

**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 policies 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."<sup>1</sup> 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."<sup>2</sup> 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.<sup>3</sup> 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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<sup>1</sup> *In the Matter of Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, 13 FCC Rcd. 24816, 224852 (1998).

<sup>2</sup> 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>.

<sup>3</sup> 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>.