indus., Inc.*, 206 F.R.D. 525, 528 (D. Del 2002) (citing *Am. Standard Inc. v. Pfizer, Inc.*, 828 F.2d 734, 738 (Fed. Cir. 1987); *Spacecon Specialty Contractors, LLC v. Bensinger*, 2010 WL 3927783, at 3 (D. Colo. Oct. 1, 2010).

[63] *Cusumano v. Microsoft Corp.*, 162 F.3d 708, 717 (1st Cir. 1998) (affirming denial of motion to compel). As a result, a burden of proof heavier than the ordinary burden imposed is required for non-party discovery requests. *See Spacecon Specialty Contractors, LLC*, 2010 WL 3927783, at 3.

[64] *Mannington Mills*, 206 F.R.D. 525, 528 (D. Del 2002) (considering application of Fed. R. Civ. P. 45).

[65] *See Micro Motion, Inc.*, 894 F.2d 1318, 1325; *cf. Federal Trade Commission v. OSF healthcare System*, 2012 WL 1144620, at 8 (N.D. Ill. 2012) (recognizing the manner in which a business prices its products and services is generally confidential).

even when otherwise relevant, when the potential harm in disclosing the information outweighs any benefit.[66]

Where requiring the disclosure of confidential business information would damage a non-party's ability to compete in the marketplace, courts have rejected disclosure.[67] Civil courts recognize that the disclosure of confidential documents – including those addressing prices and contractual terms – provide competitors an unfair advantage.[68] Further, courts understand that non-parties are essentially powerless to protect their interests following the disclosure of their confidential information – even under the shield of a protective order – leaving their respective positions in the marketplace increasingly vulnerable.[69]

Significantly, courts also consider to whom the information is being released or who may potentially receive the information. Courts recognize that confidential commercial information can be improperly used to compete with the disclosing party (or can be disclosed by a competitor), substantially decreasing the value of the confidential commercial information.[70] As a result, courts presume that disclosure to a competitor is more harmful than disclosure to a non-competitor.[71]

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66 *Education Logistics, Inc. v. Laidlaw Transit, Inc.*, 2011 WL 1348401, at 4 (N.D. Tex. Apr. 8, 2011).

67 *Id.*; *Mannington Mills*, 206 F.R.D. at 528-29.

68 *See Wauchop v. Domino's Pizza, Inc.*, 138 F.R.D. 539, 548-49 (N.D. Ind. 1991) (declining to require production of all governing board minutes where likely to reveal confidential commercial information).

69 *See Education Logistics, Inc.*, 2011 WL 1348401, at 4.

70 *See Echostar Commc'ns Corp.*, 180 F.R.D. 391, 395.

71 *Am. Standard Inc.*, 828 F.2d 734, 741 (citations omitted). *See, e.g.*, *Education Logistics, Inc.*, 2011 WL 1348401, at 2; *Echostar Comm'ns Corp.*, 180 F.R.D. at 395; *R & D Business Sys. v. Xerox Corp.*, 152 F.R.D. 195, 196 (D. Colo. 1993).

Even where the requested information is relevant, disclosure will not be required if the potential harm outweighs the benefit.[72] The Bureau's Order here requires the automatic disclosure of content providers' confidential commercial information, specifically targeting pricing and contractual material essential to competing in the marketplace. As part of that disclosure, the Order places that same information in the hands of a competitor without any attempt at balancing, without review by a neutral third party, and without any opportunity to participate by the non-party content providers. In doing so, the Order imposes a requirement that flatly contradicts the standards of civil procedure, which recognize the special consideration appropriate for non-parties as well as the risks inherent in requiring the disclosure of their confidential commercial information.

G. The Order Violates the Trade Secrets Act.

Federal law mandates that agencies proceed cautiously with regard to confidential business information. In particular, the Trade Secrets Act prohibits government personnel from disclosing sensitive business data unless "authorized by law" to do so.[73] The central question under the Trade Secrets Act is whether a disclosure of highly confidential business information is "authorized by law," as required by that Act. If not, disclosure is forbidden.[74] An agency's disclosure decision is "authorized by law" under the Trade Secrets Act if the disclosure takes place pursuant to a regulation that: (i) is substantive in that it affects individual rights and obligations, (ii) is rooted in a grant of power by Congress and (iii) was promulgated in conformance with any procedural requirements established by Congress, such as those found in

[72] *See, e.g.*, *Education Logistics, Inc.*, 2011 WL 1348401, at 2.

[73] 18 U.S.C. § 1905 ("Section 1905").

[74] *See Chrysler Corp. v. Brown*, 441 U.S. 281, 318 (1979) ("[W]e believe any disclosure that violates § 1905 is 'not in accordance with law' within the meaning of" the Administrative Procedure Act ("APA")).

the Administrative Procedure Act.[75] In the context of the Benchmark Condition, the disclosures required by the Order are not “authorized by law” within the meaning of the Trade Secrets Act.

There is no FCC regulation authorizing, or even contemplating, the compelled disclosure of confidential information by one private entity to another, let alone mandating one entity to disclose a *third party*’s confidential materials to one of its chief competitors. Yet this is precisely the result the Order requires. Because the Order was neither “rooted in a grant of power by Congress,” nor “promulgated in accordance” with the APA, the disclosure required by the Order is not “authorized by law.”

IV. A STAY IS APPROPRIATE IN THIS INSTANCE.

The Content Companies have demonstrated that they are likely to prevail on the merits of their application for review of the Order by the Commission. They have shown that irreparable harm will result from the disclosure of highly sensitive information, and, in comparison, that no party will be harmed if the Order is not immediately effective. Finally, the Commission has found that the Merger Decision as adopted was in the public interest. Accordingly, the public benefit of a modification that fundamentally changes one of the conditions in the Merger Decision is immediately questionable and the change at issue here plainly is not in the public interest. For all of the reasons expressed in this request, the Commission should stay the effect of the Order pending resolution of the application for review and until Content Companies have exhausted all remedies.

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75 *See 1998 Policy Statement*, 13 FCC Rcd at 24820-24821; *1996 Policy Statement NPRM*, 11 FCC Rcd at 12413 (citing *Chrysler*, 441 U.S. at 301-303).

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of December, 2012, a true and correct copy of the foregoing Request for Stay of Media Bureau Order DA-12-190 has been served, in the delivery manner specified, on the following persons at the addresses shown below:

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