

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

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

ORDER ON RECONSIDERATION

Adopted: November 4, 2014

Released: November 4, 2014

By the Chief, Media Bureau:

I. INTRODUCTION

1. In this Order on Reconsideration, the Media Bureau reconsiders on its own motion its recent Order¹ adopting Modified Joint Protective Orders² in the above-captioned proceedings. We further explain why those orders properly balance, on the one hand, the need for Commission staff and other interested parties to access certain Highly Confidential Information (referred to as “Video Programming Confidential Information” or “VPCI”),³ and, on the other hand, the legitimate interests of programmers

¹ See *Applications of Comcast Corp. and Time Warner Cable Inc. for Consent to Assign or Transfer Control of Licenses and Authorizations*, MB Docket No. 14-57; *Applications of AT&T, Inc. and DIRECTV for Consent to Assign or Transfer Control of Licenses and Authorizations*, MB Docket No. 14-90, Order, DA 14-1463 (MB, rel. Oct. 7, 2014) (“VPCI Order”).

² See *Applications of Comcast Corp. and Time Warner Cable Inc. for Consent to Assign or Transfer Control of Licenses and Authorizations*, Joint Protective Order, MB Docket No. 14-57, DA 14-1464 (MB, rel. Oct. 7, 2014) (“Comcast-TWC Modified Joint Protective Order”); *Applications of AT&T, Inc. and DIRECTV for Consent to Assign or Transfer Control of Licenses and Authorizations*, Joint Protective Order, MB Docket No. 14-90, DA 14-1465 (MB, rel. Oct. 7, 2014) (“AT&T-DIRECTV Modified Joint Protective Order”) (together, the “Modified Joint Protective Orders”).

³ Under the Modified Joint Protective Orders, VPCI is defined as “information that is Highly Confidential Information, and is an agreement, or any part thereof, for distribution of any video programming (including broadcast programming) carried by an Applicant’s (i) MVPD service and/or (ii) OVD service; a detailed description (continued....)”

and broadcasters in preventing the dissemination and misuse of their VPCI. We also clarify one aspect of the Modified Joint Protective Orders and make a minor modification to the orders (see Appendices A and B).⁴

2. As described below, due to the unique circumstances in these proceedings, the *VPCI Order* highlighted the strict restrictions prohibiting access to Highly Confidential Information that allow only outside representatives that are not involved in “Competitive Decision-Making” (as described below) to obtain access. The order also imposed additional procedures to protect Highly Confidential Information. Specifically, the Order (1) provided third parties with a procedure to object to particular individuals executing Acknowledgements of Confidentiality under the Modified Joint Protective Orders, (2) required that all individuals, whether or not they previously executed Acknowledgements pursuant to the Joint Protective Orders, file additional Acknowledgements of Confidentiality under the Modified Joint Protective Orders to reflect that signatories understood the implications of, and restrictions associated, with filing an Acknowledgement of Confidentiality, (3) imposed additional and even more stringent restrictions on the means of access to VPCI by prohibiting printing, copying, or transmittal of such information and allowing access only at the offices of an Applicant’s representative or via a secure remote platform set up for this purpose, and (4) highlighted that Highly Confidential Information can be used only for purposes of the proceeding and that it must be destroyed at the conclusion of the proceeding, including a requirement that certifications of such destruction must be provided subject to criminal penalties.

II. BACKGROUND

3. On April 4, 2014 and June 11, 2014, the Media Bureau adopted and released the Joint Protective Orders.⁵ The Joint Protective Orders “adopt procedures to ... more strictly limit access to certain particularly competitively sensitive information, which, if released to competitors or those with whom the Submitting Party does business, would allow those persons to gain a significant competitive advantage or an advantage in negotiations.”⁶ On August 21, 2014 and September 9, 2014, we issued the Information Requests in these proceedings that seek, among other things, certain types of contracts (including programming and retransmission consent agreements) and related documents whose key terms have historically been treated as especially sensitive from a competitive standpoint and involve Highly Confidential Information.⁷ Because certain programmers and broadcasters expressed concern that the

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of one or more provisions of such an agreement, including, but not limited to, price terms; and information relating to the negotiation of such an agreement.” Comcast-TWC Modified Joint Protective Order at ¶ 2; AT&T-DIRECTV Modified Joint Protective Order at ¶ 2.

⁴ See *infra* ¶¶ 35-36. Persons who previously signed an Acknowledgment of Confidentiality under the Modified Joint Protective Orders are not required to sign a new one because of this Order on Reconsideration.

⁵ See *Applications of Comcast Corp. and Time Warner Cable Inc. for Consent to Assign or Transfer Control of Licenses and Authorizations*, Joint Protective Order, 29 FCC Rcd 3688 (2014) (“Comcast-TWC Joint Protective Order”); *Applications of AT&T, Inc. and DIRECTV for Consent to Assign or Transfer Control of Licenses and Authorizations*, Joint Protective Order, 29 FCC Rcd 6047 (2014) (“AT&T-DIRECTV Joint Protective Order”) (together, the “Joint Protective Orders”).

⁶ Comcast-TWC Joint Protective Order, 29 FCC Rcd at 3688, ¶ 1; AT&T- DIRECTV Joint Protective Order, 29 FCC Rcd at 6047, ¶ 1. A “Submitting Party” is a person or entity who submits a Confidential or Highly Confidential document. Comcast-TWC Joint Protective Order, 29 FCC Rcd at 3690, ¶ 2; AT&T-DIRECTV Joint Protective Order at 6049, ¶ 2.

⁷ See Information and Data Request to Comcast Corporation, MB Docket No. 14-57 (Aug. 21, 2014); Information and Data Request to Time Warner Cable Inc., MB Docket No. 14-57 (Aug. 21, 2014); Information and Data Request to Charter Communications, Inc., MB Docket No. 14-57 (Aug. 21, 2014); AT&T Information and Discovery (continued....)

April and June 2014 Joint Protective Orders did not provide adequate protection for these documents,⁸ on September 23, 2014, we issued a Public Notice seeking comment on those concerns and the Joint Protective Orders.⁹

4. On October 7, 2014, the Media Bureau issued the *VPCI Order* adopting Modified Joint Protective Orders. The Modified Joint Protective Orders replaced the previously adopted Joint Protective Orders.¹⁰ The *VPCI Order*, among other things, reiterated and emphasized the stringent protections afforded to Confidential and Highly Confidential Information under the Joint Protective Orders, including sanctions for violations.¹¹ The *VPCI Order* also highlighted and clarified the limited universe of individuals that are permitted to access Highly Confidential Information produced in these proceedings.¹² Further, the order established certain additional procedures limiting the manner in which VPCI can be viewed in the pending merger proceedings to further decrease the likelihood that VPCI will be improperly used or disclosed.¹³ Specifically, the order required the various Applicants to make VPCI available only at their offices or through a remote access document review platform that would not permit the printing, copying, or transmittal of that information.¹⁴ The order further requires that all Highly Confidential Information be returned or destroyed within two weeks of the conclusion of the proceeding, and that parties promptly certify that all such materials have been returned or destroyed. The order also mandated that all qualified individuals that intend to review Highly Confidential Information in these proceedings execute and file an Acknowledgment of Confidentiality under the Modified Joint Protective Orders, regardless of whether they had executed and filed an Acknowledgment of Confidentiality under the Joint Protective Orders, prior to gaining access to Highly Confidential Information.¹⁵ In addition, the Modified Joint Protective Orders, together with the *VPCI Order*, provided an opportunity for third parties to object to individuals filing Acknowledgments.¹⁶

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Requests, MB Docket No. 14-90 (Sept. 9, 2014); DIRECTV Information and Discovery Requests, MB Docket No. 14-90 (Sept. 9, 2014) (collectively, the “Information Requests”).

⁸ See Letter from Mace Rosenstein, Covington & Burling LLP, to Marlene H. Dortch, Secretary, FCC, MB Docket Nos. 14-57, 14-90 (Sept. 23, 2014); Letter from Rebecca S. Bryan, Vice President/General Counsel, Raycom Media, to William T. Lake, Chief, Media Bureau, FCC, MB Docket Nos. 14-57, 14-90 (Sept. 17, 2014); Letter from Joshua N. Pila, LIN Television Corp., et al., to William T. Lake, Chief, Media Bureau, FCC, MB Docket No. 14-57 (Sept. 11, 2014).

⁹ See *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 (MB, rel. Sept. 23, 2014) (“Sept. 23 Public Notice”).

¹⁰ The Modified Joint Protective Orders, as adopted by the *VPCI Order*, are “designed to provide interested parties with access to confidential information submitted in these proceedings and to address concerns certain parties raised concerning the adequacy of the protections provided in the protective orders previously adopted.” *VPCI Order* at ¶ 1.

¹¹ *Id.* at ¶¶ 4-10.

¹² *Id.* at ¶ 5.

¹³ *Id.* at ¶ 11.

¹⁴ *Id.*

¹⁵ *Id.* at ¶ 10.

¹⁶ See Comcast-TWC Modified Joint Protective Order at ¶¶ 8, 10; AT&T-DIRECTV Modified Joint Protective Order at ¶¶ 8, 10; *VPCI Order* at ¶¶ 10-12. This objection procedure is not limited to VPCI. It permits all third parties, not just programmers, to object to certain individuals’ executions of Acknowledgments.

5. Pursuant to the Modified Joint Protective Orders, certain individuals executed and filed Acknowledgments with the Commission.¹⁷ Beginning October 15, 2014, a number of third parties (the “Content Companies”)¹⁸ filed objections against every individual who sought to review Highly Confidential Information, including VPCI, under the Modified Joint Protective Orders. In addition, on October 14, 2014, the Content Companies filed a petition for stay and Application for Review of the *VPCI Order* and Modified Joint Protective Orders.¹⁹ Therein, the Content Companies allege that the orders require mass publication of their Highly Confidential Information to the public and are thus contrary to prior Commission practices and violate applicable law.²⁰ The Content Companies further request additional modifications of the protective orders that would require the Commission to review all VPCI provisionally, either *in camera* or at the Department of Justice, on a confidential basis that does not permit disclosure of the documents to any commenters.²¹ They request that the Commission place only the materials it deems relevant in the record for commenter review after such materials have been redacted and anonymized.²² They also advocate other additional procedural protections within the production process.²³

6. Comcast, Time Warner Cable, and Charter responded to the Content Companies’ petitions on October 20, 2014.²⁴ These Applicants assert that the approach to protecting Highly Confidential Information and VPCI reflected in the Bureau’s order “strikes a reasonable balance among the various interests at stake in this proceeding . . . protect[ing] highly confidential business information, while also permitting very limited access to parties’ counsel and consultants that make the requisite certifications and comply with stringent restrictions on the use of such information.”²⁵ They assert that the adequacy of the Modified Joint Protective Orders is evidenced by the fact that their own most Highly Confidential Information has been produced to the Commission subject to such orders without incident.²⁶ They note that the most Highly Confidential Information of a number of third parties to the transaction, including Netflix, Inc., DISH Network Corporation (DISH), and Cogent Communications, is also contained in the record subject to the protections of the Modified Joint Protective Orders.²⁷ The Applicants characterize

¹⁷ See <http://www.fcc.gov/transaction/List-of-Ack-ComcastTWC.xlsx>; www.fcc.gov/transaction/List-of-Ack-Att.xlsx.

¹⁸ The Content Companies include: CBS Corp., Scripps Networks Interactive, Inc., The Walt Disney Company, Time Warner Inc., Twenty First Century Fox, Inc., Univision Communications Inc., Viacom Inc., Discovery Communications LLC, and TV One, LLC. Discovery Communications LLC and TV One, LLC also filed separate objections to many of the individuals objected to by the other Content Companies in their later filings.

¹⁹ See CBS Corp. et al. Emergency Request for Stay of Media Bureau Order and Associated Modified Protective Orders, MB Docket Nos. 14-57, 14-90 (Oct. 14, 2014) (“Content Companies’ Request for Stay”); CBS Corp. et al. Application for Review, MB Docket Nos. 14-57, 14-90 (Oct. 14, 2014) (“Content Companies’ Application for Review”).

²⁰ Content Companies’ Application for Review at 15-25.

²¹ *Id.* at 18.

²² *Id.*

²³ *Id.* at 12-14.

²⁴ Letter from Kathryn A. Zachem, Senior Vice President, Regulatory and State Legislative Affairs, Comcast Corp. et al., to Marlene H. Dortch, Secretary, FCC, MB Docket No. 14-57 (Oct. 20, 2014) (“Comcast/TWC/Charter Oct. 20, 2014 Letter”).

²⁵ *Id.* at 3.

²⁶ *Id.*

²⁷ *Id.*

the protections afforded Highly Confidential Information in these proceedings as “unprecedented” in Commission proceedings.²⁸ The Applicants urge that further delay in the review of the pending transactions as a result of the Content Companies’ objections to the Modified Joint Protective Orders should not be permitted.²⁹

7. AT&T and DIRECTV opposed the Content Companies’ petitions on October 27, 2014.³⁰ These Applicants dispute the Content Companies’ claims that the Applicants are not motivated to protect VPCI and state they “have spent thousands of hours (and over \$1,000,000) isolating their VPCI.”³¹ Further, these Applicants argue that the Modified Joint Protective Orders include “unambiguous protections” that provide “unique and unprecedented” protections for this information.³² They note that only a “few individuals” have access to VPCI “subject to strict limitations on how they use the material.”³³ They describe a 20-year history of Commission proceedings using protective orders similar to the ones in place in this proceeding for the production of AT&T’s most sensitive business records and state that “[d]uring that entire period, AT&T is unaware of a single instance of a third party misusing confidential information obtained pursuant to the Commission’s protective orders.”³⁴ They claim that the need to pause the merger proceedings to address the Content Companies’ “unsupported objections” prevents “the Applicants from delivering . . . public interest benefits and hamper[s] the Commission in meeting its ‘obligation to review proposed transactions as expeditiously as possible.’”³⁵

8. DISH, in a Motion for Further Extension of Time, asserts that, through the Modified Joint Protective Orders, “the Commission has adopted extraordinary procedures to provide additional protection” for VPCI in these proceedings.³⁶ DISH claims that, if adopted, the programmers’ position that interested parties’ outside counsel or experts cannot review VPCI subject to such procedures, “no matter how important . . . [the documents] are to the evaluation of the transaction,”³⁷ would preclude meaningful analysis of issues central to the proceeding.³⁸ DISH also filed an Opposition to the Content Companies’ petitions alleging that their claim that the “unprecedented protections” contained in the Modified Joint Protections Orders “are not enough is frivolous.”³⁹ DISH describes the document production and protective order practices in these proceedings as “standard practice for regulatory

²⁸ *Id.* at 4.

²⁹ *Id.* at 5.

³⁰ Letter from Maureen R. Jeffreys, Arnold & Porter LLP, Counsel for AT&T, and William M. Wiltshire, Harris, Wiltshire & Grannis LLP, Counsel for DIRECTV, Inc., to Marlene H. Dortch, Secretary, FCC. MB Docket No. 14-90 (Oct. 27, 2014) (“AT&T-DIRECTV Oct. 27, 2014 Letter”).

³¹ *Id.* at 2.

³² *Id.* at 1-2.

³³ *Id.* at 7.

³⁴ *Id.* at 2.

³⁵ *Id.* at 7 (internal citations omitted).

³⁶ DISH et al. Motion for Further Extension of Time to File Replies, MB Docket No. 14-57 (Oct. 20, 2014) (“DISH et al. Motion”) at 4.

³⁷ *Id.*

³⁸ *Id.* at 5-6.

³⁹ DISH Opposition to Application for Review and Emergency Request for Stay, MB Docket Nos. 14-57, 14-90 (Oct. 29, 2014) (“DISH Opposition”) at 2.

proceedings,”⁴⁰ describing prior Commission cases where similar, although less restrictive, protective orders were used to govern the treatment of highly sensitive commercial information.⁴¹ DISH asserts that the Commission could not grant the Content Companies’ demand that documents be reviewed *in camera* or at the Department of Justice because “[r]eview by DISH and other parties to this proceeding is a critical part of the FCC’s merger review.”⁴²

9. In light of the arguments contained in the record with respect to the Bureau’s prior orders, we take this opportunity to explain more fully certain elements of our prior actions. The Content Companies’ petitions remain pending before the Commission.

III. DISCUSSION

10. As described below, it is absolutely clear that VPCI is highly relevant and indeed central to a meaningful assessment of the issues pending before the Commission in these merger proceedings. Moreover, in contrast to the Content Companies’ claims, the Modified Joint Protective Orders are fully consistent with Commission precedent and the applicable statute, and in fact impose new and greater protections. Despite the implications of the Content Companies’ allegations, the existing orders ensure that only a limited universe of qualified individuals that are not involved in Competitive Decision-Making will be able to review VPCI and Highly Confidential Information in these proceedings, and the established procedures protect against the risk of competitive harm to the Content Companies. Even when an individual is permitted to review VPCI, the individual does so subject to the Modified Joint Protective Orders’ strict limitations on the use of such information and exacting limitations on the means of access thereto. Thus, additional procedures that the Content Companies seek with respect to VPCI are unnecessary in light of the provisions already in place and unworkable given the Commission’s mandate to address transactions transparently and expeditiously. The Bureau clarifies one element of the Modified Joint Protective Orders and modifies another to eliminate possible ambiguity.

11. *VPCI is Highly Relevant to These Merger Proceedings.* A critical issue in each of the transactions under review is how the proposed transaction will alter the incentives and abilities of the resultant companies as they bargain with video programming companies. Allegations of both potential harms and potential benefits rely on anticipated changes in these abilities and/or incentives. The requested documents demonstrate what three distribution companies in one case and two in the other, with very different characteristics (e.g., size, geographical location, vertical integration, possession of “must have” programming) have sought and/or been able to achieve in past negotiations with various video programmers which themselves differ in size, breadth and attractiveness of programming. These documents thus provide what is likely the best evidence available to test the validity of allegations as to how incentives and abilities (and thus potential harms and benefits) vary with size, integration, and other characteristics that the transactions would alter.⁴³

⁴⁰ *Id.* at 6.

⁴¹ *Id.* at 3-7.

⁴² *Id.* at 8. *See also, Response to Objections to Request for Access to Highly Confidential Information and Video Programming Confidential Information*, MB Docket Nos. 14-57, 14-90, p. 4, filed by Free Press (Nov. 3, 2014) (Free Press states the “Content Companies are resorting to dilatory tactics” and that it “will not allow any such tactics to hinder its full participation in these proceedings.”)

⁴³ *See, e.g., Comcast-TWC Opposition* at 152; DISH Sept. 29, 2014 Comments, MB Docket Nos. 14-57, 14-90, at 2 (“parties...have raised concerns about programming costs,” and the “merger review process would be incomplete and one-sided if these parties (or their appropriate outside counsel) were denied the opportunity to review the key documents that would enable them to support their concerns about the Comcast/TWC merger”); American Cable Association Sept. 29, 2014 Comments, MB Docket No. 14-57 at 11 (“[i]nterested parties must have a right to verify AT&T’s claims of significant cost savings”); Letter from Tiffany West Smink, CenturyLink, to Marlene H. Dortch, (continued....)

12. VPCI, includes two critically important and highly relevant elements related to the issues in these proceedings -- price and exclusive contracting terms. AT&T claims that one of the primary benefits it expects to realize from the proposed merger with DIRECTV is the reduced programming costs that are possible with increased scale.⁴⁴ AT&T claims that the significant savings in programming costs from the merger will enable it to deliver more value to consumers and provide stronger competition to cable bundles.⁴⁵ Similarly, Comcast asserts that its merger may lower the combined company's programming costs.⁴⁶ Commenters and petitioners argue in turn that the transactions will increase both Comcast's and AT&T's bargaining leverage with respect to programmers, as well as their ability to use contracting provisions to limit alternative distribution of unaffiliated programming.⁴⁷ The Applicants dispute these allegations and argue that the transactions will not materially alter the relative bargaining positions of parties.⁴⁸

13. In the Comcast proceeding, Comcast's economist opines that the merger "is unlikely to affect the relative bargaining position of Comcast and content companies in any material fashion."⁴⁹ On the other hand, Frontier contends that a merged entity will achieve cost savings at the expense of smaller competitors and customers.⁵⁰ CenturyLink alleges that Comcast will gain unprecedented negotiating power in purchasing content, leading to decreased per-subscriber rates versus other MVPDs.⁵¹ American Cable Association ("ACA") asserts that programmers will be required to accept lower rates to reach Comcast's customers.⁵² NTCA alleges that Comcast will leverage dominance in the pay-TV market, leading to "higher prices and fewer choices for consumers."⁵³ As DISH notes, "[i]nterested parties to this proceeding . . . have the right to challenge [the Applicants'] statements and need access to all the relevant documentation that might allow them to do so. . . . The merger review process would be incomplete and one-sided if these parties (or their appropriate outside counsel) were denied the opportunity to review the

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Secretary, FCC, MB Docket Nos. 14-57, 14-90 (Sept. 29, 2014) at 2 ("the effect of a merger of Comcast and TWC on programming costs – and, in particular, the disparity in programming costs between the post-merger entity and its MVPD competitors – is crucial to this case"); DISH et al. Motion for Further Extension of Time to File Replies (Oct. 20, 2014) at 5-6 ("one or more Petitioners have argued that the Applicants' combined strength in the market would squeeze programmers' margins, forcing programmers to recoup these same margins through higher prices extracted from smaller distributors"). Parties assert that exclusionary provisions in contracts are also cause for concern, as further described below. *See* Cox Petition, MB Docket No. 14-90, at 7-13; DISH Petition, MB Docket No. 14-90, at 12, 14-16, 16-18.

⁴⁴ AT&T-DIRECTV Application at 23-25, 33-37; AT&T-DIRECTV Opposition at 16-19.

⁴⁵ AT&T-DIRECTV Application at 28-29, 33-37.

⁴⁶ *See* Comcast-TWC Application at 79, Exhibit 4, Declaration of Michael J. Angelakis, at 4.

⁴⁷ *See, e.g.*, DISH Petition, MB Docket No. 14-57, at 85-86; TheBlaze Comments, MB Docket No. 14-57, at 9-18; Public Knowledge Petition, MB Docket No. 14-57, at 40-43; COMPTTEL Petition, MB Docket No. 14-57, at 29-30; AAI Comments, MB Docket No. 14-57, at 20-21; CFA et al. Petition, MB Docket No. 14-57, at 18-19; RCN et al. Petition, MB Docket No. 14-57, at 19-24; DISH Petition, MB Docket No. 14-90, at 10-14; Cox Petition, MB Docket No. 14-90, at 7-17; Letter from F. William LeBeau, Holland & Knight LLP, Counsel for ReelzChannel, LLC, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 14-90 (July 30, 2014) ("ReelzChannel Ex Parte Letter") at 2.

⁴⁸ *See* Comcast-TWC Opposition at 149-72; AT&T-DIRECTV Opposition at 49-54.

⁴⁹ Comcast-TWC Opposition at 152.

⁵⁰ Frontier Communications Petition, MB Docket No. 14-57, at 7-8.

⁵¹ CenturyLink Aug. 25, 2014 Comments, MB Docket No. 14-57, at 13.

⁵² ACA Aug. 25, 2014 Comments, MB Docket No. 14-57, at 24-25.

⁵³ NTCA Petition, MB Docket No. 14-57, at 7.

key documents that would enable them to support their serious concerns.”⁵⁴

14. Commenters also express concern that an increase in bargaining power would enable the Applicants to demand exclusionary provisions and other preferential terms from programmers. For instance in the Comcast proceeding DISH argues that “potential price shifting is likely to be compounded by what would be a post-merger strengthening of Comcast’s already powerful ability to negotiate Most Favored Nation (“MFN”) protections in its programming agreements.”⁵⁵ Commenters allege that Comcast is already using contract provisions to limit alternative distribution of unaffiliated programming and that a combined company will have an even greater ability to do so.⁵⁶ And a programmer with both over-the-top and linear channel offerings asserts that “MFNs amplify the monopsony power of the applicants by forcing independent programmers to negotiate with a *de facto* MVPD buying cartel”.⁵⁷ Similarly, in the AT&T-DIRECTV proceeding, commenters allege that DIRECTV uses restrictive contract provisions (e.g., MFNs) to the detriment of small, independent programming networks.⁵⁸ In addition, DISH alleges that a combined AT&T-DIRECTV could use contract provisions in programming agreements to limit alternative distribution of programming by unaffiliated programmers.⁵⁹

15. Importantly, the programmers themselves, in objecting to third-party access to VPCI under the protective orders, can be viewed as conceding the potential relevance of that information to the pending proceedings. They acknowledge that the Commission must have access to VPCI for purposes of evaluating the pending transactions.⁶⁰ The Content Companies state that, “[t]o be clear, this Application for Review does not seek to prevent the Commission or its staff from reviewing the Content Companies’ Carriage Agreements.”⁶¹ And one programmer states that “[u]nderstanding the video programming marketplace and the concessions made by programmers to gain carriage are essential to [the Commission’s work]”.⁶²

16. Given the highly relevant nature of the VPCI, we find that narrowing the scope of documents made available to commenters to some limited subset of the VPCI selected by the Commission after initial review, as the Content Companies advocate, would curtail meaningful participation in the proceedings. If such a pre-vetting process resulted in the exclusion of a large number of potentially relevant documents from review by commenters, it would deprive the commenters of the opportunity to argue that the documents have significance in ways that are not apparent to the Commission when pre-vetting. Such a limitation might require a particularized showing of why certain materials were excluded

⁵⁴ DISH Sept. 29, 2014 Comments, MB Docket Nos. 14-57, 14-90, at 2.

⁵⁵ DISH Petition, MB Docket No. 14-57, at 85-86.

⁵⁶ See, e.g., Public Knowledge Petition, MB Docket No. 14-57, at 41-42; DISH Petition, MB Docket No. 14-57, at 85-86; TheBlaze Comments, MB Docket No. 14-57, at 9-18.

⁵⁷ TheBlaze Comments, MB Docket No. 14-57, at 17.

⁵⁸ ReelzChannel Ex Parte Letter at 2 (July 30, 2014); DISH Petition, MB Docket No. 14-90, at 12.

⁵⁹ DISH Petition, MB Docket No. 14-90, at 14-16. The Applicants produced documents to the Commission, including Highly Confidential and VPCI information. Staff has initiated analysis of the material. Although the volume of material will require substantial time for comprehensive review, preliminary review of the documents confirms the expectation that the documents do reflect use and consideration of a variety of programming acquisition practices that are relevant to an analysis of issues raised in these proceedings.

⁶⁰ Content Companies’ Application for Review at 18 (following a “provisional review,” the Media Bureau should “place only relevant, redacted, and anonymized information in the record”).

⁶¹ *Id.* at 2.

⁶² BBC America Sept. 26, 2014 Comments, MB Docket Nos. 14-47, 14-90, at 2.

from the record, a showing that necessarily could not be meaningfully examined or challenged by objecting parties without access to the full universe of documents that comprise VPCI. On the other hand, if the pre-vetting process did not significantly limit the universe of documents reviewable by commenters, it would have entailed delay and diversion of resources to no productive end.

17. We conclude that, because VPCI is central to some of the most significant and contested issues pending in these transactions, it must be part of the record available to commenters, subject to the multiple protections in the Modified Protective Orders that minimize any risk of competitive harm as a result of the production.⁶³ To decide otherwise would subject the Commission's ultimate decision to approve the applications or designate them for hearing to judicial challenge as arbitrary and capricious in denying interested parties the ability to analyze whether additional documents undercut evidence on which the Commission relied, in violation of the Communications Act and the Administrative Procedure Act.⁶⁴ Accordingly, under applicable regulations and our statutory mandate we will afford qualifying individuals access to the materials that are relevant to an analysis of the issues in these proceedings.

18. *Actions Consistent with Precedent.* In order to fulfill its statutory obligations under the Communications Act⁶⁵ and the Administrative Procedure Act,⁶⁶ the Commission is often obligated to require the production of the most highly sensitive business materials, sometimes from third parties. The Commission has broad authority to require the production of documents and information necessary to inform its decisions in proceedings subject to its jurisdiction.⁶⁷ The Commission delegates authority over certain functions to the Media Bureau, including explicit authority to process applications and to compel production of information relevant to consideration of such matters.⁶⁸ Because the Commission is both obligated and committed to conducting its work with as much transparency as the circumstances allow, in order to permit meaningful and effective public engagement on relevant issues, the Commission often uses protective orders to shield such material from disclosure in a manner that could result in competitive harm. AT&T properly acknowledges that in exercising these powers "[i]t is customary practice of the Commission to issue protective orders to facilitate the filing of highly confidential information."⁶⁹ As we

⁶³ Not satisfied by the mechanism established by the Modified Joint Protective Orders to control review of VPCI and the prohibition on copying, printing, and transmitting VPCI, the Content Companies assert that the Protective Orders should be modified even further to prohibit reviewing parties from taking notes on the materials they view. Content Companies' Application for Review at 14. That contention, if accepted, could even appear to prohibit any reference to VPCI in the reviewing parties' pleadings, lest the reference to the VPCI be seen as a notation. In order for reviewing parties to participate meaningfully in the merger review, we believe it is necessary that they be able to take notes when reviewing materials, an essential step in the preparation and submission of comments or petitions in these proceedings. We decline to impose the requested restriction. We note that the Modified Joint Protective Orders prevent reviewing parties from using or disclosing any Confidential or Highly Confidential Information (which includes VPCI) for any purpose other than participation in these proceedings, in perpetuity, regardless of whether or not the reviewing party made notes when viewing the material and require certification that any notes containing such information have been destroyed shortly after the end of the proceeding.

⁶⁴ We similarly reject the Content Companies' contention that qualified individuals should be required to demonstrate a particularized showing of need for access to VPCI does. This is not a private dispute in which only specific individuals have an interest to protect. The Commission's procedures are premised on informed participation by the public, while precluding access to certain Highly Confidential Information by persons whose employment or activities make such access inappropriate.

⁶⁵ Communications Act of 1934, as amended, 47 U.S.C. §§ 151 *et seq.*

⁶⁶ Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*

⁶⁷ See 47 U.S.C. §§ 154(i) & (j), 214, 310(d); 5 U.S.C. § 552(b)(4).

⁶⁸ 47 C.F.R. §§ 0.283; 0.61(h), (j).

⁶⁹ AT&T-DIRECTV Oct. 27, 2014 Letter at 2; *see also* DISH Opposition at 3-7.

noted in the *VPCI Order*, document productions in Commission proceedings involving highly sensitive business material, including the types of documents and information at issue in these proceedings, under protective orders substantially similar to the Modified Joint Protective Orders, are not unique to the pending merger transactions.⁷⁰

19. The Commission first adopted a protective order similar to the ones at issue here in the as early as 1998 in the MCI/Worldcom proceeding.⁷¹ In that case, the Commission sought to protect information concerning “highly sensitive, vital competitive information, including customer names, usage patterns, locations and traffic volumes.”⁷² Since that time, the Commission has adopted similar procedures in many proceedings which have involved highly competitively sensitive information.⁷³ For instance, in reviewing Comcast and Time Warner’s purchase of Adelphia’s cable systems, the Commission requested competitively sensitive information, including programming agreements, from the cable company applicants.⁷⁴ The Commission made those documents available for review by interested parties subject to the protections of a protective order.⁷⁵ The Modified Joint Protective Orders adopted here offer protections additional to those in *Adelphia*, including re-acknowledgment requirements, objection procedures, and access and copying restrictions. Similarly, in considering Liberty Media’s application to acquire an interest in DIRECTV from News Corporation, the Commission required the production of affiliation agreements, retransmission consent agreements and related documents, all subject to the protections of an order similar to the original Joint Protective Orders in these proceedings.⁷⁶ In other examples, in both the Cingular/AT&T Wireless and AT&T/T-Mobile merger proceedings, the Commission adopted similar although less restrictive protective orders governing treatment of some of the most highly sensitive business information produced by third parties -- detailed subscriber, pricing, and revenue data (including billing records).⁷⁷

⁷⁰ See *VPCI Order* at ¶ 14 n. 32.

⁷¹ *Applications of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, CC Docket No. 97-211, Order Adopting Protective Order, 13 FCC Rcd 11166 (1998) (“*WorldCom-MCI Protective Order*”).

⁷² *WorldCom-MCI Protective Order*, 13 FCC Rcd 11166, 11168.

⁷³ ACA stated in comments that the procedures established in this proceeding even prior to issuance of the Modified Joint Protective Orders have been used “time and time again in similar proceedings [and] are sufficient.” ACA Sept. 29, 2014 Comments, MB Docket Nos. 14-57, 14-90, at 5.

⁷⁴ Links to copies of the Information and Document Request and the cover letters to Comcast, Time Warner, and Adelphia can be found at: http://transition.fcc.gov/transaction/tw-comcast_adelphia.html.

⁷⁵ See, e.g., *Applications for Consent to the Assignment and/or Transfer of Control of Licenses Adelphia Communications Corporation (and Subsidiaries, Debtors-In-Possession), Assignors, to Time Warner Cable Inc. (Subsidiaries), Assignees, Adelphia Communications Corporation, (and Subsidiaries, Debtors-In-Possession), Assignors and Transferors, to Comcast Corporation (Subsidiaries), Assignees and Transferees*, Second Protective Order, 20 FCC Rcd 20073 (2005) (“*Adelphia Second Protective Order*”) (establishing procedures for review of competitively sensitive information, including programming agreements, by interested parties).

⁷⁶ See *News Corp. and the DIRECTV Group, Inc., Transferors, and Liberty Media Corp. Transferee; For Authority to Transfer Control*, MB Docket No. 07-18, Information and Document Request for News Corporation at 4-5 (rel. June 15, 2007); *General Motors Corp. and Hughes Electronics Corp., Transferors, and The News Corp. Limited, Transferee, for Authority to Transfer Control*, MB Docket No. 03-124, Initial Information and Document Request at 3 (rel. Jul. 8, 2003).

⁷⁷ See *Applications of AT&T Inc. and Deutsche Telekom AG for Consent to Assign or Transfer Control of Licenses and Authorizations*, Second Protective Order (Revised), 26 FCC Rcd 8801 (2011); *Applications for the Transfer of* (continued....)

20. Indeed, the Commission has successfully used similar protective orders in all manner of proceedings in which it has obtained commercial information of the most sensitive nature for review by the Commission and by interested parties.⁷⁸ Currently, the Commission has no fewer than 10 active proceedings involving the production of Highly Confidential Information that is necessary and relevant to the evaluation of various issues and various industries and is produced subject to protective orders similar to or less restrictive than the Modified Joint Protective Orders.⁷⁹ The additional copying and distribution restrictions placed on VPCI in the pending transactions do not suggest that VPCI is qualitatively different from a competitive standpoint than other Highly Confidential Information. Those restrictions were imposed because of the volume and breadth of information necessary for production in these proceedings. As Commission officials have properly noted in describing the importance of the Modified Protective Orders in these proceedings, “[a]ccess to the Applicants’ contracts could allow someone to obtain a detailed, industry-wide overview of the current and future programming market. Indeed, because the AT&T and Comcast transactions are pending simultaneously, the ability to capture an understanding of the programming marketplace is greater, and potentially more troublesome, than if only one were before us.”⁸⁰ Similar restrictions have been imposed by the Commission previously when a significant amount of industry data was required for the Commission to accomplish its statutory mission.⁸¹

21. Furthermore, in these proceedings, the Applicants have already produced documents subject to the Joint Protective Orders and Modified Joint Protective Orders that include Highly Confidential Information, including contracts and pricing information.⁸²

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Control of Licenses and Authorizations from AT&T Wireless Services, Inc. and Its Subsidiaries to Cingular Wireless Corporation, Order, 19 FCC Rcd 4793 (2004); *See also*, AT&T-DIRECTV Oct. 27, 2014 Letter at 2-3.

⁷⁸ *See, e.g., Applications of Cricket License Company, LLC, et al., Leap Wireless International, Inc., and AT&T Inc. for Consent to Transfer Control of Authorizations*, Second Protective Order, 28 FCC Rcd 11803 (2013); *Applications of Comcast Corp., General Electric Co. and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licenses*, Second Protective Order, 25 FCC Rcd 2140 (2010).

⁷⁹ *See, e.g., Special Access for Price Cap Local Exchange Carriers AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25, Order and Data Collection Protective Order, DA 14-1424, rel. Oct. 1, 2014 (“*Special Access Protective Order*”)(requiring submission of data regarding locations with connections, prices charged to customers at the circuit-level, maps showing fiber routes and points of interconnection, revenues and expenditures); *Iridium Constellation LLC Petition for Rulemaking to Promote Expanded Mobile Satellite Service in the Big LEO MSS-band Terrestrial use of the 2473-2495 MHz Band for Low-Power Mobile Broadband Networks; Amendments to Rules for the Ancillary Terrestrial Component of Mobile Satellite Service Systems*, IB Docket 13-213, Joint Protective Order, DA 14-1500, rel. October 16, 2014; *Petition of Telcordia Technologies, Inc. to Reform or Strike Amendment 70, to Institute Competitive Bidding for Number Portability Administration and to End the NAPM LLC’s Interim Role in Number Portability Administration Contract*, WCB Docket No. 09-109, CC Docket No. 99-116, Revised Protective Order, 29 FCC Rcd 7592.

⁸⁰ *Transaction Reviews and the Public Interest*, by Bill Lake, Chief, Media Bureau, Jon Sallet, General Counsel & Julie Veach, Chief, Wireline Competition Bureau, Oct. 7, 2014. <http://www.fcc.gov/blog/transaction-reviews-and-public-interest>

⁸¹ *Special Access Protective Order*, *supra*, n.79.

⁸² For instance, Comcast notes that it has already submitted: “detailed video, broadband, and telephone subscriber data, detailed information regarding its content acquisition practices. . . detailed data regarding the location of and technology used to support its physical plant; detailed analyses and assessments of current and future competitive entry; documents regarding its current and future business and strategic plans and budgets; . . . detailed information and analyses regarding its interconnection relationships and practices, including copies of its interconnection agreements; . . .detailed information and analyses regarding NBCUniversal’s content distribution relationships and (continued....)”

22. Accordingly, the Commission's protective orders, including the protective orders adopted in these proceedings, are based on years of Commission experience and represent a time-tested means to protect highly sensitive information, including that of parties not directly involved in a transaction under review.⁸³ These long-established procedures have worked successfully in the past and can be relied on here. Moreover, in the case of VPCI, the Modified Joint Protective Orders afford additional category-specific protections that should further allay concerns about access to and use of such information.⁸⁴

23. *Actions Consistent with Trade Secrets Act.* The Content Companies assert that the Trade Secrets Act and the Commission rules prohibit the actions taken in these proceedings.⁸⁵ Nothing in the Commission's rules or the Trade Secrets Act precludes the use of the Modified Protective Orders with respect to VPCI in these proceedings. The Commission has long recognized the importance of collecting certain competitively sensitive information and of making such information available for review by interested parties subject to appropriate procedural safeguards, where the public interest in providing access to such information outweighs countervailing interests in preventing disclosure.⁸⁶ Sections 0.457(d)(1) and 0.457(d)(2)(i) of the Commission's rules constitute the legal authority for the disclosure of such competitively sensitive information under the Trade Secrets Act.⁸⁷ These rules permit the

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practices, including its agreements with MVPDs." Comcast/TWC/Charter Oct. 20, 2014 Letter at 6. AT&T notes that "[b]eginning with SBC Communications' acquisition of Ameritech in 1998, and continuing through subsequent acquisitions of AT&T Wireless, AT&T Corp., BellSouth, and many other companies, AT&T has routinely produced its most sensitive documents to the Commission for review by staff and qualified third parties." AT&T-DIRECTV Oct. 27, 2014 Letter at 2. AT&T's productions have included "strategic planning, current and future plans to compete for customers, pricing, marketing, merger and acquisition valuation, and many other subjects that are universally recognized as competitively-sensitive." *Id.*

⁸³ Notably, the Applicants and certain other parties in the Comcast-Time Warner Cable-Charter transaction proceeding have not found the safeguards of our protective orders to be lacking. For instance, pursuant to the *initial* Joint Protective Order in that proceeding, the Applicants collectively submitted "several million pages of documents and extensive responses to Commission information requests, many of which contain [Highly Confidential Information], including some of the Applicants' most competitively sensitive business information," and other parties (e.g., Netflix, DISH, and Cogent) have done so as well. Comcast/TWC/Charter Oct. 20, 2014 Letter at 3.

⁸⁴ See Comcast-TWC Modified Joint Protective Order at ¶ 10; AT&T-DIRECTV Modified Joint Protective Order at ¶ 10. The D.C. Circuit has twice affirmed Commission decisions not to include certain information in the administrative record in a license transfer proceeding where the Commission's decision was based on relevance. Those cases rest on the Court's determination that the agency was within its discretion in weighing the relevance and significance of the information to making its decision. See *SBC v. FCC*, 56 F.3d 1484, 1496 (D.C. Cir. 1995) ("The Commission's manner of proceeding was well within its procedural discretion in implementing the Communications Act. . . . The Commission is fully capable of determining which documents are relevant to its decision-making [citations omitted]."); *Consumer Federation v. FCC*, 348 F.3d 1009, 1013 (D.C. Cir. 2003) (affirming the FCC's decision not to include the "AOL ISP agreement" in the record, but noting "[i]f [the consumer groups] needed the AOL ISP Agreement to make that argument [that the Commission should change its policy], perhaps the Commission would have erred in excluding it."). As explained above, VPCI is highly and unquestionably relevant to the Commission's decision-making in these two transactions.

⁸⁵ Content Companies' Application for Review at 14-23.

⁸⁶ See generally *Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, Report and Order, 13 FCC Rcd 24816 (1998) ("1998 Confidential Information Order").

⁸⁷ *Id.* at 24820, ¶ 5 (citing *Northern Television v. F.C.C.*, 1 Gov't Disclosure Serv (P-H) ¶ 80,124 (No. 79-3468) (D.D.C. Apr. 18, 1980); *Chrysler Corp. v. Brown*, 441 U.S. 281, 301-03 (1979)); 47 C.F.R. §§ 0.457(d)(1), 0.457(d)(2)(i). The Commission's statutory authority to adopt a rule that permits disclosure of materials covered by the Trade Secrets Act is grounded in Section 4(j) of the Communications Act. See *Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, Notice of Inquiry and Notice of Proposed Rulemaking, 11 FCC Rcd 12406, 12413-15, ¶¶ 14-15 (1986); 47 U.S.C. § 4(j) ("[t]he Commission may (continued....)

disclosure of such information on a “persuasive showing” of the reasons in favor of its release.⁸⁸ The Commission permits disclosure where the Commission has identified a compelling public interest in disclosure.⁸⁹ The rules also contemplate that the Commission will engage in a balancing of the interests favoring disclosure and nondisclosure.⁹⁰ Historically, the Commission has relied on special instruments, such as protective orders, to serve the interests in disclosure while preserving the confidentiality of competitively sensitive materials, rather than excluding relevant documents from the record.⁹¹ Given the highly relevant nature of VPCI to the pending transactions, we conclude that the need for interested parties to have access to that information in order to participate meaningfully in the transactions’ review constitutes a compelling public interest in favor of disclosure. Moreover, the Modified Joint Protective Orders provide the proper balance between, on the one hand, the need to provide access to VPCI and, on the other hand, the legitimate interests of broadcasters and programmers in preventing the dissemination and misuse of their VPCI.

24. *Highly Confidential Information Is Available Exclusively to Qualified Individuals That Have Executed an Acknowledgment.* The Content Companies repeatedly suggest that the VPCI materials will be accessible to any member of the public. When referencing access to VPCI by qualified participants in this proceeding, the Content Companies use overbroad terms such as “public access,” “public disclosure,” “public inspection,” “publicly available,” and even “mass public disclosure.”⁹² Despite these mischaracterizations, the Content Companies are well aware that the general public will not have access to Highly Confidential Information.⁹³ The Modified Joint Protective Orders and the *VPCI Order* make it abundantly clear that only a very restricted category of people will have permission to inspect VPCI materials and that they may do so only under narrowly prescribed circumstances.

25. As the Content Companies acknowledge,⁹⁴ the Modified Joint Protective Orders limit access to Outside Counsel of Record and Outside Consultants (and their employees and agents) who do not engage in “Competitive Decision-Making.”⁹⁵ As the orders stressed, “Competitive Decision-Making” is defined as “a person’s activities, association, or relationship with any of his clients involving advice about or participation in the relevant business decisions or the analysis underlying the relevant business decisions of the client in competition with or in a business relationship with the Submitting Party” or with a third party, where the third party is claiming a confidentiality interest in the information at issue.⁹⁶ This

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conduct its proceedings in such a manner as will best conduce to the proper dispatch of business and to the ends of justice”).

⁸⁸ *1998 Confidential Information Order* at 24820, ¶ 5 (citing 47 C.F.R. §§ 0.457(d)(1), 0.457(d)(2)(i)).

⁸⁹ *1998 Confidential Information Order* at 24822-23, ¶ 8 (citing *MCI Telecommunications Corp.*, 58 RR 2d 187, 190 (1985)).

⁹⁰ *1998 Confidential Information Order* at 24822, ¶ 8 (citing *F.C.C. v Schreiber*, 381 U.S. 279, 291-92 (1965)).

⁹¹ *1998 Confidential Information Order* at 24823-24, 24831 ¶¶ 9, 21.

⁹² See, e.g., Content Companies’ Request for Stay at i, ii, 2, 3, 5, 6, 7, 9, 16, 17, 20, 21, 24.

⁹³ A document labeled “Highly Confidential” or “Confidential” under the Modified Joint Protective Orders is automatically designated as one “not be made routinely available for public inspection.” Comcast-TWC Modified Joint Protective Order at ¶ 4; AT&T-DIRECTV Modified Joint Protective Order at ¶ 4.

⁹⁴ Content Companies’ Request for Stay at 11.

⁹⁵ See Comcast-TWC Modified Joint Protective Order at ¶¶ 7, 13 (emphasis added); AT&T-DIRECTV Modified Joint Protective Order at ¶¶ 7, 13 (emphasis added).

⁹⁶ Comcast-TWC Joint Protective Order at 3688, ¶ 2; AT&T-DIRECTV Joint Protective Order at 6047, ¶ 2; Comcast-TWC Modified Joint Protective Order at ¶ 2; AT&T-DIRECTV Modified Joint Protective Order at ¶ 2.

restriction, among other things, excludes persons whose activities on behalf of their clients would place them in a situation where their obligations under a protective order are likely to be put at risk, even if unintentionally or unconsciously. We have noted that, in the context of VPCI, any individual who participates in the negotiation of programming contracts likely has been involved in “Competitive Decision-Making,” and allowing such an individual to review the documents would raise the very problem the restriction is designed to address.⁹⁷ To ensure awareness of the special protections in the Modified Joint Protective Orders those orders require any qualified individual to file a supplemental Acknowledgment of Confidentiality form with the Commission and to serve it on the parties submitting VPCI.⁹⁸ As an added safeguard, either party to a VPCI agreement (and related VPCI material) has the right to object to the disclosure of the materials to a particular individual.⁹⁹ Moreover, as noted, the Modified Joint Protective Orders impose additional restrictions with respect to the handling of VPCI, beyond what is ordinarily required for Highly Confidential Information in Commission protective orders, including requiring that the documents be reviewed in electronic format only and prohibiting the printing, copying, or electronic transmission of VPCI materials.¹⁰⁰

26. The individuals who filed Acknowledgments under the Modified Joint Protective Orders represent only a relatively small number of entities as compared to the general public. And some of those entities are public interest organizations and therefore not competitors in the media industry. Many of the Acknowledgments were filed by outside counsel and consultants for the Applicants themselves.¹⁰¹ Therefore, the actual universe of potential reviewing parties is extremely limited as compared with disclosure to the general public as the Content Companies imply.¹⁰² The Content Companies, however, warn that Outside Counsel of Record and Outside Consultants often play a substantive role in the negotiation of a client’s carriage agreements and provide advice regarding programming rates and other highly sensitive terms and conditions.¹⁰³ Yet we have already made clear and re-emphasize here that such activity constitutes Competitive Decision-Making and therefore would disqualify such individuals as Outside Counsel of Record or Outside Consultants under the Modified Joint Protective Orders¹⁰⁴ We

⁹⁷ *VPCI Order* at para 8. *See also* AT&T-DIRECTV Oct. 27, 2014 Letter at 7 (highlighting that the Modified Joint Protective Orders make it clear that “no employees of any customer or competitor” of the Content Companies and “no outside counsel or consultant who engages in ‘competitive decision-making’ for clients” can gain access to Highly Confidential Information (emphasis in original)).

⁹⁸ Comcast-TWC Modified Joint Protective Order at ¶ 7; AT&T-DIRECTV Modified Joint Protective Order at ¶ 7.

⁹⁹ *See, e.g.*, Comcast-TWC Modified Joint Protective Order at ¶ 8; AT&T-DIRECTV Modified Joint Protective Order at ¶ 8.

¹⁰⁰ Comcast-TWC Modified Joint Protective Order at ¶¶ 10-11; AT&T-DIRECTV Modified Joint Protective Order at ¶¶ 10-11.

¹⁰¹ *See* AT&T-DIRECTV Oct. 27, 2014 Letter at n.17 (noting the Content Companies “have sought to block outside counsel and outside consultants who represent Applicants from obtaining access to VPCI, even though the only VPCI that has been submitted . . . is Applicants’ own VPCI. . . . [These] broad objections are meritless and should be dismissed.”)

¹⁰² *See* AT&T-DIRECTV Oct. 27, 2014 Letter at 5 (stating that of the 32 individuals other than the Applicants’ representatives that signed Acknowledgments to the Modified Joint Protective Orders in the AT&T-DIRECTV proceeding, only 25 are seeking access to VPCI, “and the vast majority of those individuals are lawyers with strict ethical and professional obligations to comply with orders from federal regulators.”); AT&T-DIRECTV Oct. 31, 2014 Letter at 2 (revising its count of individuals seeking access to VPCI to 21).

¹⁰³ Content Companies’ Request for Stay at 11.

¹⁰⁴ *See* Comcast-TWC Modified Joint Protective Order at ¶ 2; AT&T-DIRECTV Modified Joint Protective Order at ¶ 2.

appreciate the highly sensitive nature of the VPCI materials and the competitive harm that could result from their broad disclosure. Accordingly, the Modified Joint Protective Orders reinforce and strengthen the preceding protective orders by specifically highlighting the restrictions on who may execute an Acknowledgment in these proceedings and by providing added protections against improper handling of VPCI.

27. The Content Companies assert that the Media Bureau's protective orders do not account for the possibility that outside agents may later become employees of the Content Companies' competitors and distributors.¹⁰⁵ They express concern that such outside agents will use, even if inadvertently or subliminally, their knowledge of the VPCI materials to the benefit of their new employer.¹⁰⁶ We believe this risk is minimized by: (1) the signed Acknowledgment agreement not to divulge VPCI, subject to severe penalties for violation; (2) the obligation to use the information solely for the preparation and conduct of the applicable merger proceeding; and (3) the likely difficulty of accurately recalling the precise details of complex and voluminous submissions.¹⁰⁷ In any event, it is reasonable to expect a certain "cooling off" period between when an outside agent has access to VPCI materials and when the agent seeks alternative employment that would have rendered him ineligible to review the VPCI materials at the time of the proceeding. In the *C-NBCU Order*, the Commission offered a model protective order for arbitration proceedings that includes a one-year employment restriction for outside agents who review highly confidential information.¹⁰⁸ We view this provision as one indication of what would constitute a reasonable lapse of time before an outside agent may seek alternative disqualifying employment.

28. *Additional Production Procedures are Unnecessary or Unworkable.* The Content Companies argue that they should have an opportunity to review and object to any proposed production on the ground that their confidential information has been erroneously designated before such information is made publicly available. They propose that the Applicants be required to notify them before their sensitive information is produced. And they assert that all documents containing VPCI must be redacted and anonymized. These procedures are unnecessary or unworkable, as described below.

29. Allowing the Content Companies to prescreen the Applicants' document productions to confirm accurate and comprehensive designation of VPCI and Highly Confidential Information would be unworkable. Allowing scores of third parties each to review, pre-production, several million documents contained in the productions of five separate Applicants would grind the transaction review process to a halt and create insurmountable logistical challenges. Even if such a process could be achieved, in order for each Content Company to determine that nothing had been improperly designated, it would have to have access to the entire production, in which case each programmer's representatives would necessarily

¹⁰⁵ Content Companies' Request for Stay at 11-12.

¹⁰⁶ *Id.* at 11-13.

¹⁰⁷ After the conclusion of the proceeding, individuals cannot rely on the documents or notes reflecting the content of documents to refresh their recollection about sensitive information. The Modified Joint Protective Orders forbid individuals who gain access to Highly Confidential Information, including VPCI, from retaining those materials after the conclusion of these proceedings. All such materials must be returned or destroyed within two weeks of the conclusion of the proceeding. The orders state "No material whatsoever containing or derived from Confidential and Highly Confidential Information may be retained." They require certification that all such materials have been returned or destroyed and highlight that "[s]uch certification shall be made pursuant to 28 U.S.C. section 1746 and is subject to 18 U.S.C. section 2001." See Comcast-TWC Modified Joint Protective Order at ¶ 22; AT&T-DIRECTV Modified Joint Protective Order at ¶ 22.

¹⁰⁸ *Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licenses*, Memorandum Opinion and Order, MB Docket No. 10-56, 26 FCC Red 4238, 4422-23, App. E at 7(d) (2011).

have access to the VPCI of other programmers, the very eventuality the Content Companies have sought to avoid and necessitating the use of a protective order exactly like the one already in place. Furthermore, this additional prescreening by multiple additional parties would serve to delay unnecessarily and prejudicially the Commission's review of these transactions.

30. In any event, we believe that the Applicants' method of identifying and classifying material as VPCI is more likely to be over-inclusive than under-inclusive, thereby minimizing any risk that VPCI has not been designated. The Applicants have employed sophisticated document management software, text searches, discovery analytics, and dozens of attorneys to identify and segregate relevant documents. Comcast, TWC, and Charter have conducted additional reviews of potentially responsive documents in their respective productions to determine if the documents contain any VPCI. They explain that if such "documents contained information relating to programming contracts, terms, or negotiations of same, the Applicants instructed their document review teams to designate those documents as containing VPCI. In addition, where documents were ambiguous but could be understood to convey limited information about programming negotiations or contract terms, reviewers were directed to lean towards designated such documents as containing VPCI as well."¹⁰⁹ Similarly, AT&T and DIRECTV explain that they "used a multipronged approach" to identify VPCI, including "human review" and "multiple rounds of broadly inclusive electronic searches fine-tuned with significant attorney review."¹¹⁰ They describe an "intensive and thorough" process that required "hundreds of attorney reviewers and support from experts at Applicants' document vendors." They employed "sophisticated and modern electronic capabilities to ensure [proper identification of VPCI]." These steps included carefully training and specifically instructing reviewers "to designate documents as VPCI if they are video programming distribution agreements or a part of an agreement or if they contain detailed description of one or more provisions of such an agreement, including but not limited to price, terms or information relating to the negotiation of such an agreement."¹¹¹ We believe that the approaches the Applicants describe are not only reasonable but, if anything, are likely to result in the over-inclusion of documents in the VPCI category. By erring on the side of granting the enhanced protections to more material rather than less, the Applicants are further safeguarding the interests of third parties, such as the Content Companies.

31. At least some of the contracts contained in the VPCI contain non-disclosure provisions that recognize production may be required if legally compelled.¹¹² However, the Applicants may face the threat of potential lawsuits from third parties – including, but not limited to, the Content Companies – if they disclose information that they previously agreed to hold confidential per the terms of an agreement. Thus, while the Content Companies allege that the Orders give the Applicants "little incentive to ensure that the Content Companies' proprietary interests are protected,"¹¹³ we believe that in fact the Applicants have every incentive to protect the confidential information of third parties, and, as indicated previously, we expect they will use "all reasonable efforts to identify and segregate"¹¹⁴ documents containing VPCI

¹⁰⁹ Comcast/TWC/Charter Oct. 20, 2014 Letter at 4.

¹¹⁰ AT&T-DIRECTV Oct. 27, 2014 Letter at 6.

¹¹¹ *Id.* AT&T and DIRECTV report that such efforts to identify VPCI required approximately 4,500 hours of reviewer time and cost over \$1,000,000. *Id.*

¹¹² ACA notes that "it is common for programming agreements to include an exception to the contract's non-disclosure agreement [] that permits them to be disclosed to government officials upon request." ACA Sept. 29, 2014 Comments, MB Docket No. 14-57 at 7.

¹¹³ Content Companies' Application for Review at 12.

¹¹⁴ *VPCI Order* at n.30.

in these proceedings.¹¹⁵

32. Moreover, the entirety of the Applicants' document productions in these proceedings is Confidential or Highly Confidential Information and subject to the restrictions set forth in the protective orders. Indeed, the types of documents that would disclose VPCI would be Highly Confidential Information. Thus, documents the Applicants produce, even if not segregated as VPCI, would not be made publicly available. Rather, such documents would be designated as Highly Confidential in any regard and viewable only by a limited universe of individuals not involved in Competitive Decision-Making. In addition, the special process for VPCI was created due to the uniquely broad and detailed industry-wide information being made available in two simultaneous reviews. Inadvertent failures to designate some documents as VPCI, even if they were to occur, would be so limited that the normal protections for Highly Confidential Information should be adequate.

33. Despite the Content Companies' complaints, we find that there is no cause for additional notice provisions with regard to access to their VPCI.¹¹⁶ Consistent with their contractual obligations under the respective agreements, the Applicants already give notice to the relevant third parties – be they Content Companies or otherwise – when they are asked to produce the agreements in connection with the proposed transactions. Furthermore, as a result of the carefully crafted procedures established in the Modified Joint Protective Orders, the Content Companies, along with all other interested parties, have notice each time an individual files a certification under the Modified Joint Protective Orders seeking to gain access to Highly Confidential Information. Thus, the Content Companies have advance notice of every individual seeking access to Highly Confidential Information, along with an opportunity to object to that individual's access, as evidenced by their objections to date. Thus, the assertion that the Content Companies require additional notice in order to know that their confidential information could be produced in connection with the merger review is simply incorrect.

34. While the Content Companies have asserted that the Commission should require that any VPCI included in the record be redacted and anonymized to remove identifying information, such an approach is unrealistic and inappropriate.¹¹⁷ First, the Applicants have stated that it would be unworkable to prepare redacted or anonymized versions of the hundreds of thousands of pages of programming contract materials that have been produced, and we concur.¹¹⁸ In addition, such redaction would have to be extensive to ensure that the parties and programming involved are not identifiable from the material, which then, in turn, would likely render the material unusable for purposes of analyzing the issues pending in the merger. Understanding the parties (e.g., size, vertical integration, possession of "must-have" programming, etc.), price and non-price terms, and the programming content involved in a particular agreement or negotiation is essential for parties to properly assess the significance of the

¹¹⁵ Indeed, the Applicants have confirmed this throughout the proceedings. *See, e.g.*, Letter from Maureen R. Jeffreys, Counsel for AT&T, and William M. Wiltshire, Counsel for DIRECTV, Inc. to Marlene H. Dortch, Secretary, FCC, MB Docket No. 14-90 (Oct. 16, 2014) at 1-2 ("Applicants have every interest in assuring that the confidential information produced to the Commission be appropriately safeguarded, as the overwhelming majority of highly sensitive information in the docket is information that belongs to Applicants themselves and includes highly sensitive details of their business and strategy. That is no less true of the programming agreements and related materials at issue in the Application for Review." "As parties with an equal interest in the protection of the materials at issue in the Application for Review, Applicants understand and take seriously the terms of the Modified Joint Protective Order ("MJPO"), including the obligations to identify and segregate documents containing Video Programming Confidential Information pursuant to the Order adopting the MJPO.") (citations omitted).

¹¹⁶ *See* Content Companies' Request for Stay at 10.

¹¹⁷ Content Companies' Application for Review at 11.

¹¹⁸ *See* Comcast/TWC/Charter Oct. 20, 2014 Letter at n. 11.

material, and thus such identifying terms and details are highly relevant to a reviewing party's consideration. Thus, even if anonymization were feasible, it would not be appropriate as it would undermine the utility of making such documents available for limited review in the first place.

35. *Designation of Highly Confidential Material is Mandatory.* The Content Companies object to language in paragraph 3 of the Modified Joint Protective Orders that states that “[a] Submitting Party *may* designate as Highly Confidential only those types of information described in Appendix A.”¹¹⁹ Their confusion is perhaps understandable but their conclusion is incorrect. The instruction is permissive because not all of the information described in Appendix A qualifies as VPCI. However, the Modified Joint Protective Orders are intended to ensure that the subset of documents described in Appendix A that contain VPCI are designated as Highly Confidential and are subject to the additional restrictions applicable to VPCI. Submitting Parties do not have the liberty to treat VPCI materials otherwise. To that end, we clarify that all VPCI materials must be labeled Highly Confidential and must be handled in accordance with the Modified Joint Protective Orders’ prescribed procedures for VPCI.¹²⁰

36. *Objections Do Not Indefinitely Stay Proceedings.* In addition, we hereby amend paragraph 8 of the Modified Joint Protective Orders to remove any doubt about whether a party is able to suspend indefinitely another party’s (or every other party’s) effective participation in the proceeding simply by filing an objection.¹²¹ We replace the second to last sentence of that paragraph with the following and make conforming edits to other portions of the paragraph:

A person subject to an objection shall not have access to the relevant Confidential Information or Highly Confidential Information until five (5) business days after any objection is resolved by the Bureau in favor of the person seeking access.

We believe this approach provides an appropriate balance between providing ample opportunity for the consideration of legitimate objections and proceeding with the merger review in a timely manner.¹²² Accordingly, the informal 180-day clock will restart when access to Highly Confidential Information is permitted pursuant to paragraph 8 of the Modified Joint Protective Orders, as amended herein. In addition, we will issue a public notice establishing dates for respective pleading cycles in each merger proceeding.

¹¹⁹ Comcast-TWC Modified Joint Protective Order at ¶ 3 (emphasis added); AT&T-DIRECTV Modified Joint Protective Order at ¶ (emphasis added).

¹²⁰ One of the applicable restrictions prohibits reviewing parties from making copies of any documents containing VPCI. Comcast-TWC Modified Joint Protective Order at ¶ 10; AT&T-DIRECTV Modified Joint Protective Order at ¶ 10. Therefore, the concern of the Content Companies is misplaced with respect to language in paragraph 6 of the Modified Joint Protective Order providing the option to Submitting Parties to prohibit the copying of certain Highly Confidential documents. *See* Content Companies’ Request for Stay at 8 n.3. The blanket copying restriction for all VPCI supersedes the ability of Submitting Parties to apply copying restrictions selectively to other Highly Confidential materials. *See* Comcast-TWC Modified Joint Protective Order at ¶ 6; AT&T-DIRECTV Modified Joint Protective Order at ¶ 6 (subjecting the instructions in paragraph 6 to the copying prohibition in paragraph 10).

¹²¹ Comcast-TWC Modified Joint Protective Order at ¶ 8; AT&T-DIRECTV Modified Joint Protective Order at ¶ 8.

¹²² We do not believe that this modification to the language of the Modified Joint Protective Orders alters any rights or obligations of individuals executing Acknowledgments and thus it is not necessary for individuals to sign new Acknowledgments as a result of this change.

IV. ORDERING CLAUSES

37. Accordingly, **IT IS ORDERED**, that pursuant to the authority contained in sections 4(i), 214 and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 214 and 310(d), Section 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4), and authority delegated under section 0.283 of the Commission's rules, 47 C.F.R. § 0.283, the above amendment to the Modified Joint Protective Orders are adopted.

38. **IT IS FURTHER ORDERED** that, pursuant to section 1.102(b)(1) of the Commission's rules, 47 C.F.R. § 1.102(b)(1), this Order SHALL BE EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

William T. Lake
Chief, Media Bureau