Before the
Federal Communications Commission
Washington, DC 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

Adopted: November 10, 2014 **Released: November 10, 2014**

By the Commission: Commissioners Pai and O'Rielly dissenting and issuing separate statements.

1. We have before us two requests for stay and two applications for review seeking review of the Amended Modified Joint Protective Orders, the predecessor Modified Joint Protective Orders, and the Bureau orders adopting them, in the above-captioned proceedings.[1] We deny the applications for review and, for the reasons stated by the Media Bureau in its November 4, 2014, *Order on Reconsideration*,[2] affirm the adoption of the Amended Modified Joint Protective Orders in these proceedings[3] with one modification.

2. We hereby order that Reviewing Parties may review Video Programming Confidential

[1] Emergency Request for Stay of Media Bureau Order and Associated Modified Protective Orders, filed by CBS Corporation, Discovery Communications, Scripps Networks Interactive, Inc., The Walt Disney Company, Time Warner Inc., TV One, LLC, Twenty First Century Fox, Inc., Univision Communications Inc., and Viacom Inc. (together, the "Content Companies") (filed Oct. 14, 2014); Emergency Request for Stay, field by the Content Companies (filed Nov. 7, 2014); Application for Review, filed by the Content Companies (filed Oct. 14, 2014); Application for Review, filed by the Content Companies (filed Nov. 7, 2014).

[2] *Applications of Comcast Corp. and Time Warner Cable Inc. for Consent to Assign or Transfer Control of Licenses and Authorizations and Applications of AT&T, Inc. and DIRECTV for Consent to Assign or Transfer Control of Licenses and Authorizations*, Order on Reconsideration, DA 14-1601 (Media Bur., rel. Nov. 4, 2014).

[3] *Applications of Comcast Corp. and Time Warner Cable Inc. for Consent to Assign or Transfer Control of Licenses and Authorizations*, Amended Modified Joint Protective Order, DA 14-1604 (Media Bur., rel. Nov. 4, 2014); *Applications of AT&T, Inc. and DIRECTV for Consent to Assign or Transfer Control of Licenses and Authorizations,* Amended Modified Joint Protective Order, DA 14-1602 (Media Bur., rel. Nov. 4, 2014) (together, the "Amended Modified Joint Protective Orders").

Information under the Amended Modified Joint Protective Orders only at the offices of the Submitting Party's Outside Counsel of Record or at other secure locations that may be established by the Submitting Party, as these terms are used in the Amended Modified Joint Protective Orders. Reviewing Parties may not review Video Programming Confidential Information through remote access. We instruct the Media Bureau to issue new protective orders in these proceedings consistent with this Order by the close of business one business day following the release of this Order.

3. Given our denial of the applications for review, we also deny the requests for stay. It is our considered judgment that permitting access to Confidential Information and Highly Confidential Information under the terms of the Amended Modified Joint Protective Orders will aid the Commission in the expeditious resolution of these proceedings. However, to allow the parties time to seek judicial review, we further order that notwithstanding the provisions of paragraph 8 of the Amended Modified Joint Protective Orders, no Reviewing Party shall have access to Confidential or Highly Confidential Information under the provisions of the Amended Modified Joint Protective Orders until seven calendar days after this Order is released.

4. ACCORDINGLY, IT IS ORDERED, pursuant to sections 4(i) and 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 155(c), and section 1.115 of the Commission's Rules, 47 C.F.R. § 1.115, that the applications for review jointly filed by CBS Corporation, Discovery Communications, Scripps Networks Interactive, Inc., The Walt Disney Company, Time Warner Inc., TV One, LLC, Twenty First Century Fox, Inc., Univision Communications Inc., and Viacom Inc. ARE DENIED.

5. IT IS FURTHER ORDERED that the Media Bureau is directed to issue new protective orders in these proceedings consistent with this Order by the close of business one business day following the release of this Order.

6. IT IS FURTHER ORDERED that the requests for stay jointly filed by CBS Corporation, Discovery Communications, Scripps Networks Interactive, Inc., The Walt Disney Company, Time Warner Inc., TV One, LLC, Twenty First Century Fox, Inc., Univision Communications Inc., and Viacom Inc. ARE DENIED.

7. IT IS FURTHER ORDERED that no person may have access to Confidential or Highly Confidential Information until seven calendar days after this Order is released.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

DISSENTING STATEMENT OF COMMISSIONER AJIT PAI

Re: *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

About four weeks ago, numerous content companies filed an Application for Review challenging Media Bureau orders. In that Application for Review, they argued that the Bureau did not provide sufficient protection to highly sensitive proprietary commercial information contained in the companies' affiliation and distribution agreements with Comcast, Time Warner Cable, Charter, AT&T, and DIRECTV. The agency's leadership, however, did not allow the Commission to resolve that Application for Review.

Instead, in a highly irregular maneuver, the Media Bureau issued an Order on Reconsideration on November 4, 2014, rejecting the arguments set forth in the Application for Review. Moreover, it modified the protective orders applicable to these proceedings to take away the content companies' due process rights. Specifically, prior to last Tuesday, no party could access highly sensitive information while an objection to such disclosure remained under review by the Commission or by a court—a policy consistent with prior Commission practice. Under the modified protective order, however, parties now may obtain access to information five business days after the *Bureau* rejects an objection. I was not given any advance notice that the Bureau was planning to issue these decisions responding to the Application for Review. I learned about them through press reports.

Flash forward six days. This afternoon, on November 10, at 1:39 PM, I was presented with this item denying the content companies' Applications for Review and told that I needed to cast my vote today. Why? Unless the Commission adopted this item, which also gives the content companies another week to obtain a stay in court, the Bureau threatened to disclose the disputed documents to outside parties on Wednesday morning, November 12. And remember that tomorrow, November 11, is a federal holiday.

These procedural shenanigans are unworthy of this Commission, and I will not countenance them by voting to approve today's item. In their Applications for Review, the content companies have raised serious arguments that merit the Commission's thoughtful consideration. Instead, the Commission swats them away in a cursory two-page order that has been in front of us for no more than a few hours.

Time does not permit me to review in detail all of my objections to this item. I will just highlight two of them here.

First, I strongly disagree with the Bureau's decision to permit third parties to access highly confidential documents while any objections to such access remain pending at the Commission or in court. I am unaware of any Commission precedent for this departure from our prior practice. Our longstanding confidentiality polices have served us well in prior merger proceedings, and I see no justification for changing course here. Once a party has accessed confidential information, the cat cannot

be put back in the bag. The harm is irreparable. A subsequent court ruling that the Commission erred in allowing such access is too little, too late.

Second, I remain unconvinced that it is necessary or appropriate for the Commission to give outside parties access to the content companies' affiliation and distribution agreements, let alone documents related to the negotiation of those agreements. The Commission has repeatedly recognized the extremely sensitive nature of these contracts. It has said that "[d]isclosure of programming contracts between [MVPDs] and programmers can result in substantial competitive harm to the information provider."[4] And it has processed transaction after transaction in the video market, including the Comcast-NBCU transaction (a vertical transaction in which programming was directly at issue), *without* supplying the contracts to any and all signatories of the protective orders.

So what's going on here? Why are these transactions different from any previous transaction? I haven't been given any persuasive explanation for why additional disclosure is necessary here. Rather, to the extent that these proceedings differ from prior ones, the argument for protecting programming contracts is *more* compelling here, not less. Indeed, as the Chief of the Media Bureau, the Commission's General Counsel, and the Chief of the Wireline Competition Bureau have explained: "Access 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."[5] I agree.

To conclude, it is worth noting that the Commission's commitment to openness in these proceedings is selective. According to media reports, Commission staffers have been holding secret meetings with certain parties about these transactions.[6] No information about these meetings is being placed in the public record. So other parties to these proceedings are being left completely in the dark as to who is attending and what is being discussed. I *myself* asked who was taking part in these meetings and what was being said; but my request was refused. The end result is that whoever is writing the drafts of the decisions in these proceedings is reviewing information that is being denied to the Commissioners who will be voting on these transactions. When taken in tandem with today's item, one reaches the strange conclusion that outside parties have better input into the decision-making process than do Commissioners appointed by the President and confirmed by the Senate.

For all of these reasons, I dissent.

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[4] *In the Matter of Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, 13 FCC Rcd. 24816, 224852 (1998).

[5] Bill Lake, et al., *Transaction Reviews and the Public Interest*, The Official FCC Blog, at 2 (Oct. 7, 2014), *available at* http://www.fcc.gov/blog/transaction-reviews-and-public-interest.

[6] *See, e.g.*, Shalini Ramachandran, Keach Hagey and Amol Sharma, "Comcast Targeted by Entertainment Giants," *The Wall Street Journal* (Aug. 29, 2014), *available at* http://online.wsj.com/articles/comcast-targeted-by-entertainment-giants-140934979.

DISSENTING STATEMENT OF
COMMISSIONER MICHAEL O'RIELLY

Re: *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

While I appreciate my colleagues willingness to discuss my concerns and listen to efforts to fix this flawed course of action, I must strenuously dissent to today's order in which Commission generally affirms, with some changes, the staff's determination allowing access to highly confidential agreements in the Comcast-Time Warner and AT&T-DirecTV merger proceedings and setting forth when and how they will be provided to third parties. The documents at issue contain the extremely sensitive pricing and term information of America's leading programming content producers—a crown jewel of American creativity and a major American export to the world marketplace.

I am not convinced that access to such materials by outside parties is necessary for consideration of the pending merger transactions, especially given the risks at stake and because the Commission has not disclosed these agreements in the past. I have been told that disclosure is necessary to ensure compliance with the Administrative Procedure Act, which is a dubious reading of the statute and questionable justification as the Commission has ignored it numerous times of late. I also find it duplicitous to suggest that disclosing the market-sensitive information of content creators is acceptable, while it is permissible to withhold information about certain secretive *ex parte* meetings held on the topic.

Moreover, the content producers are not parties to the transactions and their rights cannot and should not be trampled over for some ulterior political goal. No matter how safe or protected this information may seem, you can never promise with any level of certainty that the information won't get out in some form or be used in separate proceedings: This bell cannot be unrung. To me, this appears to be more of a fishing expedition by interests groups and competitors to obtain market-sensitive information. Thus, this action could clearly result in irreparable harm and I hope that some court will recognize this.

I also cannot agree with the about face on our longstanding presumption that sensitive documents would not be disclosed until any challenges were reviewed by the Commission and, if appropriate, a court of competent jurisdiction. Suddenly, last Tuesday's orders altered our normal course to inexplicably provide access to such documents after the Media Bureau responds to any challenge in favor of the party seeking disclosure. Affected parties should have the ability to exercise their rights to protect sensitive information if they wish. At least today's item makes some minor modifications to the protective orders, which will allow programmers seven days to obtain a stay from the court and prevent disclosure of these agreements online. Placing sensitive agreements online would have been reckless so it is an improvement that these documents will be visible only in the offices of the submitting parties, but it highlights how outrageous making these documents accessible is in the first place.