

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

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

ORDER

Adopted: September 2, 2015

Released: September 11, 2015

By the Commission: Commissioner Pai approving in part, dissenting in part, and issuing a statement;
Commissioner O'Reilly dissenting and issuing a statement.

I. INTRODUCTION

1. On June 25, 2015, Charter Communications, Inc., Time Warner Cable Inc., and Time Warner Entertainment–Advance/Newhouse Partnership (the partnership that controls Bright House Networks, LLC) (collectively the “Applicants”), filed applications seeking consent to transfer control of various Commission licenses and other authorizations pursuant to Sections 214 and 310(d) of the Communications Act of 1934, as amended (“Act”), in connection with their proposed transactions. In their applications, the Applicants submitted certain information that they asserted was competitively sensitive and should be treated as confidential under our rules. In addition, consistent with our past practice, we expect that in connection with our review of the applications we will seek further information from the Applicants and perhaps others that those entities will claim constitute competitively sensitive information, the public release of which would place them at a significant competitive disadvantage.

2. Consistent with the Commission’s practice over the past fifteen years, we adopt the attached Protective Order in this proceeding and explain the reasoning for its adoption. The information the Applicants submit, the information we request as relevant and material to the issues raised by the applications, and the information submitted by other parties to the proceeding together constitute the record on which the Commission must base our determination whether granting the applications serves the public interest. While we are mindful of the sensitive nature of some of the information involved, we are also mindful of the general right of the public, and our desire for the public, to participate in this proceeding in a meaningful way. We find that allowing limited access to competitively sensitive materials pursuant to the procedures set forth in the attached Protective Order allows the public (through appropriate representatives) to do so while also protecting competitively sensitive information from improper disclosure and use. Accordingly, sensibly balancing the public and private interests involved,

1 See Commission Opens Docket for Proposed Transfer of Control of Time Warner, Inc. and Charter Communications Inc. and Proposed Transfer of Control of Bright House Networks from Advance/Newhouse Partnership to Charter Communications Inc., MB Docket No. 15-149, Public Notice FCC 15-733 (Media Bur. rel. June 23, 2015).

we conclude that these procedures serve the public interest and that adopting them “best conduce[s] to the proper dispatch of the Commission’s business and to the ends of justice.”<sup>2</sup>

3. The Commission has successfully used protective orders in its review of license transfer applications for over 15 years. Although in 1998, when the Commission issued the *Confidential Information Policy Statement*, it stated that it expected that requests for confidentiality in licensing proceedings would be relatively rare,<sup>3</sup> they have in fact become routine. Recently, however, some entities have objected to participants in licensing proceedings being able to review their confidential information under the strictures of protective orders.<sup>4</sup> In addition, the Commission’s materials on the use and treatment of confidential commercial information in Commission proceedings have been described as “confusing and often contradictory.”<sup>5</sup> We therefore take this opportunity to clarify and provide our reasoning and procedures for using protective orders, as well as our procedures for determining whether to publicly release such information.<sup>6</sup>

## II. SUMMARY

4. In this Order, we explain more fully why we conclude that permitting participants in licensing proceedings (or, more accurately, their appropriate representatives) to review competitively sensitive and other confidential information pursuant to protective orders reflects a sensible balancing of the public interest considerations and “will best conduce to the proper dispatch of the Commission’s business and to the ends of justice.”<sup>7</sup> We describe the various factors favoring review, including our desire that we obtain a “full rounded picture” of the issues,<sup>8</sup> and that interested parties be able to provide us with a different perspective on the materials in the record, thus aiding our understanding and enabling us to reach a better resolution of the issues. We emphasize that these factors apply to the review of all competitively sensitive information contained in the record. Finally, while we are very sensitive to the competitive concerns of parties whose information may be before us, we find that our protective orders

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<sup>2</sup> 47 U.S.C. § 154(j). See *FCC v. Schreiber*, 381 U.S. 279, 289, 291-94 (1965); see also *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, 12414-15, 12417-18 ¶¶ 14-15, 21 (1996) (*Confidential Information Policy Notice*).

<sup>3</sup> *Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, Report and Order, 13 FCC Rcd 24816, 24838 ¶ 34 (1998) (*Confidential Information Policy Statement*).

<sup>4</sup> See, e.g., *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*, MB Dkts. 14-57, 14-90, Application for Review, 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. (Nov. 7, 2014).

<sup>5</sup> *CBS Corp. v. FCC*, 785 F.3d 699, 708 (D.C. Cir. 2015). The court then stated that “the Commission is free to clarify its current policy or to amend it.” *Id.*

<sup>6</sup> We note that it is not necessary that we seek public comment before adopting the attached Protective Order, for several reasons. The Protective Order is substantially the same as the ones the Commission, through its Bureaus, has routinely adopted over the past fifteen years without seeking comment. The Protective Order applies only to the current proceeding, although, like all of our orders, it serves as precedent for future proceedings. And we are not adopting or amending any of our regulations. Rather, as stated in the text, because the court in *CBS Corp. v. FCC* found our materials regarding the treatment of confidential information to be confusing and often contradictory, we are setting forth in detail our reasoning why we find it in the public interest to adopt a protective order; clarifying the information to which the protective order applies and that all participants in the proceeding may review that information subject to the strictures of the protective order; and clarifying how our regulations regarding the public release of confidential information are applied.

<sup>7</sup> 47 U.S.C. § 154(j).

<sup>8</sup> See *FCC v. Schreiber*, 381 U.S. at 294.

are sufficient to protect the confidentiality of even highly competitively sensitive information and that the risk of competitive injury is therefore minimal. We therefore conclude that allowing a limited review pursuant to our protective orders sensibly balances the public interest considerations.

5. We also address some other issues regarding protective orders. We first describe procedures by which any party with a confidentiality interest in information subject to a protective order may object to its generally being made available for review, and provide that if a timely objection is made the confidential information may not be reviewed pursuant to the terms of the protective order while the objection is pending at the Commission and while a timely motion for a judicial stay is pending before a court. We emphasize, however, that since the adoption of the 1998 *Confidential Information Policy Statement*, we have never granted a request to withhold information in the record entirely from review and we expect that we would do so in only the rarest of instances.<sup>9</sup> Next, we change our protective orders to provide that third parties with a confidentiality interest in information may object to specific individuals reviewing that information, and to provide that where a timely objection to a specific individual is made the individual may not review the confidential information pursuant to the terms of the protective order while the objection is pending at the Commission and while a timely motion for a judicial stay is pending before a court. Third, we eliminate the requirement that support personnel sign protective order acknowledgments, although we continue to require anyone who substantively reviews the confidential material to do so. Finally, we note that, while we are adopting the Protective Order attached to this Order for this proceeding, the Bureaus retain the authority to adopt different or modified protective orders where they determine it is warranted. New issues continue to arise and new concerns continue to be raised, and we do not intend to prevent the Bureaus from adapting their procedures accordingly.

6. In the last section of this Order, we clarify our standards and regulations regarding the public release of confidential information, and clarify that they do not apply to the review of information pursuant to protective orders. Those regulations, which implement the Freedom of Information Act (“FOIA”), require persons who seek the public release of confidential information to make a “persuasive showing” as to the reasons for release. This showing applies to requests to *publicly* disclose confidential information; it does not apply when we permit participants in a proceeding to review confidential information pursuant to a protective order. The Supreme Court has made clear that once information is released under FOIA it belongs to the general public, and that FOIA does not allow the use of a protective order to limit the release of information to particular persons or to prevent its general dissemination.<sup>10</sup> We also clarify that, in making the persuasive showing required by our rules for public disclosure under FOIA, the requestor need not show that the information is “vital” or absolutely necessary. Finally, we clarify that in deciding whether to publicly release confidential commercial information or whether to require it to be filed publicly in the first instance, we balance the considerations favoring disclosure and non-disclosure and weigh them in light of the particular circumstances, to determine whether public disclosure of the confidential information would serve the public interest.

### III. DISCUSSION

#### A. Background

7. Section 309 of the Communications Act provides that the Commission must allow at least 30 days following issuance of a public notice of certain license applications for interested parties to file petitions to deny the application.<sup>11</sup> Section 309 thus contemplates that interested members of the

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<sup>9</sup> See *infra* n. 63.

<sup>10</sup> *Nat'l Archives and Records Admin. v. Favish*, 541 U.S. 157, 174 (2004); see *The Larkin Law Firm, P.C. On Request for Inspection of Records*, 19 FCC Rcd 12727, 12730 ¶ 7 (2004).

<sup>11</sup> 47 U.S.C. §§ 309(b), (d)(1). Section 3008 of the Balanced Budget Act of 1997, Pub. L. No. 105-33 (1997), provides that with respect to frequencies assigned by competitive bidding the Commission may specify a period of no shorter than five days for the filing of petitions to deny.

public will have a full opportunity to challenge the grant of license applications.<sup>12</sup> Also, relevant case law indicates that petitioners to deny generally must be afforded access to all information submitted by licensees that bear upon their applications.<sup>13</sup> In the 1998 *Confidential Information Policy Statement*, the Commission reiterated that it expected that most material filed in license applications would be made publicly available,<sup>14</sup> and it therefore continued the practice of making license applications and all supporting material routinely available for public inspection.<sup>15</sup>

8. The Commission's practice in licensing proceedings was consistent with its practice in other proceedings where historically the public participated. For example, tariff proceedings are historically open, and the supporting cost data historically has been available for public inspection.<sup>16</sup> In the *Confidential Information Policy Statement*, the Commission noted that in tariff proceedings it had withheld information from public inspection (that is, allowed review only pursuant to a protective order) only in limited circumstances.<sup>17</sup> And, as the Commission has recognized, the Administrative Procedure Act contemplates wide public participation in rulemaking proceedings and requires the agency to provide interested persons an opportunity to participate.<sup>18</sup> Therefore, the Commission generally has not afforded confidential treatment to material submitted in rulemakings, instead making the material available to the general public.<sup>19</sup>

9. While the Commission reiterated in 1998 that it expected that most material filed in license applications would be made fully available to the general public,<sup>20</sup> it did agree to consider requests

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<sup>12</sup> *Confidential Information Policy Notice*, 11 FCC 2d 12425 ¶ 39.

<sup>13</sup> *See, e.g., Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC*, 595 F.2d 621, 634 (D.C. Cir. 1978) (*en banc*) (although Commission need not allow discovery on EEO claim in license renewal case, the full report of the Commission's investigation, including all evidence it receives, must be placed in the public record, and a stated reasonable time allowed for response by petitioners); *see also Amendment of Subpart H, Part 1 of the Commission's Rules and Regulations Concerning Ex Parte Communications and Presentations in Commission Proceedings*, 2 FCC Rcd 6053, 6054 (1987) (if after reviewing information submitted in connection with Commission investigation of license applications, Commission tentatively decides hearing unnecessary, it will disclose information and afford opportunity to comment before final decision), *amended*, 3 FCC Rcd 3995 (1988).

Moreover, Section 309 of the Act, 47 U.S.C. § 309(e) provides that if an application has been designated for hearing, it shall be a full hearing at which all parties in interest shall be permitted to participate, thus requiring parties having full access to all information at that stage, if not before.

<sup>14</sup> *Confidential Information Policy Statement*, 13 FCC Rcd at 24838 ¶34.

<sup>15</sup> *Id.* *See* 47 C.F.R. §§ 0.453. Title II applications are also routinely available for public inspection. *See id.* The Commission also releases regular public notices listing the routine Title III license applications that have been filed. With regard to applications involving more significant transactions (as well as applications regarding domestic 214 authorizations), the Commission releases separate public notices notifying the public that the applications have been filed, describing the applications and the transaction, and listing the dates by which comments or petitions to deny must be filed and the rest of the pleading cycle. As stated in the text, prior to 1998, the information contained in or accompanying the applications was publicly available. Since 1998, while the Commission has issued protective orders in many significant license transfer proceedings, pursuant to those protective orders appropriate representatives of participants in the proceedings have been able to review *all* of the information submitted (with the exception of the two proceedings at issue in the recent *CBS v. FCC* decision, where, with regard to certain information, the court vacated and remanded our decision for further explanation).

<sup>16</sup> *Confidential Information Policy Notice*, 11 FCC 2d at 12426-27 ¶¶ 42-43; *Confidential Information Policy Statement*, 13 FCC Rcd at 24839 ¶ 35, 24841 ¶ 39. *See* 47 C.F.R. § 0.453.

<sup>17</sup> *Confidential Information Policy Statement*, 13 FCC Rcd at 24839 ¶ 35.

<sup>18</sup> *See Confidential Information Policy Statement*, 13 FCC Rcd at 24843 ¶¶ 43-44.

<sup>19</sup> *Confidential Information Policy Notice*, 11 FCC 2d at 12429 ¶ 47.

<sup>20</sup> *Confidential Information Policy Statement*, 13 FCC Rcd at 24838 ¶34.

by applicants to limit disclosure of certain information pursuant to a protective order.<sup>21</sup> In fact, however, by 1998 the situation was rapidly changing. The Commission had begun the *Confidential Information Policy* proceeding because it had been receiving “an increasing number of requests” to afford confidential treatment to information provided to it by regulated entities and others.<sup>22</sup> The Commission stated then that, “[a]s the telecommunications industry becomes increasingly competitive, participants increasingly assert that the information they provide to the Commission is competitively sensitive.”<sup>23</sup>

10. Thus, although the Commission’s preference was for all material to be made publicly available, the Commission also recognized that, “even when [competitively sensitive] information is critical to resolution of a public interest issue, the competitive threat posed by widespread disclosure under FOIA [that is, by making the information publicly available] may outweigh the public benefits in disclosure.”<sup>24</sup> Indeed, “the Commission has long been sensitive to the concern that fulfillment of its regulatory responsibilities does not result in unnecessary disclosure of confidential information that places Commission regulatees at an unfair competitive disadvantage.”<sup>25</sup> It agreed with several commenters in the *Confidential Information Policy* proceeding that an applicant should not necessarily be required to forgo confidential treatment of its competitively sensitive information as a condition of obtaining a license.<sup>26</sup> Further, as it recognized with regard to rulemaking proceedings, insisting that all information be publicly filed could deprive it of information highly relevant to its decision.<sup>27</sup> On the other hand, the Commission also agreed with these same commenters that most information should be publicly available.<sup>28</sup> And, as discussed below, it recognized that access to the information provided to and examined by the Commission is necessary both for interested persons to participate effectively in a licensing proceeding<sup>29</sup> and to provide the Commission with those participants’ expertise and perspectives, which may differ from its own.<sup>30</sup> The Commission therefore concluded that it would consider limiting disclosure of confidential information in licensing proceedings pursuant to a protective order.<sup>31</sup>

11. The Commission’s statement in 1998 that, “[a]s the telecommunications industry

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<sup>21</sup> *Confidential Information Policy Statement*, 13 FCC Rcd at 24838 ¶34. As stated below, we note that the choice the Commission was making was between requiring *all* information in license transfer proceedings to be filed publicly or, in rare circumstances, allowing some information to be made available for review only pursuant to a protective order; it was not between allowing review pursuant to a protective order or not allowing review by commenters at all.

<sup>22</sup> *Confidential Information Policy Notice*, 11 FCC 2d at 12408 ¶ 1.

<sup>23</sup> *Confidential Information Policy Statement*, 13 FCC Rcd at 24824 ¶ 10.

<sup>24</sup> *Confidential Information Policy Statement*, 13 FCC Rcd at 24824 ¶ 9.

<sup>25</sup> *Confidential Information Policy Notice*, 11 FCC Rcd at 12422 ¶ 30.

<sup>26</sup> *Confidential Information Policy Statement*, 13 FCC Rcd at 24838 ¶ 34.

<sup>27</sup> *Cf. Confidential Information Policy Statement*, 13 FCC Rcd at 24844 ¶ 45 (discussing rulemakings).

<sup>28</sup> *Confidential Information Policy Statement*, 13 FCC Rcd at 24838 ¶ 34.

<sup>29</sup> *See Confidential Information Policy Notice*, 11 FCC Rcd at 12422 ¶ 30 (and cases cited therein) (“Public participation in Commission proceedings cannot be effective unless meaningful information is made available to interested persons.”).

<sup>30</sup> *Cf. FCC v. Schreiber*, 381 U.S. at 294 (“The Commission stated ... ‘to obtain a full rounded picture of such transactions, it is highly desirable that the facts, information, data and opinion supplied by one group or individual be known to other groups and individuals involved, so that they may verify, refute, explain, amplify or supplement the record from their own diverse points of view.’”); *Confidential Information Policy Statement*, 13 FCC Rcd at 24844 ¶ 44 (discussing rulemakings).

<sup>31</sup> *Confidential Information Policy Statement*, 13 FCC Rcd at 24838 ¶ 34. The Commission noted that, historically, it had tried generally to balance the interests in disclosure against the interests in preserving the confidentiality of competitively sensitive information by using protective orders. *Id.* at ¶ 21.

becomes increasingly competitive, participants increasingly assert that the information they provide to the Commission is competitively sensitive<sup>32</sup> is true now more than ever. In almost every significant license transfer proceeding, both applicants and commenters place issues of competition at the forefront, and the Commission relies on competitively sensitive and other confidential commercial information such as market shares, prices, contract terms, and internal competitive evaluations to determine whether competition will be enhanced or harmed if the applications are approved.<sup>33</sup> Tariff proceedings, too, routinely require the examination of competitively sensitive and confidential commercial information.<sup>34</sup>

## **B. Permitting Review of Confidential Information Pursuant to Protective Orders**

12. The Commission has long recognized that the handling of confidential information requires the Commission to balance the concerns of the parties submitting information; the interest of the public in accessing that information;<sup>35</sup> and the Commission's interest in reviewing all relevant evidence and hearing all relevant views in order to best determine the public interest. We recognize that even where information is relevant and material to the issues before us, the competitive injury posed by widespread public disclosure may outweigh the public benefits of disclosure.<sup>36</sup> In such cases, as the Commission has stated on numerous occasions, disclosure under a protective order serves the dual purpose of protecting competitively sensitive information while still permitting a limited disclosure for a public purpose.<sup>37</sup> Accordingly, the Commission has long "used protective orders in a variety of proceedings to protect competitively sensitive information from public disclosure while at the same time allowing interested parties to have access to potentially decisional documents."<sup>38</sup> For the reasons stated below, we find that allowing participants to review the competitively sensitive information submitted in licensing proceedings pursuant to our protective orders serves the public interest.

13. Our authority to publicly release competitively sensitive information when it is in the public interest to do so, or to allow review of such information pursuant to a protective order, is well-established. Section 4(j) of the Communications Act provides that "[t]he Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of the Commission's business and to the ends of justice."<sup>39</sup> As the Supreme Court has held, this section "authorize[s] public disclosure of information, or receipt of data in confidence, as the agency may determine to be proper upon a balancing of the public and private interests involved."<sup>40</sup> Moreover, section 4(j) "does not merely confer power to promulgate rules generally applicable to all Commission proceedings; it also delegates broad discretion to

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<sup>32</sup> *Confidential Information Policy Statement*, 13 FCC Rcd at 24824 ¶ 10.

<sup>33</sup> The Commission considers the competitive effects of a proposed license transfer as part of its public interest determination. See, e.g., *WorldCom-MCI Order*, 13 FCC Rcd 18025, 18036 ¶ 12 (1998) (quoting *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 93-95 (1953); *United States v. FCC*, 652 F.2d 72, 81-82, 87 (D.C. Cir. 1980) (*en banc*) (agency is required to consider anticompetitive consequences as one part of its public interest calculus).

<sup>34</sup> See *Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996*, 12 FCC Rcd 2170, 2210 ¶ 87 (1997) (*Streamlined Tariff Filing Order*); *Confidential Information Policy Notice*, 11 FCC 2d at 12427 ¶ 43.

<sup>35</sup> *Confidential Information Policy Statement*, 13 FCC Rcd at 24824-25 ¶ 10.

<sup>36</sup> See *Confidential Information Policy Statement*, 13 FCC Rcd at 24824 ¶ 9; *Streamlined Tariff Filing Order*, 12 FCC Rcd at 2213 ¶ 91 (and cases cited therein).

<sup>37</sup> See *Confidential Information Policy Statement*, 13 FCC Rcd at 24824 ¶ 9; *Streamlined Tariff Filing Order*, 12 FCC Rcd at 2213 ¶ 91 (and cases cited therein).

<sup>38</sup> *Streamlined Tariff Filing Order*, 12 FCC Rcd at 2213 ¶ 91.

<sup>39</sup> 47 U.S.C. § 154(j).

<sup>40</sup> *FCC v. Schreiber*, 381 U.S. at 291-92; see also *Confidential Information Policy Notice*, 11 FCC Rcd at 12414-15, 12417-18 ¶¶ 15, 21.

prescribe rules for specific investigations, and to make *ad hoc* procedural rulings in specific instances.”<sup>41</sup> Further, our regulations implementing the Freedom of Information Act provide that, even where we have the authority to withhold records from public inspection, “the considerations favoring disclosure and non-disclosure will be weighed in light of the facts presented,” and we will either grant the request for public release of the information or deny it.<sup>42</sup> Thus, while the Trade Secrets Act restrains the Commission from disclosing trade secrets “unless otherwise authorized by law,”<sup>43</sup> the Communications Act and our regulations provide that authorization, as well as the authorization to adopt protective orders when the Commission finds they are warranted.<sup>44</sup>

14. Our reasoning for permitting review of confidential information pursuant to a protective order has been stated before and we find it applicable here. As a legal matter, the relevant case law indicates that petitioners to deny generally must be afforded access to all information submitted by licensees.<sup>45</sup> And sound policy reasons support permitting review. Basic notions of fairness generally require that materials that are available to some participants in the proceeding should be available to all.<sup>46</sup> Further, withholding information can have a significant impact on whether commenters have notice and an opportunity to comment meaningfully on the bases of the agency’s decision.<sup>47</sup> As the Commission has recognized, “[p]ublic participation in Commission proceedings cannot be effective unless meaningful

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<sup>41</sup> *FCC v. Schreiber*, 381 U.S. at 289 (citations omitted); *Southwestern Bell Telephone Co.*, 13 FCC Rcd 3602, 3608 ¶ 19 (1997) (“We have the authority, when addressing request for confidentiality, to impose or modify protective orders on a case-by-case basis as circumstances dictate.”). Thus, section 4(j) is different from the internal housekeeping statute at issue in *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979), to which one of the dissenting statements adverts. See Statement of Commissioner Pai Approving in Part and Dissenting in Part, at Section IV.

<sup>42</sup> 47 C.F.R. § 0.461. Section 0.461 also provides that the request may be granted “conditionally.” 47 C.F.R. § 0.461(f)(4). This provision does not survive the Supreme Court’s decision in *Nat’l Archives and Records Admin. v. Favish*, 541 U.S. at 174, that there is no provision under FOIA for limiting the information’s use or disclosure once it is released.

<sup>43</sup> 18 U.S.C. § 1905.

<sup>44</sup> See *CBS v. FCC*, 785 F.3d at 703-04; *Confidential Information Policy Notice*, 11 FCC Rcd at 12414-15 ¶¶ 14-16; *Confidential Information Policy Statement*, 13 FCC Rcd at 24820 ¶ 5. The Commission has stated that other provisions of the Communications Act, such as Section 220(f) which authorizes the disclosure of a carrier’s books or accounts, may also authorize release of materials governed by the Trade Secrets Act in particular circumstances. See *Confidential Information Policy Notice*, 11 FCC Rcd at 12415 ¶ 16 (and cases cited therein); *Confidential Information Policy Statement*, 13 FCC Rcd at 24820 ¶ 5.

<sup>45</sup> See *supra* para. 7. We need not decide here the extent to which the Administrative Procedure Act or other applicable laws require that participants in license proceedings be provided access to the administrative record. The case law indicates that participants should generally be afforded access and, as stated in the text, sound policy reasons support generally providing participants with full access.

<sup>46</sup> See *Confidential Information Policy Statement*, 13 FCC Rcd at 24828 ¶ 16; *GTE – Telenet Merger*, 72 F.C.C.2d 111, 164-68 (1978) (while Section 214 proceedings do not require a hearing on the record (and distinguishing licensing proceedings under Section 309), to avoid any even arguable unfairness to the parties, all documents submitted by the applicants and relied on by the staff and the Commission will be made available pursuant to a protective order).

The alternative of not considering competitively sensitive and other confidential commercial information would deprive us of information highly relevant to our decision. *Confidential Information Policy Statement*, 13 FCC Rcd at 24844 ¶ 45. It might also require us to designate many applications for hearing on the ground that there is a material issue of disputed fact, see 47 U.S.C. § 309(d)(2), significantly delaying resolution of the proceeding, a route the Commission has been able often to avoid by its use of protective orders in licensing proceedings.

<sup>47</sup> See *Confidential Information Policy Statement*, 13 FCC Rcd at 24843 ¶ 43.

information is made available to interested parties.”<sup>48</sup> We encourage public participation in our proceedings and it is important to us.<sup>49</sup> One purpose of disclosing the information on which the Commission may rely “is to ensure that interested parties have a full opportunity to participate in the proceeding by providing a different perspective on materials that may be relied upon by the agency,”<sup>50</sup> thus aiding our understanding and allowing us to reach a better result.<sup>51</sup> It is, after all, a core principle of our adversarial legal tradition that one party’s advocacy be challengeable by another in front of the decision-maker.

15. In 1965, the Supreme Court affirmed the Commission’s making otherwise confidential and competitively sensitive information available to participants in an industry-wide inquiry, noting that “[t]he Commission stated . . . ‘to obtain a full rounded picture of such transactions, it is highly desirable that the facts, information, data and opinion supplied by one group or individual be known to other groups and individuals involved, so that they may verify, refute, explain, amplify or supplement the record from their own diverse points of view.’”<sup>52</sup> We reaffirm that statement today in the context of licensing proceedings. Simply put, as a general matter, we believe it “best conduce[s] to the proper dispatch of the Commission’s business and to the ends of justice”<sup>53</sup> when interested parties have the opportunity to review and challenge information provided to the Commission by others.

16. While we recognize that parties have a legitimate concern that their competitively sensitive and other confidential information not be made available to their competitors, those with whom they do business, or the general public, we find that the risk of harm in allowing commenters to review that information pursuant to our protective orders is small.<sup>54</sup> Our protective orders limit disclosure to counsel and outside experts who are not involved in competitive decision-making or involved in a business relationship with the submitting party,<sup>55</sup> and they limit the use of the information to the current

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<sup>48</sup> *Confidential Information Policy Notice*, 11 FCC 2d at 12422 ¶ 31; *Confidential Information Policy Statement*, 13 FCC Rcd at 24841 ¶ 39 (in tariff proceedings, allowing release of confidential information under a protective order so that “interested parties are afforded the opportunity to participate effectively”).

<sup>49</sup> See *Southwestern Bell Telephone Co.*, 13 FCC Rcd at 3608 ¶ 17.

<sup>50</sup> *Confidential Information Policy Statement*, 13 FCC Rcd at 24843-44 ¶ 44 (citations omitted); see generally *id.* at 24843-45 ¶¶ 43-45.

<sup>51</sup> See *CBS v. FCC*, 785 F.3d at 705 (different perspective on materials Commission is considering facilitates informed decision making).

<sup>52</sup> *FCC v. Schreiber*, 381 U.S. at 294. For the reasons expressed in the text, we disagree with a suggestion in a dissent that it is “beyond plausibility” that commenters’ review of the materials in the record will assist our determinations. See Dissenting Statement of Commissioner O’Reilly.

<sup>53</sup> 47 U.S.C. § 154(j). See *FCC v. Schreiber*, 381 U.S. at 289, 293-94.

<sup>54</sup> See *CBS v. FCC*, 785 F.3d at 705 (“The risks involved in disclosure thus appear minimal.”). See also *Streamlined Tariff Filing Order*, 12 FCC Rcd at 2214 ¶ 92.

<sup>55</sup> Our protective orders further limit the disclosure of especially sensitive information to “outside” counsel and experts and to employees of non-commercial entities who are not in a business relationship with the owners of the confidential information.

Limiting review of especially sensitive information to outside counsel and experts is a recent restriction. In the *Confidential Information Policy Statement*, we stated that such restrictions should be rare. *Confidential Information Policy Statement*, 13 FCC Rcd at 24833 ¶ 26. And prior to the *Confidential Information Policy Statement*, the Bureaus regularly denied requests to limit review to outside counsel. See, e.g., *Application of WorldCom, Inc. and MCI Communications Corp.*, *Order Adopting Protective Order*, 13 FCC Rcd 11166, 11168-70 ¶¶ 5-9 (Com. Car. Bur. 1998) (denying access to in-house staff; permitting access by in-house counsel); *GTE Corp.-Bell Atlantic Corp.*, *Order Adopting Protective Order*, 13 FCC Rcd 22751, 22753-54 ¶ 5 (1998). As the Commission has sought more and more detailed business information from applicants in licensing proceedings, however, the amount of information we limit to review by outside persons has similarly expanded.

proceeding.<sup>56</sup> Persons who seek to review confidential information under a protective order must be a representative of a participant in the proceeding. We will not permit access to confidential materials by anyone who is not participating in the proceeding in good faith or by someone who we have good reason to believe will not be using the information for proper purposes.<sup>57</sup> The protective orders provide sanctions for violations that may include suspension or disbarment of counsel or expert consultants from practice before the Commission, forfeitures (monetary penalties), cease and desist orders, and denial of further access to confidential information in that or other Commission proceedings. Any false statement made to the Commission in order to obtain information subject to a protective order may be criminally punishable.<sup>58</sup> Additional remedies may be available at law or equity. We will not hesitate to take swift and decisive enforcement action where warranted for violation of our orders. As the Commission has concluded before, we find that these provisions are sufficient to protect the confidentiality of even highly competitively sensitive information that may be submitted in this and other proceedings.<sup>59</sup>

17. We also conclude that in deciding to allow review of competitively sensitive information pursuant to a protective order in licensing proceedings, we have given proper weight to the purposes of the Trade Secrets Act.<sup>60</sup> As described above,<sup>61</sup> the Commission has long recognized the concerns that trade secrets and other competitively sensitive business information be kept from a party's competitors and recognized that the risks of competitive injury resulting from public disclosure may outweigh the benefits to the public. Our decision to allow review pursuant to a protective order is the result of our balancing the various public and private interests involved. In the very act of performing that balancing, both in considering the concerns of parties that favor keeping confidential their trade secrets and other competitively sensitive information, and in considering whether any release should be only pursuant to

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<sup>56</sup> Our protective orders provide that the information may not be used by the reviewing parties for any business, governmental, or commercial purposes, or in any other administrative, regulatory or judicial proceedings. We retain our discretion, however, to enter into the record in one proceeding evidence originally submitted in another where doing so would serve the public interest. *See Confidential Information Policy Statement*, 13 FCC Rcd at 24836 ¶ 31. Typically, though, where the confidential information is relevant to a second proceeding, we will issue a separate request for the information in that second proceeding.

<sup>57</sup> Other restrictions may also apply. For example, if the information is classified, we may not make it available for review, *see Ralls Corp. v. Committee on Foreign Investment in the United States*, 758 F.3d 296, 319 (D.C. Cir. 2014) (due process does not require that classified material be made available for review), and, in any event, would permit review only by persons who have the appropriate security clearance.

<sup>58</sup> *See* 18 U.S.C. § 1001.

<sup>59</sup> *See, e.g., Southwestern Bell Telephone Co.*, 13 FCC Rcd at 3609-10 ¶¶ 21-23; *Streamlined Tariff Filing Order*, 12 FCC Rcd at 2214 ¶ 92. For over fifteen years, the Commission has successfully used protective orders to protect access to a company's most sensitive business information, such as future business plans (including future pricing and roll out plans), customer information, responses to competitive bid requests, cost information, and competitive analyses.

One of the dissenting statements suggests that the Commission's protective orders offer "inconsequential and ineffective protections." *See* Dissenting Statement of Commissioner O'Rielly. For the reasons expressed in the text, we disagree, as did the court in the *CBS* decision, which held that the risks under our protective orders appear minimal. *CBS v. FCC*, 785 F.3d at 705. Nor do we find it "hopelessly naïve" to believe that the attorneys and experts who appear before us will follow our rules. The fact is that not only has the Commission successfully used protective orders for over fifteen years, but those protective orders are similar to the ones that have been routinely issued by other federal agencies and courts for decades.

<sup>60</sup> 18 U.S.C. § 1905. As discussed in paragraph 13 above, the Commission has the authority to release information otherwise protected by the Trade Secrets Act when we have determined, after balancing the various interests involved, that it serves the public interest to do so.

<sup>61</sup> *See supra* ¶ 12.

the strictures of a protective order (and that the risk of competitive injury is small when a protective order is used), we give weight to the purpose of the Act to protect confidential business information.<sup>62</sup>

18. We emphasize that our reasoning allowing for review pursuant to a protective order applies to *all* of the information submitted in the record.<sup>63</sup> As the Commission has previously noted, the material that is reviewed pursuant to a protective order is “potentially decisional.”<sup>64</sup> Moreover, where the information has been submitted by the applicants or other parties, it is because they believe it is, at the very least, relevant and material to the issues before the Commission (and, in any event, basic notions of fairness require that materials submitted by some should be available to all). And where the Commission requests the submission of information by applicants or other persons, it is on a determination that the information is relevant and material to the issues before it, if not, in fact, required for the Commission to complete its inquiry and make its determinations regarding the public interest. The factors favoring review – particularly our desire that parties be able to provide us with a different perspective on the materials than we may bring ourselves, thus aiding our understanding and allowing us to reach a better result – apply to all of this information.<sup>65</sup>

19. This conclusion is consistent with the Commission’s prior decisions. In the years since the *Confidential Information Policy Statement* was adopted, the Commission has never ruled that material submitted in the record should be withheld from review.<sup>66</sup> In the *Confidential Information Policy*

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<sup>62</sup> This is not to imply that, in the appropriate circumstances, we may not require that confidential business information be publicly filed or released. Rather, as discussed in section III.D, we may require the public release of confidential business information as we “determine to be proper upon a balancing of the public and private interests involved.” *Schreiber v. FCC*, 381 U.S. at 291-92. See, e.g., 47 C.F.R. § 0.461(f)(4).

<sup>63</sup> In the *Confidential Information Policy Statement*, because of the paucity of comments from the public, the Commission found it unnecessary to determine whether it is ever appropriate in licensing proceedings to withhold some information entirely from inspection and, if so, under what standards. *Confidential Information Policy Statement*, 13 FCC Rcd at 24838 n.113. We continue to leave this question open. Similarly, in the *Confidential Information Policy Statement*, the Commission allowed for the possibility in tariff proceedings that it could absolutely withhold some documents from review, but stated that this would occur “only in the rarest of instances.” *Confidential Information Policy Statement*, 13 FCC Rcd at 24842 ¶ 40; Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission, *Memorandum Opinion and Order on Reconsideration*, 14 FCC Rcd 20128, 20129 ¶ 3 (1999) (*Confidential Information Policy Reconsideration*). (Moreover, if the tariff filer did seek total non-disclosure, the Commission stated that the tariff would likely be suspended, and the Commission felt that the prospect of suspension would be sufficient to deter any frivolous requests. *Id.*) We note, however, that there have been no instances since the Commission adopted the *Confidential Information Policy Statement* in which it has determined that it was appropriate to absolutely withhold any information from participants in either a license transfer proceeding or a tariff proceeding. We recognize that there may be situations, such as those involving national security, where it *is* inappropriate to release certain information or even to place it in the record in the first instance. See, e.g., 47 C.F.R. § 1.1204 (describing *ex parte* presentations that are exempt from the general prohibition and disclosure requirements of the Commission’s rules); *Ralls Corp. v. Committee on Foreign Investment in the United States*, 758 F.3d at 319 (and cases cited therein) (due process does not require that classified material be made available for review).

<sup>64</sup> *Southwestern Bell Telephone Co.*, 13 FCC Rcd at 3608 ¶ 17; *Streamlined Tariff Filing Order*, 12 FCC Rcd at 2213 ¶ 91.

<sup>65</sup> There is no requirement that participants or the Commission staff find that the information is absolutely necessary or vital to the Commission’s determinations before it may be reviewed pursuant to a protective order. As discussed below in Section III.D, although our FOIA regulations require people who seek the *public* release of information to make a “persuasive showing” as to why the information should be released, those regulations do not require a showing that the information is “necessary” or “vital” and, in any event, neither the regulations nor the persuasive showing requirement contained within them apply to the Commission’s issuance of a protective order or to a party seeking to review information pursuant to a protective order.

<sup>66</sup> In *CBS v. FCC*, 785 F.3d 699, however, the court vacated and remanded for further explanation the Commission’s decision to make certain information available for review pursuant to a protective order.

*Statement*, the discussion regarding the use of protective orders in licensing proceedings involved the choice between requiring *all* of the information to be filed publicly or allowing some information to be made available for review only pursuant to a protective order; the choice was not between allowing review pursuant to a protective order or not allowing review by commenters at all.<sup>67</sup> Similarly, in tariff proceedings, the Commission has concluded that even when a submitting party shows by the preponderance of the evidence that information is entitled to confidential treatment, interested parties are permitted to review it pursuant to a protective order.<sup>68</sup>

20. We retain our discretion, however, to decline to make irrelevant evidence available for review by excluding it from the administrative record.<sup>69</sup> We note that, in license transfer proceedings in particular, in order to ensure that we receive all of the relevant material, the requests for information are sometimes written broadly, and some requests may be read to cover information that is not in fact relevant to the issues before us. In such cases, parties may seek to have the request narrowed or clarified, and we may permit some otherwise-responsive information to not be submitted, or to be returned. We also retain our discretion to defer ruling on whether information we have requested is relevant, and therefore to allow parties to defer fully responding to information requests. These procedures are fully consistent with the Commission's past actions in licensing proceedings.<sup>70</sup> Finally, nothing in this Order is meant to narrow the Commission's discretion in deciding which information is relevant to the issues before us, which

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<sup>67</sup> For example, the Commission asked in the *Confidential Information Policy Notice* whether it should require public disclosure of information without protective orders in some types of proceedings even though the information is competitively sensitive and need not be publicly disclosed under FOIA. *Confidential Information Policy Notice*, 11 FCC Rcd at 12424 ¶ 38. Similarly, while occasionally parties have argued that their confidential information should not be allowed to be reviewed even pursuant to a protective order, an argument the Commission has consistently rejected, just as often other parties have argued that all of the information should be made public, even where it is confidential. *See, e.g., Streamlined Tariff Filing Order*, 12 FCC Rcd at 2214 ¶ 92; *Southwestern Bell Telephone Co.*, 13 FCC Rcd at 3608 ¶ 19.

<sup>68</sup> *Confidential Information Policy Reconsideration*, 14 FCC Rcd at 20129 ¶ 3. *See also Streamlined Tariff Filing Order*, 12 FCC Rcd at 2214 ¶ 92, and generally at 2210-16 ¶¶ 87-95; *Confidential Information Policy Statement*, 13 FCC Rcd at 24841-42 ¶¶ 39-41; *Southwestern Bell Telephone Co.*, 13 FCC Rcd 3602.

We emphasize that making confidential information available for review pursuant to a protective order in certain types of proceedings, as the Commission has ordered in tariff proceedings and as we do here with respect to licensing proceedings, does not make such information “routinely available for inspection” as that term is used in our regulations and FOIA. *Contra CBS v. FCC*, 785 F.3d at 706. Records that are “routinely available for inspection” are available to members of the public with no restrictions and may be freely disseminated. *See Nat'l Archives and Records Admin. v. Favish*, 541 U.S. at 174. Documents and information reviewed under the strictures of a protective order, by contrast, are available only to a limited set of people and only for the limited purposes of the proceeding; they may not be freely disseminated.

<sup>69</sup> By “irrelevant,” we mean information that is not relevant or material to the issues the Commission is considering. Thus, contrary to one of the dissenting statements, in the unlikely event that the Commission were to seek irrelevant information – such as contracts with semiconductor manufacturers in a situation where those were plainly not of any significance – either the recipient of the document request or the third party manufacturer could object to the request pursuant to the procedures delineated below. Of course, no one disputed that – as the DC Circuit found – the confidential material at issue in the *CBS* case was relevant to those proceedings.

<sup>70</sup> *See, e.g., Comcast Corp. and AT&T Corp.*, 17 FCC Rcd 22633, 22636 (2002) *aff'd sub. nom Consumer Federation of America v. FCC*, 348 F.3d 1009 (D.C. Cir. 2003); *SBC Communications, Inc. v. FCC*, 56 F.3d 1484; *GTE Corp. and Southern Pacific Co.*, reprinted at 9 FCC Rcd 2617, 2623 (1983); *id.* at 2622 n.10 (returning non-relevant materials); *GTE Corp. and Southern Pacific Co.*, 94 FCC 2d 235 (1983); *ATT- McCaw*, 9 FCC Rcd 2610, 2610 (Enf. Div., Com. Carr. Bur. 1994).

information we will review, or how we will review it, or to provide parties with any right of discovery not elsewhere provided in our rules.<sup>71</sup>

21. We also emphasize that there are no special requirements, other than good faith participation in the proceeding and those imposed by the protective order itself, for participants or their representatives to review information pursuant to a protective order. The protective order explicitly limits reviewing individuals to those who are not involved in competitive decision-making or in a business relationship with the party whose confidential information is at issue. As stated above, our protective orders are sufficient to protect the competitive and other business interests of parties. We also continue to decline to impose any limitations on the number of persons who may review confidential information. In the *Confidential Information Policy Statement*, the Commission specifically rejected the arguments that only a limited number of people, with various sublimits, should be entitled to review the information pursuant to a protective order.<sup>72</sup> Such limitations may unreasonably preclude a party from utilizing individuals, consistent with its needs and resources, who can provide the requisite expertise to examine the information. For example, as the Commission noted, limiting the number of individuals entitled to review the information would prevent a law firm partner from obtaining the advice of associates.<sup>73</sup> Finally, we continue to decline to impose additional restrictions on certain types of confidential information, such as those in which a third party has an interest.<sup>74</sup> Again, we find that the protections provided by our protective orders are more than sufficient to protect even highly competitively sensitive information.<sup>75</sup> No one engaged in competitive decision-making is permitted to view any information under our protective orders, and inside counsel who are not engaged in competitive decision-making are nonetheless also not permitted to review certain highly sensitive information. We find that further subdividing the information and treating the subcategories differently would impose burdens on the parties, burdens that are unnecessary given the protections of our protective orders and the substantial sanctions for violating them.<sup>76</sup>

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<sup>71</sup> See *SBC Communications, Inc. v. FCC*, 56 F.3d at 1496 (“The Commission’s manner of proceeding was well within its procedural discretion in implementing the Communications Act. The HSR documents contained millions of pages; for the Commission to have sorted through all of them would have delayed a decision on the transfer indefinitely. The Commission is fully capable of determining which documents are relevant to its decision-making; for us to hold that the Commission is bound to review every document deemed relevant by the parties would be an unwarranted intrusion into the agency’s ability to conduct its own business”); *Comcast Corp. and AT&T Corp.*, 17 FCC Rcd 22633, 22636 (2002) (Commission has discretion to review or not review HSR documents based on the requirements of a particular case), *aff’d sub. nom Consumer Federation of America v. FCC*, 348 F.3d 1009 (D.C. Cir. 2003).

<sup>72</sup> *Confidential Information Policy Statement*, 13 FCC Rcd at 24833 ¶ 26.

<sup>73</sup> *Id.*

<sup>74</sup> See *Confidential Information Policy Statement*, 13 FCC Rcd at 24836 ¶ 32 (rejecting suggestion to divide confidential information into two categories). We note that not only does much of the information submitted by applicants in licensing proceedings involve information in which third parties have a confidentiality interest, such as the applicants’ cost data, bid proposals and contracts, but the Commission also often asks third parties for their own competitively sensitive information. Thus, a significant portion of the record in a licensing proceeding may, in one way or another, involve information in which a third party has a confidentiality interest. For the reasons expressed in the text, we find that our protective orders adequately protect this information. The fact that a third party has a confidentiality interest in the information, however, is certainly a reason not to release it publicly but to allow review only pursuant to a protective order. See *Letter to Jonathan E. Canis, et al.*, 9 FCC Rcd 6495 (Com. Carrier Bur. 1994) (concluding that protective order strikes appropriate balance between protecting third-party equipment vendors from competitive harm and ensuring parties to a tariff proceeding are able to comment on the lawfulness of the proposed tariffs).

<sup>75</sup> See *supra* para. 16

<sup>76</sup> In *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*

(continued....)

22. In 1998, in concluding that it should make information filed in tariff proceedings available to all participants, the Commission stated:

By allowing release of confidential information under a protective order . . . , interested parties are afforded the opportunity to participate effectively in tariff proceedings, thus allaying the fears expressed by some commenters. We believe that the protective order approach appropriately balances the competing interests in such situations. We also disagree with those who suggest that the public interest concerns that underlie the history of open tariff proceedings are now outweighed by the submitter's need to protect competitively sensitive information.<sup>77</sup>

We find this reasoning equally applicable to license transfer proceedings. Weighing the various factors discussed in this section, regardless whether we are legally required in licensing proceedings to make all confidential information available to interested parties pursuant to a protective order, we conclude that the public benefits of doing so far outweigh the harms. Thus, as the Commission has consistently decided in proceedings where there is public participation, we conclude that in a license transfer proceeding, allowing the materials in the record to be reviewed pursuant to an appropriate protective order both reflects a sensible balancing of the public interest considerations (including the Congressional policies underlying the Trade Secrets Act) and "best conduce[s] to the proper dispatch of the Commission's business and to the ends of justice."<sup>78</sup>

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*Control of Licenses and Authorizations*, Order, 29 FCC Rcd 11864 (Med. Bur. 2014), the Media Bureau concluded that, in the unique circumstances of that case, certain additional procedures should be adopted with regard to the review of what was termed Video Programming Confidential Information. In addition to imposing additional restrictions on participants who wished to review the information, the Order required the parties submitting the information to segregate Video Programming Confidential Information from their other Highly Confidential information, a task that proved to be a huge undertaking. Although we affirmed the imposition of these procedures, *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, 29 FCC Rcd 14267 (2014), we now find that they imposed substantial burdens and were unnecessary because our standard protective orders are sufficient to protect the competitive and confidentiality interests of both applicants and third parties whose information is being reviewed and because they did not prove to be of importance to the review by the CBS court.

<sup>77</sup> *Id.* ¶ 39 (citations omitted); see also *Southwestern Bell Telephone Co.*, 13 FCC Rcd at 3608 ¶ 17 (affirming general use of protective orders in tariff proceedings).

<sup>78</sup> 47 U.S.C. § 154(j). See *FCC v. Schreiber*, 381 U.S. at 289, 293-94. Cf. *GTE – Telenet Merger*, 72 F.C.C.2d at 168, *supra* n. 46.

Our reasoning applies equally to other Commission proceedings where there has historically been (or where there is a statutory right for) public participation, such as tariff proceedings and rulemaking proceedings. See *Confidential Information Policy Statement*, 13 FCC Rcd at 24838-43 ¶¶ 33-42. We distinguish, however, those proceedings where there has not historically been public participation or where the public is not statutorily granted a right of participation, such as audits. See *id.* at 24846-49 ¶¶ 52-56 (noting, however, some circumstances in which data would be released publicly). See also *Qwest v. FCC*, 229 F.3d 1172, 1181-84 (D.C. Cir. 2000) (remanding for inadequate explanation of how the Commission's decision to release raw audit data was consistent with its longstanding policy not to release any audit data or, in rare cases, to release summary data; and noting that Qwest argued that there is no statutory right of public participation in audits and that they have historically involved only the Commission and the company being audited).

Finally, by our conclusions here, we do not intend in any way to limit the Commission's ability to *publicly* release confidential information when we decide, on balance, that it is in the public interest to do so. See generally *FCC v. Schreiber*, 381 U.S. 279.

### C. Other Protective Order Issues

#### 1. Objections to the Release of Information Pursuant to a Protective Order

23. Our protective orders do not themselves contain any provision by which parties, either those who are asked to submit the information or those who have a confidentiality interest in the information, may object to it being reviewed pursuant to a protective order or may seek to have the protective order modified before it may be reviewed.<sup>79</sup> As discussed above, we conclude that our protective orders are sufficient to protect even the most highly sensitive material from improper disclosure, and that all relevant material in the record should be available for review pursuant to a protective order. Since the *Confidential Information Policy Statement* was adopted, the Commission has never granted a request to entirely withhold from review under a protective order any of the information contained in the record in licensing proceedings. Nonetheless, we have not definitively determined that it is never appropriate to withhold some information entirely from inspection in licensing proceedings, although we expect any such situation would be extraordinary.<sup>80</sup> As parties have, indeed, made such challenges in the past, we find it prudent to lay out the procedures we will follow if such a challenge is brought. Specifically, mirroring our regulations in FOIA cases,<sup>81</sup> where a challenge is made within the time limits described below, we will not require that information be disclosed under the Protective Order until the Commission resolves the challenge, and if a timely motion for judicial stay is filed, until the court rules upon the stay motion.<sup>82</sup>

24. Commission orders are normally effective upon release or public notice.<sup>83</sup> Our FOIA regulations, however, provide that if a request for confidentiality is denied or a request for public inspection of a confidential document is granted, the order is not effective immediately. Rather, the regulations provide time for a party with a confidentiality interest in the information to file an appeal with the Commission and, if that is denied, a request to a court for a judicial stay; while those timely appeals and motions are pending, the rules provide that the information shall not be released.<sup>84</sup>

25. We conclude that when challenges are brought to the review of information under protective orders, mirroring these stay provisions would be most conducive for the proper dispatch of

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<sup>79</sup> The protective orders do, however, contain a provision whereby a person who submits confidential information can object to particular persons reviewing that information. See *infra* paragraph 27.

<sup>80</sup> See *supra* n. 63; *Confidential Information Policy Statement*, 13 FCC Rcd at 24842 ¶ 40; *Confidential Information Policy Reconsideration*, 14 FCC Rcd at 20129 ¶ 3 (allowing for the possibility in tariff proceedings of absolutely withholding information from review “only in the rarest of instances.”). As discussed, however, *supra* n. 63, there may be situations, such as those involving national security, where it *is* inappropriate to allow certain information to be reviewed or even to place it in the record in the first instance.

<sup>81</sup> See 47 C.F.R. § 0.461(i). Cf. *Confidential Information Policy Statement*, 13 FCC Rcd at 24832 ¶ 23 (where a request for confidential treatment is pending, review even under a protective order will be delayed to allow the submitting party to file an application for review with the Commission and then a judicial stay).

<sup>82</sup> We note that the procedures described in the text below do not supersede the time periods in our regulations for seeking review of decisions nor the ability of a person to otherwise seek a stay. See 47 C.F.R. §§ 1.106(f), 1.115(d).

<sup>83</sup> 47 C.F.R. §§ 1.102(b)(1), 1.103(a). See also 47 C.F.R. § 1.102 (designated authority or Commission may in its discretion stay effect of order); 47 C.F.R. § 1.106(n) (filing petition for reconsideration does not excuse person from complying with order).

<sup>84</sup> 47 C.F.R. §§ 0.459(g), 0.461(i), (j) (l). Specifically, if the Commission determines that the information should not be afforded confidential treatment or should nonetheless be publicly released, an interested person has ten business days within which to file an application for review (and if an application for review is not filed within that time the documents will be released). If the application for review is denied by the Commission, the person is afforded ten business days within which to seek a judicial stay of the Commission’s action; if a motion for stay is not made, the documents will be released, and if the party does seek a stay within that time, the records will not be released until the court acts on the motion.

business and best serve the ends of justice. Our current FOIA regulations provide adequate protection to both submitters of information and third parties who have an interest in that information. In fact, in the context of review under a protective order, the reasons for expedition are greater and the potential harm to the objecting party is smaller. Unlike the situation under FOIA, the information is not being released publicly, and because review is subject to the strictures of a protective order, as stated above, the risk of improper use is minimal.<sup>85</sup> Accordingly, as described below, if an objection is made within the time periods stated, we will not require that the confidential information be made available for review pursuant to the protective order while the challenge is pending.

26. Specifically, when a person who receives a request for information objects to the information being made available for review pursuant to a protective order or seeks to change the terms of the protective order governing the review of that information and files an objection with the Commission explaining its reasoning within 10 business days of receiving the request; or when a third party objects to information that is submitted by another entity being made available for review pursuant to a protective order or seeks to change the terms of the protective order governing the review of that information, and files its objection as soon as practicable after being notified of the information request or submission, we will not require that the information be made available for review pursuant to the protective order until the objection is ruled upon.<sup>86</sup> If the Bureau overrules the objection, we will not require that the information be made available for review pursuant to the protective order for ten business days and, if an application for review is filed within that time, until the Commission acts upon the application for review (if an application for review is not filed within that time, the information will be required to be made available for review pursuant to the terms of the protective order). If an application for review is denied by the Commission, we will not require that the information be made available for review pursuant to the protective order for ten business days and, if the objecting person seeks a judicial stay of the Commission's action within that time, until the court acts on the stay request (and if a motion for stay is not made within that time the information will be required to be made available for review pursuant to the terms of the protective order).<sup>87</sup>

## 2. Objection to an Individual's Review of Confidential Information

27. The Commission's protective orders historically have allowed persons who have supplied confidential information (Submitting Parties in the terms of the protective order) to object to the review of

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<sup>85</sup> See *CBS v. FCC*, 785 F.3d at 706.

<sup>86</sup> Thus, a third party who has a confidentiality interest in information that will be made available for review pursuant to a protective order may file its objection before the information is submitted to the Commission.

<sup>87</sup> We do worry, however, about the possibility of a lengthy delay under this procedure. While the applicants in a licensing proceeding have every incentive not to file frivolous objections, see *Application of WorldCom, Inc. and MCI Communications Corp., Order Adopting Protective Order*, 13 FCC Rcd at 11172 ¶ 11; cf. *Confidential Information Policy Reconsideration*, 14 FCC Rcd at 20129 ¶ 3, that may not be true with respect to others from whom the Commission may seek information or who have an interest in the information being provided. As the courts have noted, resolving objections takes time, "and time often works to the advantage of one party over another." See *United States v. FCC*, 652 F.2d at 91. Many procedural devices "may also be exploited for unworthy purposes," *id.*, and we therefore worry about "arm[ing] interested parties with a potent instrument for delay," cf. *id.*, *SBC Communications v. FCC*, 56 F.3d at 1496. Accordingly, we and the Bureaus retain the authority to take appropriate action if it is determined that these procedures are being used for improper purposes or to file frivolous objections. However, the Bureaus shall not have the authority to modify these procedures or the review procedures discussed in paragraphs 30 and 31; rather, any modification must be done by the full Commission.

Parties, of course, are generally free to make their own confidential information available to whomever they want or even to release it publicly (subject to constraints imposed by law, by a non-disclosure agreement, etc.). Thus, while we do not require Submitting Parties to make confidential information available pursuant to the protective order until the Commission has ruled on any objection and any stay proceedings have been completed, neither do we here forbid them from reaching any private agreements to do so.

that information by any individual who seeks access pursuant to the procedures of the protective order (a Reviewing Party). Such objections are not intended, and may not be used, to challenge the protective order as a whole but are a method to challenge a particular individual on the ground that he or she is not qualified under the provisions of the protective order to review confidential information. Further, most of the protective orders adopted by the Bureaus since the *Confidential Information Policy Statement* provide that, where a Submitting Party objects to a particular person, that potential Reviewing Party is not entitled to access to the information “[u]ntil any objection is resolved by the Commission and, if appropriate, by any court of competent jurisdiction, and unless such objection is resolved in favor of the person seeking access.” For the reasons stated below, we modify these procedures as follows: first, consistent with our FOIA regulations and the protective orders in the recent *Comcast-Time Warner Cable* and *AT&T-DirectTV* proceedings, to allow third parties who have an interest in the confidential information to raise objections to Reviewing Parties;<sup>88</sup> and second, again mirroring our regulations in FOIA cases,<sup>89</sup> to not require disclosure to a Reviewing Party until any objection is resolved by the full Commission in the Reviewing Party’s favor, and, if a timely motion for judicial stay is filed, until the stay motion is resolved by the court.

28. We begin with permitting persons other than the Submitting Party who have a confidentiality interest in competitively sensitive and other confidential information to object to certain parties reviewing that information. While much of the information provided in license transfer proceedings is competitively sensitive only to the person who submitted it, some information, like contracts and cost information, may also contain information that is competitively sensitive to other parties. In such cases, the Commission has determined that the information should be available to be reviewed only pursuant to a protective order, even if other information is being publicly disclosed.<sup>90</sup> It seems obvious that if we are protecting such information because of the interest of a third party, that third party should have the ability to challenge its review by others. In a similar situation, our FOIA regulations provide that if we have determined that a member of the public may inspect a confidential document (in other words, that the document will be publicly released), an application for review may be filed not only by the party who submitted the document but also by “a third party owner” or “a person with a personal privacy interest” in the document.<sup>91</sup> However, we emphasize that the fact that a third party may have a confidentiality interest in information submitted by another does not mean that the information will not be made available or that any special procedures, other than the issuance of the protective order, will be used. As we have concluded in tariff proceedings, we find it unreasonable to forgo review of such information or to not allow it to be reviewed pursuant to a protective order because the person submitting the information may have a non-disclosure agreement with third-parties.<sup>92</sup> We thus conclude that it would be appropriate and serve the public interest to allow persons who have a confidentiality interest in information subject to review under a protective order to be allowed to challenge the review of that information by any potential reviewing party.

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<sup>88</sup> See 47 C.F.R. § 0.461(i); *Applications of Comcast Corp. and Time Warner Cable Inc. for Consent to Assign or Transfer Control of Licenses and Authorizations and AT&T, Inc. and DIRECTV for Consent to Assign or Transfer Control of Licenses and Authorizations*, Order, 29 FCC Rcd 11864, 11869 ¶ 10 (Media Bur. 2014); *Applications of Comcast Corp. and Time Warner Cable Inc. for Consent to Assign or Transfer Control of Licenses and Authorizations and AT&T, Inc. and DIRECTV for Consent to Assign or Transfer Control of Licenses and Authorizations*, Modified Joint Protective Order, 29 FCC Rcd 11883, 11887 ¶ 8 (Media Bur. 2014)

<sup>89</sup> See 47 C.F.R. § 0.461(i).

<sup>90</sup> See *Confidential Information Policy Notice*, 11 FCC 2d at 12427 ¶ 43 (and cases cited therein).

<sup>91</sup> 47 C.F.R. § 0.461(i)(1).

<sup>92</sup> Cf. *Southwestern Bell Telephone Co.*, 13 FCC Rcd at 3610 ¶ 22 (holding same with regard to tariff cost support data).

29. We now turn to when a Reviewing Party may have access to confidential information under a protective order after an objection has been filed. The *Confidential Information Policy Statement* does not discuss the issue of the review of information by an individual to whom a party objects.<sup>93</sup> Nor does the Model Protective Order attached to the *Confidential Information Policy Statement* contain any related provisions. The provision contained in the current protective orders, which provides that “[u]ntil any objection is resolved by the Commission and, if appropriate, by any court of competent jurisdiction, and unless such objection is resolved in favor of the person seeking access” (and which, until very recently, did not allow third parties to object), was first adopted by the Common Carrier Bureau at the applicants’ suggestion in the *WorldCom-MCI* proceeding.<sup>94</sup> The Bureau noted that the provision was similar to section 0.459(g) of our rules and did not believe the applicants would “protract unnecessarily” the proceeding by raising frivolous objections.<sup>95</sup>

30. Again, we find that our FOIA regulations provide an appropriate analogy. Those regulations are very similar to the protective order provision but differ in one critical respect. As described above, under our FOIA regulations, if the Commission denies an application for review and rules that confidential information should be publicly released, a person is afforded ten business days within which to seek a judicial stay of the Commission’s action, otherwise the records will be released; if the party does timely seek a stay, the records will not be released until the court acts on the timely motion.<sup>96</sup> By contrast, under the provision contained in previous protective orders, review is prohibited until *all* judicial proceedings (not just a ruling on the stay request) are completed.

31. We conclude that mirroring in protective orders our current procedures under FOIA would be most conducive for the proper dispatch of business and best serve the ends of justice.<sup>97</sup> We reiterate that our current FOIA regulations provide adequate protection to both submitters of information and third parties who have an interest in that information. We find no reason to provide further protection when reviewing decisions to allow review pursuant to a protective order than we do when reviewing decisions to release information under FOIA. As stated above,<sup>98</sup> in the context of review under a protective order, the reasons for expedition are greater and the potential harm to the objecting party is smaller. Unlike the situation under FOIA, the information is not being released publicly, and because review is subject to the strictures of a protective order, as stated above, the risk of improper use is

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<sup>93</sup> By contrast, where an applicant or other party who wishes to or is required to submit confidential information objects to any review under a protective order, it may seek Commission review of the protective order and then judicial review of the Commission’s decision. Pending a decision by the court, it may seek a stay.

The *Confidential Information Policy Statement* does state that, if a protective order is issued to allow limited access to information for which a good faith request for confidential treatment has been filed while the Commission considers the request for confidential treatment, as was consistent with then Commission practice, the information will not be released under the protective order until the submitting party has an opportunity to file an application for review with the Commission and then, if applicable, a judicial stay. *Confidential Information Policy Statement*, 13 FCC Rcd at 24832 ¶ 23. That is not the situation, however, where the protective order is already issued and either parties voluntarily submit information pursuant to its provisions or the time for filing an application for review of the protective order has passed.

<sup>94</sup> See *Applications of WorldCom, Inc. and MCI Communications Corp.*, Order Adopting Protective Order, 13 FCC at 11172 ¶ 11.

<sup>95</sup> *Id.*

<sup>96</sup> 47 C.F.R. § 0.461(i), (j). *Cf.* 47 C.F.R. § 0.459(g) (providing the same procedure where request for confidentiality is denied).

<sup>97</sup> Thus, as stated below, *infra* n. 107, we require that this review procedure be included in any future protective orders issued by a Bureau.

<sup>98</sup> See *supra* paragraph 25.

minimal.<sup>99</sup> Further, the confidential information is already available for review pursuant to the protective order by other individuals. This is all the more true with regard to an objection filed by a third party, where the information has already been shared with, and indeed is in the possession of, other people, apart from any review under a protective order. Accordingly, we will modify our protective orders to provide a review procedure for objections to potential reviewing parties similar to that found in our regulations regarding the release of documents under FOIA.<sup>100</sup>

### 3. Persons Required to Sign Acknowledgments

32. The Commission's protective orders have required each person who views confidential information—who examines a confidential document or reviews a portion of a comment containing confidential information—to sign and file an acknowledgment. The requirement extends to all clerical and administrative personnel employed by the attorneys and expert consultants representing parties in the proceeding, including for example, at least in theory, the employees of a copying company hired to print a party's comments. In the *Matter of Special Access for Price Cap Local Exchange Carriers*, the Wireline Competition Bureau asked whether it was necessary for support personnel to sign the protective order acknowledgment or whether the requirement was “overly burdensome or unnecessary.”<sup>101</sup> It received no comments and decided to not require support staff to sign and file separate acknowledgments in that proceeding.<sup>102</sup>

33. We agree with the Bureau's decision. The requirement that all support personnel sign and file acknowledgments is unnecessarily burdensome. We find that requiring individual support personnel to sign the acknowledgment provides little if any additional protection to submitting parties. The protective order requires all counsel and consultants to verify that there are in place procedures at their firm or office to prevent unauthorized disclosure of confidential information. We find it reasonable to rely on the obligations that the protective order imposes on counsel and consultants, who employ such support staff, to comply with the protective order, to ensure that there is no unauthorized disclosure of confidential information, by either themselves or any of their employees, and to ensure that there are adequate procedures in place at their firm or workplace to prevent any such unauthorized disclosure. We emphasize that counsel and consultants are responsible for the handling of confidential information by their employees and contractors and we may impose sanctions on them for the improper disclosure of confidential information by those employees or contractors.<sup>103</sup> We also find that this change will reduce the administrative burden on parties seeking access to data. Accordingly, we will not require support staff employed by counsel and consultants who do not substantively examine confidential information to execute separate acknowledgements.<sup>104</sup> However, we continue to require paralegals, analysts and other employees who do substantively examine confidential information to execute an acknowledgement.

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<sup>99</sup> See *CBS v. FCC*, 785 F.3d at 706.

<sup>100</sup> As stated above, n.87, while we do not require Submitting Parties to make confidential information available pursuant to the protective order until the Commission has ruled on any objection and any stay proceedings have been completed, neither do we here forbid them from reaching any private agreements to do so.

<sup>101</sup> *Wireline Competition Bureau Seeks Comment on Protective Order for Special Access Data Collection*, WC Docket No. 05-25, RM-10593, Public Notice, 28 FCC Rcd 9170, 9170 (Wireline Comp. Bur. 2013).

<sup>102</sup> *Special Access for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, Order and Data Collection Protective Order, 29 FCC Rcd 11657, 11666 ¶ 24 (2014).

<sup>103</sup> The Acknowledgment that must be signed by every person seeking to review confidential information pursuant to the protective order provides “I acknowledge that it is my obligation . . . to ensure that there is no disclosure of Confidential Information or Highly Confidential Information in my possession, in the possession of those who work for me or in the possession of other Support Personnel, except as provided in the Protective Order.” See also *supra* para. 16 (discussion of possible sanctions).

<sup>104</sup> For example, an administrative assistant of a counsel would not be required to execute a separate acknowledgement if he or she performs administrative tasks only, not substantive analysis, for the counsel.

#### 4. Future Protective Orders

34. When the Commission put forth a Model Protective Order in the *Confidential Information Policy Statement*, it concluded that the benefits of doing so would be substantial and that it would reduce the need for negotiations or litigation over the terms and prevent delays in processing.<sup>105</sup> It stated, however, that while it thought the Model Protective Order would be appropriate, the Bureaus would retain the authority to use a different or modified protective order where they determine it is warranted.<sup>106</sup> We reiterate that statement here. The Commission's experience with protective orders since the Model Protective Order was adopted is one of constant refinement. New issues arise; new concerns are raised; the type and scope of information submitted changes. While we adopt this protective order in this proceeding today, the Bureaus continue to have the authority to modify this protective order or to use a different one where they determine it is warranted.<sup>107</sup>

#### D. Permitting Public Release of Confidential Information

35. The Commission's regulations governing disclosure of information and implementing the Freedom of Information Act, section 0.441 *et seq.*,<sup>108</sup> provide that a requestor who seeks public inspection of a confidential commercial document in the Commission's possession must make a "persuasive showing" of the reasons for disclosure, and provide that the Commission will determine whether to grant such a request by weighing the factors in favor of disclosure and non-disclosure in light of the facts presented.<sup>109</sup> In *CBS Corp. v. FCC*, in determining the meaning and applicability of the "persuasive showing" requirement to the review of confidential information under a protective order, the court found the Commission's materials to be "confusing and often contradictory."<sup>110</sup> It stated that it took "no position on what the Commission should do next" and that "the Commission is free to clarify its current policy or to amend it."<sup>111</sup> Because the proper meaning and applicability of our persuasive showing requirement affects both the use of protective orders in Commission proceedings and the Commission's decisions to publicly release confidential commercial information or to require it to be filed publicly in the first instance, we now provide that clarification.

36. As explained in this section, persons who seek to review under FOIA records that have been withheld from public inspection are seeking *public* release of that information. Once information is released under FOIA, it belongs to the general public: FOIA does not provide for the use of a protective order to limit the release of information to particular persons or to prevent its general dissemination.<sup>112</sup> Thus, as discussed in the second part of this section, we clarify that the persuasive showing requirement contained in our regulations does not apply either to persons requesting that the Commission issue a protective order or to persons seeking to review information pursuant to an already-issued protective order. In the first part of this section, we clarify that in making a "persuasive showing" a person seeking the public release of information must show, among other factors, that the information sought to be released is relevant to a public interest issue before the Commission, but not that the information is "vital" or absolutely necessary. We also clarify that in deciding whether to publicly release confidential commercial information or whether to require it to be filed publicly in the first instance, we balance the

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<sup>105</sup> *Confidential Information Policy Statement*, 13 FCC Rcd at 24831 ¶ 22.

<sup>106</sup> *Confidential Information Policy Statement*, 13 FCC Rcd at 24832 ¶ 23.

<sup>107</sup> However, any protective order issued by a Bureau must include the review procedures for objections set forth in paragraphs 26 and 31 above.

<sup>108</sup> 47 C.F.R. § 0.441 *et seq.*

<sup>109</sup> See 47 C.F.R. §§ 0.457(d), 0.461.

<sup>110</sup> *CBS Corp. v. FCC*, 785 F.3d 699.

<sup>111</sup> *Id.* at 708.

<sup>112</sup> *Nat'l Archives and Records Admin. v. Favish*, 541 U.S. at 174.

considerations favoring disclosure and non-disclosure, weighing them in light of the particular circumstances, to determine whether public disclosure of the confidential information would serve the public interest.<sup>113</sup>

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37. The Freedom of Information Act generally requires the Commission to make information available to the public unless the information falls within one or more of the nine exemptions from disclosure contained in the Act.<sup>114</sup> Even where information is exempt from disclosure, however, the Commission generally has the discretion to release it.<sup>115</sup> Accordingly, our regulations governing the disclosure of information distinguish between records in the Commission’s possession that are routinely available for public inspection (that is, materials that are public) and those that are not, and provide how members of the general public may inspect the various materials. People who seek to inspect Commission records need not be participants in a Commission proceeding, and, with respect to records that are routinely available for public inspection, no reason for wanting to inspect the records need be given.<sup>116</sup> Records not routinely available for public inspection, by contrast, are not freely available to members of the public. For various reasons, they are confidential.<sup>117</sup> And either the Commission has determined they are of a specific type that should be confidential<sup>118</sup> or the person submitting them to the Commission has shown by a preponderance of the evidence that they should be treated as confidential.<sup>119</sup> As is most relevant here, under FOIA and the Commission’s regulations, trade secrets and confidential commercial or financial information need not be made freely available to the general public and are generally treated as confidential. Persons who wish to inspect these records therefore must make a “persuasive showing” demonstrating why we should nonetheless publicly release the information.

38. Specifically, Section 0.457 of our regulations states that records containing confidential trade secrets and commercial and financial information “will not be made routinely available for [public] inspection; and a persuasive showing as to the reasons for inspection will be required in requests for inspection submitted under § 0.461.”<sup>120</sup> Section 0.461, in turn, provides the procedures by which members of the public may request inspection of documents not routinely available for public inspection (that is, documents treated as confidential) and the procedures for granting or denying such requests. Thus, the requirement of a “persuasive showing” of the reasons for inspecting confidential documents applies to a person seeking to review confidential commercial information pursuant to a request under FOIA and our implementing regulations, in other words, to a person seeking to have the information

<sup>113</sup> See 47 C.F.R. § 0.461(f)(4).

<sup>114</sup> 5 U.S.C. §§ 552(a), (b); *Chrysler Corp. v. Brown*, 441 U.S. 281, 292-93 (1979).

<sup>115</sup> See *Confidential Information Policy Statement*, 13 FCC Rcd at 24818 ¶ 2.

<sup>116</sup> See 47 C.F.R. § 0.460(a) (subject to limitations, a person seeking to review public records need only appear and ask).

<sup>117</sup> See 47 C.F.R. § 0.457.

<sup>118</sup> 47 C.F.R. § 0.457.

<sup>119</sup> 47 C.F.R. § 0.459(d)(2) (records will be treated as confidential if preponderance of the evidence demonstrates that non-disclosure is consistent with FOIA); *Confidential Information Policy Statement*, 13 FCC Rcd at 24830-31 ¶ 19 (party seeking confidentiality has burden of proof). See also 47 C.F.R. § 0.451(b) (describing types of records not routinely available for public inspection). Records whose status has not yet been determined are also not routinely available for public inspection, and the Commission will make an individualized determination as to their status if inspection is requested. 47 C.F.R. § 0.451(b)(2).

<sup>120</sup> 47 C.F.R. § 0.457(d). The section similarly provides that, with regard to information specifically listed in the section and thus presumptively afforded confidential treatment, “A persuasive showing as to the reasons for inspection will be required in requests submitted under § 0.461 for inspection of such materials.”

made available for public inspection.<sup>121</sup> As set forth in the *Confidential Information Policy Statement*, Section 0.461 provides that the Commission makes the determination whether to permit public inspection on a case-by-case basis, balancing the public and private interests for and against public disclosure and taking into account, among other factors, the type of proceeding, the relevance of the information, the nature of the information, and whether the requestor is a party to a proceeding.<sup>122</sup> In sum, a requestor makes a persuasive showing when it demonstrates that, balancing the various interests in light of all the factors, public disclosure of the confidential information serves the public interest.<sup>123</sup>

39. Because the determination to publicly release the confidential information is made on a case-by-case basis, as again discussed in the *Confidential Information Policy Statement*, there is not a requirement that the person seeking disclosure show that the information is “vital” to the conduct of the proceeding or “necessary to the ‘fundamental integrity’ of the Commission process”<sup>124</sup> or that it is “absolutely needed” or “required” to resolve a public interest issue before the Commission.<sup>125</sup> Nor does the requestor need to show that the information cannot be obtained by other means.<sup>126</sup>

40. Because of the confusion surrounding the phrase “necessary link in a chain of evidence” used in some of the Commission’s decisions, it is useful to provide some background. In the *Confidential Information Policy* proceeding, the Commission sought comment on whether “persuasive showing” was the appropriate standard to use in determining whether to publicly release confidential information and, if so, what should constitute a “persuasive showing” in favor of the information’s release. It also asked how the standard should apply in particular types of proceedings.<sup>127</sup> The *Confidential Information Policy Statement*, in the *Background* discussion, in a section titled “Review of the Commission’s Rules and

<sup>121</sup> See 47 C.F.R. § 0.457(d); *Confidential Information Policy Statement*, 13 FCC Rcd at 24827-31 ¶¶ 15-20. First, however, the party seeking confidentiality must show by a preponderance of the evidence that the information is entitled to protection under FOIA. *Id.*, 13 FCC Rcd at 24829-31 ¶¶ 19-20.

<sup>122</sup> 47 C.F.R. § 0.461; *Confidential Information Policy Statement*, 13 FCC Rcd at 24827-28 ¶ 16; see also 47 C.F.R. § 0.457(first paragraph).

One of the dissenting statements claims that this is a “new” policy. See Statement of Commissioner Pai Approving in Part and Dissenting in Part, at Section III. It is not. These are the exact factors set forth by the Commission in the *Confidential Information Policy Statement*. Moreover, it is simply incorrect that we are today rejecting the Commission’s historical “sensitiv[ity] to ensuring that the fulfilment of [the FCC]’s regulatory responsibilities does not result in the unnecessary disclosure of information that might put its regulatees at a competitive disadvantage.” The Commission maintained that sensitivity in 1998 when it adopted the *Confidential Information Policy Statement* and we maintain it now. But as stated above, *supra* paragraph 10, the Commission also held in the *Confidential Information Policy Statement* that most information in Commission licensing proceedings should be publicly available, and it recognized that access to the information provided to and examined by the Commission is necessary both for interested persons to participate effectively in a licensing proceeding and to provide the Commission with those participants’ expertise and perspectives, which may differ from its own. This is why the Commission concluded in 1998, and we conclude today, that we will not generally publicly release confidential information in licensing proceedings but limit its release pursuant to a protective order

<sup>123</sup> We nonetheless retain the discretion to act on our own motion to release the confidential information at issue if we determine after weighing the policy considerations and interests for and against disclosure, in light of all the factors involved, publicly releasing the information serves the public interest. See *RKO General, Inc. v. FCC*, 670 F.2d 215, 232 (D.C. Cir. 1981) (“the Commission does not function ‘as an umpire blandly calling balls and strikes for adversaries appearing before it.’”)(citations omitted); *Confidential Information Policy Notice*, 11 FCC Rcd at 12414-15, 12417-18 ¶¶ 15, 21 (citing 47 U.S.C. § 4(j); *Schreiber v. FCC*, 381 U.S. at 291-92).

<sup>124</sup> *Id.* at 24828-29 ¶17.

<sup>125</sup> *Contra CBS, Inc. v. FCC*, 785 F.3d at 706 (defining necessary as “absolutely needed” or “required”).

<sup>126</sup> *Id.*

<sup>127</sup> *Confidential Information Policy Notice*, 11 FCC Rcd at 12422-23 ¶31.

Policies Governing Disclosure,”<sup>128</sup> described the Commission’s then past practice, stating that it did not authorize the disclosure of confidential financial information “on the mere chance that it might be helpful, but insists upon a showing that the information is a necessary link in a chain of evidence” that will resolve an issue before the Commission.<sup>129</sup> In the portion of the *Confidential Information Policy Statement* titled *Discussion*, the Commission then decided to retain the “persuasive showing” standard.<sup>130</sup> The Commission stated that determinations as to whether a persuasive showing had been met should continue to be made on a case-by-case basis, and that the factors to be taken into account included the type of proceeding, the relevance of the information, and nature of the information. It is in the *Discussion* portion of the decision that the Commission stated that it declined to require requestors to demonstrate that access to the information is “vital” to the conduct of the proceeding or “necessary to the ‘fundamental integrity’ of the Commission process.”<sup>131</sup> Thus, insofar as the Commission might have previously required a showing that information that the requestor was asking be publicly released was “absolutely needed” or “required,”<sup>132</sup> a proposition that is far from certain,<sup>133</sup> that requirement was abandoned in 1998. And, in any event, we abandon it now.<sup>134</sup>

<sup>128</sup> *Id.* at 24821-24 ¶¶ 6-9.

<sup>129</sup> *Confidential Information Policy Statement*, 13 FCC Rcd at 24822-23 ¶ 8. The “necessary link” phrase and requirement was first used in 1967, shortly after FOIA was enacted, when the Commission denied a request to publicly release information submitted confidentially for use in a different proceeding, although it provided the petitioner another opportunity to make the showing. *See Sioux Empire Broadcasting Co., et al.*, 10 FCC 2d 132, 134 (1967); *accord Classical Radio Connecticut, Inc.*, 69 FCC 2d 1571, 1520 n. 6 (1978).

<sup>130</sup> *Confidential Information Policy Statement*, 13 FCC Rcd at 24828-29 ¶17.

<sup>131</sup> *Id.* at 24828-29 ¶¶ 15-17. There is therefore no contradiction between paragraph 8 of the *Confidential Information Policy Statement* and paragraph 17. Paragraph 8 describes the Commission’s past practice and policy; paragraph 17 describes the Commission’s implementation and interpretation of the regulations going forward.

<sup>132</sup> *See CBS v. FCC*, 785 F.3d at 706.

<sup>133</sup> The phrase “necessary link” cannot be read in isolation. The full quotation is “The Commission will not authorize the disclosure of confidential information on the mere chance that it might be helpful but insists upon a showing that the information is a necessary link in a chain of evidence.” The Commission’s precedent indicates that the phrase was read and applied as a whole; that the standard used to decide whether to release information publicly was always a balancing of interests; and, further, that it was sufficient that the information was relevant (although other factors might tip the balance against public release). For example, the *Confidential Information Policy Notice* explained the mere chance/necessary link phrase as follows: “In other words, the Commission requires that ‘specific and concrete public benefits be reasonably anticipated before properly exempt information will be released on a discretionary basis.’” 11 FCC Rcd at 12419-20 ¶ 24 (quoting *The Western Union Telegraph Co.* 2 FCC Rcd 4485, 4487 (1987)). In *Kannapolis Television Co.*, 80 FCC 2d 307 (1980), while first quoting the mere chance/necessary link phrase as the Commission’s general policy, the Commission stated that in determining whether to release the confidential information, “the Commission considers the relevancy and materiality of the information sought and the inability to obtain the requested information from other sources. Application of these criteria to individual requests will produce results which vary in accordance with the particular facts of each case.” *Id.* at 310 ¶ 11. The Commission went on to determine whether the information sought was “relevant and material” and decided, “on balance,” to release some of the information. *Id.* at 311 ¶ 12. In *Alianza Federal de Pueblos Libres*, 31 FCC 2d 557 (1971), the Commission held that the financial reports whose disclosure was sought would not provide information relevant to the requestor’s arguments. The opinion recites the mere chance/necessary link phrase and then states that before the Commission will release confidential information, it requires a “persuasive showing” which depends on the various balancing criteria described in *Kannapolis Television Co.*, and later in the *Confidential Information Policy Notice*, including the relevancy and materiality of the information sought. *Id.* at 558-59. In the *Confidential Information Policy Statement*, the Commission cites *Kannaopolis* and two other cases, *Thomas N. Locke* and *Robert J. Butler*, described below, for examples of the application of the “persuasive showing” standard. The discussions in those three decisions are evidence that the balancing factors described in the text provided the basis of the Commission’s decisions, and that a showing of a “necessary link in a chain of evidence” was not an additional

(continued....)

41. Indeed, a requirement to show absolute necessity or that the information is “required” would be at odds with the Commission’s statements in that paragraph, first, that the Commission’s rules contemplate that the Commission will engage in a balancing of the public and private interests when determining whether the “persuasive showing” standard had been met and, second, that one of the factors the Commission would balance would be the relevance of the information.<sup>135</sup> If the *Confidential Information Policy Statement* or our regulations required the information to be more than relevant before it could be publicly released, then it would make no sense to “balance” the “relevance” of the information in deciding whether the public interest favored public disclosure of the information. Moreover, as the

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requirement on top of those factors. There is certainly no indication that the Commission was intending to overrule the balancing test that had been stated in the Supreme Court’s decision in *Schreiber*.

In fact, during the 1980s and 1990s when the mere chance/necessary link language was used, the Commission’s policy was that confidential information would be publicly released when a licensee put its financial condition at issue in a Commission proceeding or when a compelling public interest existed. While many of the decisions state that even in such cases disclosure is not automatic, quoting the mere chance/necessary link language, in fact, the actual decisions deny the request only when the material is on the merely helpful end of the spectrum, and otherwise routinely permit public disclosure. In *Kannapolis Television Co.*, the Commission flatly stated that inspection of the confidential annual financial reports is permitted, 80 FCC 2d at 308 ¶ 3 (citations omitted), holding only that very old financial reports and the annual reports of other stations were not relevant, *id.* at 311 ¶ 12, 313 ¶ 17 (“there is virtually no likelihood that the financial reports would reveal significant information” about the question at issue). Similarly, in *Classical Radio Connecticut, Inc.*, 69 FCC 2d 1571 (1978), the case typically cited for the mere chance/necessary link language, the Commission found that some of the information sought would not have more than “marginal evidentiary value,” while also holding that under “Commission policy and precedent,” the licensee’s “interest in retaining the confidentiality of this financial information is outweighed by having its having placed these matters in issue in this proceeding.” And in *Sioux Empire Broadcasting Co.*, where the mere chance/necessary link phrase originated, the Commission held that it doubted that some of the information sought was relevant or material and why, if so, it could not be obtained from public Commission information, and that other information sought was not “necessary, relevant, or material.” 10 FCC 2d at 134-35 ¶¶ 7-8. See also *The Western Union Telegraph Co.*, 2 FCC Rcd at 4487 (requestor argued only that the confidential audit information sought would “shed light”); *Thomas N. Locke*, 8 FCC Rcd 8746, 8747 (1993) (concluding that “overall public interest would not be served” by releasing audit information where requestor made only general allegations that information was of great importance in devising a national policy for the telephone companies); *Robert J. Butler*, 6 FCC Rcd 5414, 5418-19 ¶¶ 32-37 (1991) (holding that, even if the requested information were relevant, the proceeding in which it would be used might never occur; that the information did not bear on and was unrelated to a legitimate issue in that proceeding; and that as a practical matter it was difficult to see how the information could be at issue; also holding that disclosure would harm international negotiations); *TS Infosystems, Inc.*, 6 FCC Rcd 8, 9 n. 5 (1991) (“Rather, Infosystems merely seeks to enhance its own competitive posture in future procurement activities.”); *Martha H. Platt*, 5 FCC Rcd 5742, 5743 ¶ 9 (1990) (finding no compelling public interest to justify release under FOIA for confidential audit reports on ground that the information would “shed light”).

<sup>134</sup> One of the dissents misreads both this Order and the Commission’s prior decisions. See Statement of Commissioner Pai Approving in Part and Dissenting in Part. *The CBS, Inc. v. FCC* decision interpreted the phrase “necessary link in a chain of evidence” to mean “absolutely needed” or “required.” 785 F.3d at 706. As discussed in the text, both here and below, that interpretation is inconsistent with the Commission’s refusal in the *Confidential Information Policy Statement* to require a showing that information be “vital” before it could be reviewed pursuant to a protective order, as well as the Commission’s regulations themselves. Nor is it supported by the Commission’s pre-1998 decisions. The dissent’s implication that the Commission has always required that confidential information be “absolutely needed” or “required” before it could be released, even pursuant to a protective order, and that this Order changes the Commission’s policy in that regard, is simply incorrect.

<sup>135</sup> *Confidential Information Policy Statement*, 13 FCC Rcd at 24828 ¶ 16. Both section 0.457, which sets forth the persuasive showing requirement, and section 0.461, which describes how the Commission rules on requests for public inspection of confidential material, currently provide that in determining whether to publicly release confidential commercial information, the Commission will balance the considerations favoring disclosure and non-disclosure in light of the facts presented.

Commission had stated earlier in the *Confidential Information Policy Notice*, the Commission's balancing approach is consistent with the Supreme Court's decision in *Schreiber*, which held that Section 4(j) of the Communications Act "authorize[s] public disclosure of information, or receipt of data in confidence, as the agency may determine to be proper upon a balancing of the public and private interests involved."<sup>136</sup> A requirement that information be absolutely necessary to the resolution of an issue in front of the Commission before it may be released is at odds with such a balancing regime.

42. Finally, our interpretation today is also the most consistent with the Commission's decisions to publicly release confidential commercial information on its own accord, or to require that confidential information be filed publicly in the first instance, such as was made in *Schreiber* itself. When the Commission has done so, especially when it has required confidential information to be filed publicly, it has immediately proceeded to the ultimate question: whether, weighing the policy considerations and interests for and against disclosure, in light of all the factors involved, publicly releasing the confidential information at issue serves the public interest.<sup>137</sup> We emphasize that this procedure is the proper one. Our regulations do not require anything more.<sup>138</sup>

43. In sum, we conclude that, if the Commission ever did require a person seeking the public inspection of a document to show that the information was more than relevant to resolving an issue before the Commission, to show, for example, that the information was "required" or "necessary" (in the strictest sense of that word) -- and, again, it is doubtful that such a requirement ever existed -- the *Confidential Information Policy Statement* changed the Commission's interpretation of its regulations. In any event, we now make clear that the "persuasive showing" that must be made by a person who seeks to have records publicly released pursuant to our regulations and FOIA does not require a showing that the

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<sup>136</sup> *Confidential Information Policy Notice*, 11 FCC Rcd at 12414-15, 12417-18 ¶¶ 15, 21 (citing *Schreiber v. FCC*, 381 U.S. at 291-92).

<sup>137</sup> See, e.g., *Bartholdi Cable Co., Inc. v. FCC*, 114 F.3d 274, 281-82 (D.C. Cir. 1997) (affirming *Liberty Cable Co. Request for Confidentiality*, 11 FCC Rcd 2475, 2476 (1996)); *GTE Corp. and Southern Pacific Co.*, 94 FCC 2d 235 ¶ 21(1983) (publicly releasing confidential information cited by the parties in their pleadings). See also *Larry D. Henderson et al.*, 15 FCC Rcd 17073, 17075-77 ¶¶ 3, 9-11 (2000) (applied the balancing test, citing the *Confidential Information Policy Statement* for the proposition that it was "well-established under our rules and precedent" that the Commission may disclose confidential information when the policy considerations in favor of disclosure outweigh those favoring non-disclosure; holding that the principles articulated in *Liberty Cable* concerning procedural fairness should apply to enforcement proceedings; and concluding that the Bureau had "properly exercised its discretion" in determining that there were persuasive reasons to release portions of the confidential information.)

Using the same balancing process, we also recently denied a request that certain reports required to be filed in the Lifeline program be kept confidential. *Lifeline and Link Up Reform and Modernization; Telecommunications Carriers Eligible for Universal Service Support; Connect America Fund*, WC Docket No. 11-42, WC Docket No. 09-197, WC Docket No. 10-90, Second Further Notice of Proposed Rulemaking, Order on Reconsideration, Second Report and Order, and Memorandum Opinion and Order, FCC 15-71, ¶¶ 271-85 (rel. June 22, 2015). Because the issue of the correct interpretation of "persuasive showing" was pending before us, we stated that "Although we do not believe that such a finding is necessary, we also conclude that the information constitutes a 'necessary link in a chain of evidence' that will resolve an issue before the Commission." *Id.* at ¶ 284 n. 579. We make clear now that it was not necessary for us to make such a finding and that we have the authority to publicly release the confidential information upon a balancing of the public and private interests at stake, as described above. (Similarly, while that decision referred to the persuasive showing required under section 0.457 of our regulations, as discussed in the text, where the Commission is deciding on its own to publicly release competitively sensitive and other confidential information, it properly immediately proceeds to the balancing determination set forth in section 0.461 of the regulations and in accord with the Court's decision in *Schreiber*.)

<sup>138</sup> We point out the obvious syllogism: if the Commission concludes after weighing the various factors that confidential information should be publicly released, it has made a showing that is persuasive, at least to it, that it should do so.

information is “necessary” or “vital.” However, there must be more than a “mere chance” that the confidential information will be helpful, and it must provide more than “factual context,” before the Commission will consider publicly releasing a confidential document. The ultimate question we decide is whether, weighing the various factors, and the public and private interests and policy considerations in favor and against disclosure, publicly disclosing the confidential information serves the public interest.

44. *The “Persuasive Showing” Requirement Does Not Apply to Protective Orders.* In section III.B above, we discuss why we find it in the public interest to use protective orders to allow for a limited review of all confidential material that is contained in the record in licensing proceedings. Our discussion could end then. But because the *Confidential Information Policy Statement* has proven confusing in this regard, we explain here why the “persuasive showing” that we require from persons who seek to have confidential information released publicly should not apply to the review of information pursuant to protective orders. And we clarify that, to the extent our previous orders could be read to impose such a requirement, we are removing that requirement now.<sup>139</sup>

45. While our regulations require a requestor who seeks to *publicly* inspect records pursuant to FOIA to make a persuasive showing, there is no such requirement before a person may review confidential information pursuant to a protective order. Public release of confidential information under FOIA is very different from limited review of that information pursuant to a protective order. Information released under FOIA is released to the general public; there is no provision for limiting the information’s use or disclosure.<sup>140</sup> A protective order, on the other hand, provides only a very limited release, and the information may be used for only limited purposes – in the Commission’s standard protective orders, for the conduct of the proceeding in which it is adopted.<sup>141</sup> Indeed, disclosing confidential information pursuant to a protective order is an *alternative* to public release.<sup>142</sup> The

<sup>139</sup> Since the Commission adopted the *Confidential Information Policy Statement*, we are aware of only one instance where the Commission implied that a persuasive showing needed to be made in order for participants in a proceeding to review confidential information pursuant to a protective order. 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 on Reconsideration, 29 FCC Rcd 13597, 13608 ¶ 22 (Media Bur. 2014), *aff’d for the reasons stated by the Bureau*, 29 FCC Rcd 14267 (2014) (finding that the allowing access pursuant to the protective order properly balanced the interests favoring disclosure and nondisclosure). For the reasons discussed below, that implication was incorrect. But also for the reasons discussed below, we do not find it of practical import. In adopting a protective order, we are necessarily “persuaded” that despite the interest in maintaining the confidentiality of competitively sensitive information, the balance of the public interest favors allowing review of that information pursuant to the strictures of the protective order.

Contrary to the dissenting statement, this is not “revisionist history.” See Statement of Commissioner Pai Approving in Part and Dissenting in Part, at Section II. There have been a very large number of protective orders adopted in transaction reviews since 1998, and apart from the order cited above, *not one* even mentioned a requirement of a persuasive showing. On the other hand, almost invariably when adopting a protective order, the Bureau or the Commission *did* engage in a balancing test, finding that the provisions being adopted gave appropriate access to the public while protecting a party’s competitively sensitive information, and thereby served the public interest

<sup>140</sup> *Nat’l Archives and Records Admin. v. Favish*, 541 U.S. at 174.

<sup>141</sup> See, e.g., *Protective Order*, 28 FCC Rcd at 16957 ¶ 7.

<sup>142</sup> Compare paragraph 8 with paragraph 9 of the *Confidential Information Policy Statement*, 13 FCC Rcd at 24822-23 ¶¶ 8, 9 (also noting that where the balancing of interests leads to non-disclosure under FOIA, a protective order can be used to provide access to the information). See *Confidential Information Policy Reconsideration*, 14 FCC Rcd at 20129 ¶ 3 (“As we explained in our *Report and Order*, even if tariff cost support data is shown by a preponderance of the evidence to warrant confidential treatment, it will normally be released to interested parties pursuant to a protective order.”); *Confidential Information Policy Statement*, 13 FCC Rcd at 24832 ¶ 23 (protective order can be used to provide limited access to information while the Commission considers a request for

(continued....)

feasibility of using of a protective order is one of the factors the Commission considers in determining whether to release information publicly.<sup>143</sup>

46. Moreover, the public interest considerations between publicly releasing confidential information and permitting limited review pursuant to a protective order are quite different. For example, the harm to an owner of confidential information from a limited review of information pursuant to a protective order is far less, if any, than that arising from a general public release. Thus, in weighing the policy considerations favoring non-disclosure against those favoring inspection, the Commission's decisions would obviously differ depending on whether there would be a general public release or only a limited review pursuant to a protective order. Further, requiring each party to a proceeding to make a persuasive showing that it should be able to review the documents makes far less sense in a protective order context. As discussed in section III.B above, many protective orders are adopted because certain parties wish to file their own confidential information. Under those circumstances, the submitter itself is implicitly arguing the information is relevant if not essential. And, in any event, basic notions of fairness require that others be permitted to review that information in order to contest it. In other cases, where the Commission requests the submission of information, it acts on a determination that the information is relevant to the issues before it, if not, in fact, required for the Commission to complete its inquiry and make its determinations regarding the public interest. We conclude that these reasons, which are just some of the factors we have relied on in concluding that all of the information filed in the record in a licensing proceeding should be available for review pursuant to a protective order, would be sufficient to make out a "persuasive showing" were such a showing, indeed, required from an individual who sought to review the information. It therefore would not make sense to require individual parties (or the Commission) to go through a series of time-consuming exercises.<sup>144</sup>

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confidentiality); *Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996*, 12 FCC Rcd 2170, 2212-16 (1997) (adopting protective orders in streamlined tariff proceedings because, among other reasons, it would not be possible to resolve FOIA requests within the statutory time limits for completing tariff review); *Letter from Kathleen M.H. Wallman to Gregory F. Intoccia*, 10 FCC Rcd 13462 (Com. Car. Bur. 1995) (denying request to publicly release confidential business information but making it available pursuant to protective order, stating, "We know of no case in which the Bureau or Commission has ordered cost support data withheld in their entirety without affording some means for analysis, at least to the parties to the tariff review proceeding.") (citations omitted).

As shown by these decisions, before the Commission began regularly using protective orders, many requests for the public release of confidential information were made by participants in a proceeding wishing to use the confidential information for purposes of that proceeding. Thus, as described previously, *supra* paragraph 38, some of the factors in determining whether to publicly release confidential information include whether the requestor is a participant to the proceeding, whether the information is relevant to the proceeding, and whether a protective order can be used. In such circumstances, review and use pursuant to a protective order is an alternative to public release of the information and serves the dual purpose of protecting confidential information while allowing limited disclosure for a public purpose. See *Confidential Information Policy Statement*, 13 FCC Rcd at 24824 ¶ 9. Where the requestor is not seeking to use the information in a Commission proceeding, however, a protective order does not provide an alternative, and the Commission must determine whether the public interest favors release by balancing the remaining factors.

<sup>143</sup> *Confidential Information Policy Statement*, 13 FCC Rcd at 24828 ¶ 16. The Commission's protective orders also provide that they do not constitute a resolution of the merits as to whether any confidential information would be released pursuant to FOIA or other applicable law, see *Confidential Information Policy Statement*, Appendix C (Model Protective Order), 13 FCC Rcd at 24866, again showing the distinction between public inspection under FOIA and limited review pursuant to a protective order.

<sup>144</sup> Cf. *FCC v. Schreiber*, 381 U.S. at 289, 293; *SBC Communications, Inc. v. FCC*, 56 F.3d at 1496 ("The Commission's manner of proceeding was well within its procedural discretion in implementing the Communications Act. The HSR documents contained millions of pages; for the Commission to have sorted through all of them would have delayed a decision on the transfer indefinitely. The Commission is fully capable of determining which documents are relevant to its decision-making; for us to hold that the Commission is bound to review every document deemed relevant by the parties would be an unwarranted intrusion into the agency's ability to conduct its

(continued....)

47. Thus, at least since 1998, when the Commission adopted the *Confidential Information Policy Statement*, the Commission has not required participants in proceedings where a protective order has been adopted to make a “persuasive showing” of their need for access, or to show that the evidence is a “necessary link” to resolve an issue before the Commission. Rather, as discussed previously, in determining whether to allow confidential information to be reviewed pursuant to a protective order, the Commission sensibly balances the public considerations to reach its determination as to whether a protective order should be employed.

#### IV. CONCLUSION

48. The Commission has utilized protective orders to allow participants in proceedings to review competitively sensitive and other confidential information successfully for over 15 years. The protective orders “are based on years of Commission experience and represent a time-tested means to protect highly sensitive information . . . .”<sup>145</sup> We agree that confidential information should be adequately protected. We find that our protective orders supply that protection. We conclude that the attached Protective Order, which we are adopting in this proceeding to help “develop a more complete record,” sensibly balances the various public interest considerations, including the sensitive nature of confidential filings and the right of the public to participate in this proceeding in a meaningful way and “best conduce[s] to the proper dispatch of the Commission’s business and to the ends of justice.”<sup>146</sup>

#### V. ORDERING CLAUSES

49. Accordingly, IT IS ORDERED that, the attached Protective Order is ADOPTED.

50. This Order is issued pursuant to Sections 4(i), 4(j), 214(a), and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 214(a) and 310(d); and Section 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4); and is effective upon its adoption.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

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own business, see *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 549, 98 S.Ct. 1197, 1214, 55 L.Ed.2d 460 (1978) (“court should . . . not stray beyond the judicial province . . . to impose upon the agency its own notion of which procedures are ‘best’”), and would “arm interested parties with a potent instrument for delay.” *U.S. v. FCC*, 652 F.2d at 91); *Comcast Corp. and AT&T Corp.*, 17 FCC Rcd 22633, 22636 (2002), *aff’d sub. nom. Consumer Federation of America v. FCC*, 348 F.3d 1009 (D.C. Cir. 2003).

<sup>145</sup> 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 on Reconsideration, 29 FCC Rcd 13597, 13608 ¶ 22 (Media Bur. 2014), *aff’d for the reasons stated by the Bureau*, 29 FCC Rcd 14267 (2014).

<sup>146</sup> 47 U.S.C. § 154(j). See *FCC v. Schreiber*, 381 U.S. at 289, 293-94.

ATTACHMENT

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

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

**PROTECTIVE ORDER**

By the Commission:

1. In this Protective Order, we set forth procedures to (i) limit access to proprietary or confidential information that may be filed in this proceeding, and (ii) more strictly limit access to certain particularly competitively sensitive information, which, if released to competitors or those with whom the Submitting Party or a Third-Party Interest Holder does business, would allow those persons to gain a significant competitive advantage or an advantage in negotiations. The information the Applicants submit, the information we request as relevant and material to the issues raised by the applications, and the information submitted by other parties to the proceeding together constitute the record on which the Commission must base our determination whether granting the applications serves the public interest. While we are mindful of the sensitive nature of some of the information involved, we are also mindful of the general right of the public, and our desire for the public, to participate in this proceeding in a meaningful way. We find that allowing limited access to competitively sensitive materials pursuant to the procedures set forth in this Protective Order allows the public (through appropriate representatives) to do so while also protecting competitively sensitive information from improper disclosure and use. Accordingly, sensibly balancing the public and private interests involved, we conclude that these procedures serve the public interest and adopting them “best conduce[s] to the proper dispatch of the Commission’s business and to the ends of justice.”<sup>147</sup>

2. *Definitions.* As used herein, capitalized terms not otherwise defined in this Protective Order shall have the following meanings:

“Acknowledgment” means the Acknowledgment of Confidentiality attached as Appendix B hereto.

“Competitive Decision-Making” means 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 Interest Holder.

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<sup>147</sup> 47 U.S.C. § 154(j).

“Confidential Information” means information that is not otherwise available from publicly available sources and that is subject to protection under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and the Commission’s implementing rules.

“Counsel” means In-House Counsel and Outside Counsel of Record.

“Document” means any written, recorded, electronically stored, or graphic material, whether produced or created by the Submitting Party or another person.

“Highly Confidential Information” means information that is not otherwise available from publicly available sources; that the Submitting Party has kept strictly confidential; that is subject to protection under FOIA and the Commission’s implementing rules; that the Submitting Party claims constitutes some of its most sensitive business data which, if released to competitors or those with whom the Submitting Party does business, would allow those persons to gain a significant advantage in the marketplace or in negotiations; and that it is described in Appendix A to this Protective Order, as the same may be amended from time to time.

“In-House Counsel” means an attorney employed by a Participant in this proceeding or employed by an affiliated entity and who is actively engaged in the conduct of this proceeding, provided that such attorney is not involved in Competitive Decision-Making. (In this regard, an In-House Counsel’s employer is considered his or her client.)

“Outside Counsel of Record” or “Outside Counsel” means the attorney(s), firm(s) of attorneys, or sole practitioner(s), as the case may be, retained by a Participant in this proceeding, provided that such attorneys are not involved in Competitive Decision-Making. The term “Outside Counsel of Record” includes any attorney employed by a non-commercial Participant in this proceeding, provided that such attorney is not involved in Competitive Decision-Making.

“Outside Consultant” means a consultant or expert retained for the purpose of assisting Outside Counsel or a Participant in this proceeding, provided that such consultant or expert is not involved in Competitive Decision-Making. The term “Outside Consultant” includes any consultant or expert employed by a non-commercial Participant in this proceeding, provided that such consultant or expert is not involved in Competitive Decision-Making.

“Outside Firm” means a firm, whether organized as a partnership, limited partnership, limited liability partnership, limited liability company, corporation or otherwise, of Outside Counsel or Outside Consultants.

“Participant” means a person or entity that has filed, or has a good faith intention to file, an application, petition to deny or material comments in this proceeding.

“Redacted Confidential Document” means a copy of a Stamped Confidential Document where the Confidential Information has been redacted.

“Redacted Highly Confidential Document” means a copy of a Stamped Highly Confidential Document where the Highly Confidential Information has been redacted.

“Reviewing Party” means a person who has obtained access to Confidential Information (including Stamped Confidential Documents) or Highly Confidential Information (including Stamped Highly Confidential Documents) pursuant to paragraphs 7 or 12 of this Protective Order.

“Stamped Confidential Document” means any document, or any part thereof, that contains Confidential Information and that bears the legend (or which otherwise shall have had the legend recorded upon it in a way that brings its attention to a reasonable examiner) “CONFIDENTIAL INFORMATION – SUBJECT TO PROTECTIVE ORDER IN MB DOCKET NO. 15-149 BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION,” unless the Commission determines, *sua sponte* or by request pursuant to paragraph 4 of this Protective Order or sections 0.459 or 0.461 of its rules,<sup>148</sup> that any such document is not entitled to confidential treatment. By designating a document a “Stamped Confidential Document,” a Submitting Party signifies and represents that it contains Confidential Information.

“Stamped Highly Confidential Document” means any document, or any part thereof, that contains Highly Confidential Information and that bears the legend (or which otherwise shall have had the legend recorded upon it in a way that brings its attention to a reasonable examiner) “HIGHLY CONFIDENTIAL INFORMATION – SUBJECT TO PROTECTIVE ORDER IN MB DOCKET NO. 15-149 BEFORE THE FEDERAL COMMUNICATIONS COMMISSION,” unless the Commission determines, *sua sponte* or by request pursuant to paragraph 4 of this Protective Order or sections 0.459 or 0.461 of its rules, that any such document is not entitled to highly confidential treatment. By designating a document a “Stamped Highly Confidential Document,” a Submitting Party signifies and represents that it contains Highly Confidential Information.

“Submitting Party” means a person or entity who submits a Stamped Confidential Document or a Stamped Highly Confidential Document.

“Support Personnel” means employees of a Reviewing Party’s Outside Firm and third-party contractors and employees of third-party contractors who are assisting in this proceeding, provided such persons are involved solely in performing clerical or ministerial functions with regard to documents and information connected with this proceeding, including performing one or more aspects of organizing, filing, coding, converting, storing, or retrieving documents or data or designing programs for handling data connected with this proceeding.

“Third-Party Interest Holder” means a person who is not a Submitting Party who has a confidentiality interest in Confidential Information or Highly Confidential Information that is submitted under this Protective Order.

3. *Designation of Information as Highly Confidential.* A Submitting Party may designate as Highly Confidential only those types of information described in Appendix A. If a Submitting Party believes that the descriptions contained in Appendix A should be revised, the Submitting Party shall submit a request to amend Appendix A along with a supporting explanation. To the extent the request is granted, an amended Appendix A will be issued. In addition, before a Submitting Party may designate particular documents or information as Highly Confidential, it must receive the written approval of the Commission staff, which, based on the Submitting Party’s representations, will make a preliminary determination whether the proposed designation meets the requirements set forth in this Protective Order. By designating documents and information as Confidential or Highly Confidential under this Protective Order, a Submitting Party also will be deemed to have submitted a request that the material not be made routinely available for public inspection under the Commission’s rules.<sup>149</sup>

4. *Challenge to Designation.* Any person wishing to challenge the designation of a document, portion of a document or information as Confidential or Highly Confidential must file such a challenge at the Commission and serve it on the Submitting Party and any known Third-Party Interest Holders. The Submitting Party and any Third-Party Interest Holders must file any reply within five business days, and include a justification for treating the information as Confidential or Highly Confidential, as appropriate. The documents and information challenged will continue to be accorded confidential treatment until the Commission acts on the request and any timely motion for a judicial stay

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<sup>148</sup> 47 C.F.R. §§ 0.459, 0.461.

<sup>149</sup> See 47 C.F.R. §§ 0.459(a), 0.459(a)(3).

has been acted upon.<sup>150</sup> Any decision on whether the materials should be accorded confidential treatment does not constitute a resolution of the merits concerning whether such information would be released publicly by the Commission upon an appropriate request under our rules implementing FOIA.<sup>151</sup>

5. *Submission of Stamped Confidential Documents and Stamped Highly Confidential Documents.* A Submitting Party shall submit to the Secretary's Office one copy of each Stamped Confidential Document and each Stamped Highly Confidential Document it seeks to file and an accompanying cover letter. Before doing so, the Submitting Party shall notify any known Third-Party Interest Holders who have a confidentiality interest in any such Stamped Confidential Document or Stamped Highly Confidential Document. Each page of the Stamped Confidential Document or Stamped Highly Confidential Document shall be stamped "CONFIDENTIAL INFORMATION – SUBJECT TO PROTECTIVE ORDER IN MB DOCKET NO. 15-149 BEFORE THE FEDERAL COMMUNICATIONS COMMISSION" or "HIGHLY CONFIDENTIAL INFORMATION – SUBJECT TO PROTECTIVE ORDER IN MB DOCKET NO. 15-149 BEFORE THE FEDERAL COMMUNICATIONS COMMISSION", as appropriate. The cover letter also shall contain this legend. In addition, with respect to each Stamped Confidential Document and each Stamped Highly Confidential Document submitted, the Submitting Party shall also file through the Commission's Electronic Comment Filing System ("ECFS") a copy of the respective Redacted Confidential Document or Redacted Highly Confidential Document and an accompanying cover letter.<sup>152</sup> Each Redacted Confidential Document or Redacted Highly Confidential Document shall have the same pagination as the Stamped Confidential Document or Stamped Highly Confidential Document from which it is derived. Each page of the Redacted Confidential Document or Redacted Highly Confidential Document and the accompanying cover letter shall be stamped "REDACTED – FOR PUBLIC INSPECTION." To the extent that any page of the filing contains both Confidential Information or Highly Confidential Information and non-confidential information, only the Confidential Information and Highly Confidential Information may be redacted and the page of the unredacted filing shall clearly distinguish among the Confidential Information, the Highly Confidential Information and the non-confidential information. In addition, two copies of each Stamped Confidential Document and Stamped Highly Confidential Document and the accompanying cover letter shall be delivered, as directed by Commission staff, to Vanessa Lemmé, Vanessa.Lemme@fcc.gov, (202) 418-2611, Industry Analysis Division, Media Bureau, Federal Communications Commission, 445 12<sup>th</sup> Street, S.W., Room 2-C312, Washington, D.C. 20554

6. *Copying Sensitive Documents.* If, in the reasonable judgment of the Submitting Party, a Stamped Highly Confidential Document contains information so sensitive that copying of it should be restricted, the Submitting Party may mark the document with the legend "Additional Copying Restricted." Subject to the provisions for access to information in electronic format in paragraph 10, each Outside Firm shall receive only one copy of the document and no more than two additional copies, in any form, shall be made. Application for relief from this restriction against further copying may be made to the Commission, with notice to Counsel of Record for the Submitting Party, which will be granted only for cause.

7. *Procedure for Obtaining Access to Confidential Information and Highly Confidential Information.* Access to Highly Confidential Information (including Stamped Highly Confidential Documents) is limited to Outside Counsel of Record, Outside Consultants, their employees and employees of their Outside Firms, and Support Personnel. Any person other than Support Personnel seeking access to Confidential Information or Highly Confidential Information subject to this Protective

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<sup>150</sup> Cf. 47 C.F.R. §§ 0.459(g), 0.461(i).

<sup>151</sup> See 47 C.F.R. §§ 0.459(h), 0.461.

<sup>152</sup> If a party is not able to submit a copy of the Redacted Confidential Document or Redacted Highly Confidential Document via ECFS, it must file two copies of the Redacted Confidential Document or Redacted Highly Confidential Document with the Secretary's Office along with the appropriately stamped cover letter.

Order shall sign and date the Acknowledgment agreeing to be bound by the terms and conditions of this Protective Order, and file the Acknowledgment with the Commission. A copy of the Acknowledgment also shall be delivered to the relevant Submitting Party through its Counsel of Record and any known Third-Party Interest Holders through counsel so that it is received at least five business days prior to such person's reviewing or having access to the Submitting Party's Confidential Information or Highly Confidential Information. Where there are multiple Submitting Parties or Third-Party Interest Holders, a copy of the Acknowledgment must be served on each within the time period stated above.

8. *Procedure for Objecting to the Disclosure of Confidential Information and Highly Confidential Information to a Potential Reviewing Party.*<sup>153</sup> Each Submitting Party and Third-Party Interest Holder shall have an opportunity to object to the disclosure of its Confidential Information or Highly Confidential Information to a person seeking to review that information pursuant to this Protective Order. A Submitting Party or Third-Party Interest Holder must file any such objection at the Commission and serve it on counsel for the person seeking access within three business days after receiving a copy of that person's Acknowledgment. Persons filing Acknowledgments shall not have access to Confidential Information or Highly Confidential Information before the period for filing objections has passed, unless both the Submitting Party and any known Third-Party Interest Holders waive this requirement. If a Submitting Party files additional documents containing Confidential Information or Highly Confidential Information, the Submitting Party shall notify any known Third-Party Interest Holders who have a confidentiality interest in the information before filing the additional documents. The Submitting Party shall file any objection to the disclosure of that additional Confidential Information or Highly Confidential Information to any Reviewing Party before or contemporaneous with the filing, and any Third-Party Interest Holder shall file such any objection as promptly as practicable. Until any timely objection is resolved by the Commission in favor of the person seeking access and, if a motion for a judicial stay is timely filed, until such a motion is acted upon, a person subject to an objection shall not have access to the relevant Confidential Information or Highly Confidential Information.<sup>154</sup> If an objection is not timely filed with the Commission, the Commission will nonetheless consider the objection and retains its discretion to prohibit further access to Confidential Information or Highly Confidential Information by the Reviewing Party until the objection is resolved.

9. *Review of Stamped Confidential Documents and Stamped Highly Confidential Documents.* A Submitting Party shall make available for review the Stamped Confidential Documents and Stamped Highly Confidential Documents of such party at the offices of the party's Outside Counsel of Record. Subject to the provisions of paragraph 6, a Reviewing Party shall be provided the following alternatives: (1) a Reviewing Party shall be provided adequate opportunity to inspect the documents on site; (2) a Reviewing Party may inspect the documents on site with the ability to request copies, at cost, of some or all of the documents; or (3) a Reviewing Party may request a complete set of the documents at

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<sup>153</sup> This paragraph describes the procedure for objecting to a specific individual being permitted to review Confidential and Highly Confidential Information pursuant to this Protective Order. The procedure for objecting to specific Confidential or Highly Confidential Information being reviewed by *any* individual pursuant to the Protective Order (in other words, for requesting that certain information be entirely withheld from review under the Protective Order) is set forth in paragraph 26 of the Order adopting this Protective Order. As stated there, where such an objection is timely made, we will not require that the information at issue be disclosed under the Protective Order until the Commission resolves the objection, and if a timely motion for judicial stay is filed, until the court rules upon the stay motion.

<sup>154</sup> An objection ordinarily will first be ruled upon by the Media Bureau. If the Bureau rejects the objection, the objecting party will be provided 10 business days to file an Application for Review with the Commission; if an Application for Review is not filed within that time, the Confidential or Highly Confidential Information shall be made available to the Reviewing Party. If an Application for Review is timely filed and is denied by the Commission, the objecting party will be provided 10 business days to seek a judicial stay of the Commission's Order; if a motion for stay is not filed within that time, the Confidential or Highly Confidential Information shall be made available to the Reviewing Party.

cost, allowing two business days after the request is made for receipt of the copies. If a Reviewing Party plans on requesting a complete set of documents, it is encouraged to make such a request at the time it submits the Acknowledgment to allow it the opportunity to begin reviewing the documents at the end of the five-day period referred to in paragraph 7. All copies of documents that are removed from the Submitting Party's office must be returned or destroyed in accordance with the terms of paragraph 21.

10. *Review of Highly Confidential Information in Electronic Format.* A Submitting Party shall make available to a Reviewing Party one copy of Highly Confidential Information contained, recorded, or electronically stored on an appropriate electronic storage device (such as a CD-ROM, DVD, flash drive or portable hard drive), which shall be considered a Stamped Highly Confidential Document. The medium containing the information in electronic format should be physically delivered to the Reviewing Party; a Reviewing Party may not require that it be transmitted electronically. A Reviewing Party may temporarily load onto a computer the information in electronic format. Once loaded onto a computer, any files containing Highly Confidential Information shall be password protected immediately. The Highly Confidential Information may be stored on a computer for the duration of the proceeding. All files containing Highly Confidential Information shall be deleted from the computer no later than proceedings at the Commission are complete. The original disk or other storage medium shall be stored securely and a record kept of any persons given access to it.

11. *Use of Confidential and Highly Confidential Information.* Persons obtaining access to Confidential and Highly Confidential Information under this Protective Order shall use the information solely for the preparation and conduct of this proceeding before the Commission and any subsequent judicial proceeding arising directly from this proceeding and, except as provided herein, shall not use such documents or information for any other purpose, including without limitation business, governmental, or commercial purposes, or in any other administrative, regulatory or judicial proceedings. Should the Commission rely upon or otherwise make reference to any Confidential or Highly Confidential Information in its orders in this proceeding, it will do so by redacting any Confidential or Highly Confidential Information from the public version of the order and by making the unredacted version of the order available only to a court and to those persons entitled to access to Confidential or Highly Confidential Information under this Protective Order, as appropriate.

12. *Permissible Disclosure.* A Reviewing Party may discuss and share the contents of Confidential Information and Highly Confidential Information with another Reviewing Party, with Support Personnel, as appropriate, and with the Commission and its staff. A Submitting Party's Confidential Information and Highly Confidential Information may be disclosed to employees and Counsel of the Submitting Party, and a Third-Party Interest Holder's Confidential Information and Highly Confidential Information may be disclosed to employees and Counsel of the Third-Party Interest Holder.

13. *Filings with the Commission.* A party making a filing in this proceeding that contains Confidential or Highly Confidential Information shall submit to the Secretary's Office one copy of the filing containing the Confidential or Highly Confidential Information (the "Confidential Filing") and an accompanying cover letter. The cover or first page of the Confidential Filing and each page of the Confidential Filing that contains or discloses only Confidential Information shall be clearly marked "CONFIDENTIAL INFORMATION – SUBJECT TO PROTECTIVE ORDER IN MB DOCKET NO. 15-149 BEFORE THE FEDERAL COMMUNICATIONS COMMISSION." The cover or first page of the Confidential Filing and each page of the Confidential Filing that contains or discloses Highly Confidential Information shall be clearly marked "HIGHLY CONFIDENTIAL INFORMATION – SUBJECT TO PROTECTIVE ORDERS IN MB DOCKET NO. 15-149 BEFORE THE FEDERAL COMMUNICATIONS COMMISSION." The accompanying cover letter shall also contain the appropriate legend. The Confidential Filing shall be made under seal, and will not be placed in the Commission's public file. The party shall submit a copy of the filing in redacted form, *i.e.*, containing no Confidential or Highly Confidential Information (the "Redacted Confidential Filing") to the Commission

via ECFS.<sup>155</sup> The Redacted Confidential Filing and the accompanying cover letter shall be stamped “REDACTED – FOR PUBLIC INSPECTION.” The cover letter accompanying the Redacted Confidential Filing shall state that the party is filing a redacted version of the filing. Each Redacted Confidential Filing shall have the same pagination as the Confidential Filing from which it is derived. To the extent that any page of the Confidential Filing contains any Confidential Information or Highly Confidential Information, only the Confidential Information or Highly Confidential Information may be redacted and the page of the unredacted Confidential Filing shall clearly distinguish among the Confidential Information, the Highly Confidential Information and the non-confidential information. Two copies of each Confidential Filing and the accompanying cover letter must be delivered, as directed by Commission staff, to Vanessa Lemmé, Vanessa.Lemme@fcc.gov, (202) 418-2611, Industry Analysis Division, Media Bureau, Federal Communications Commission, 445 12<sup>th</sup> Street, S.W., Room 2-C313, Washington, D.C. 20554. Parties should not provide courtesy copies of pleadings containing Highly Confidential Information to Commission staff unless the Bureau so requests, and any such courtesy copies shall be submitted under seal.

14. *Non-Disclosure of Confidential Information, and Highly Confidential Information.* Except with the prior written consent of the Submitting Party or as provided under this Protective Order, Confidential Information and Highly Confidential Information shall not be disclosed further.

15. *Protection of Stamped Confidential Documents, Stamped Highly Confidential Documents, Confidential Information, and Highly Confidential Information.* A Reviewing Party shall have the obligation to ensure that access to Confidential Information and Highly Confidential Information (including Stamped Confidential Documents and Stamped Highly Confidential Documents) is strictly limited as prescribed in this Protective Order. A Reviewing Party shall have the further obligation to ensure that Confidential Information and Highly Confidential Information are used only as provided in this Protective Order.

16. *Requests for Additional Disclosure.* If any person requests disclosure of Confidential or Highly Confidential Information outside the terms of this Protective Order, such a request will be treated in accordance with sections 0.442 and 0.461 of the Commission’s rules.

17. *Client Consultation.* Nothing in this Protective Order shall prevent or otherwise restrict Counsel from rendering advice to their clients relating to the conduct of this proceeding and any subsequent judicial proceeding arising therefrom and, in the course thereof, relying generally on examination of Confidential Information or Highly Confidential Information to which they have access under this Protective Order; *provided, however*, that in rendering such advice and otherwise communicating with such clients, Counsel shall not disclose Confidential Information or Highly Confidential Information.

18. *No Waiver of Confidentiality.* Disclosure of Confidential or Highly Confidential Information as provided herein by any person shall not be deemed a waiver by any Submitting Party of any privilege or entitlement to confidential treatment of such Confidential or Highly Confidential Information. Reviewing Parties, by viewing this material, agree: (1) not to assert any such waiver; (2) not to use Confidential or Highly Confidential Information to seek disclosure in any other proceeding; and (3) that accidental disclosure of Confidential or Highly Confidential Information by a Submitting Party to a Reviewing Party shall not be deemed a waiver of any privilege or entitlement provided that the Submitting Party takes prompt remedial action.

19. *Subpoena by Courts, Departments, or Agencies.* If a court, or a federal or state department or agency issues a subpoena for or orders the production of Stamped Confidential Documents, Stamped Highly Confidential Documents, Confidential Information or Highly Confidential Information

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<sup>155</sup> If a party is not able to submit a copy of the Redacted Confidential Filing via ECFS, it must file two copies of the Redacted Confidential Filing with the Secretary’s Office along with the appropriately stamped cover letter, as described in this paragraph.

that a party has obtained under the terms of this Protective Order, such party shall promptly notify each relevant Submitting Party and each known Third-Party Interest Holder of the pendency of such subpoena or order. Consistent with the independent authority of any court, department or agency, such notification must be accomplished such that each Submitting Party and Third-Party Interest Holder has sufficient opportunity to oppose such production prior to the production or disclosure of any Stamped Confidential Document, Stamped Highly Confidential Document, Confidential Information or Highly Confidential Information.

20. *Violations of the Protective Order.* Should a Reviewing Party violate any of the terms of this Protective Order, such Reviewing Party shall immediately convey that fact to the Commission and to the relevant Submitting Parties and known Third-Party Interest Holders. Further, should such violation consist of improper disclosure of Confidential or Highly Confidential Information, the violating person shall take all necessary steps to remedy the improper disclosure. The Commission retains its full authority to fashion appropriate sanctions for violations of this Protective Order, including but not limited to suspension or disbarment of Counsel or Consultants from practice before the Commission, forfeitures, cease and desist orders, and denial of further access to Confidential or Highly Confidential Information in this or any other Commission proceeding. Nothing in this Protective Order shall limit any other rights and remedies available to the Submitting Party or any Third-Party Interest Holder at law or in equity against any person using Confidential or Highly Confidential Information in a manner not authorized by this Protective Order.

21. *Termination of Proceeding.* The provisions of this Protective Order shall not terminate at the conclusion of this proceeding. Within two weeks after conclusion of this proceeding and any administrative or judicial review, Reviewing Parties shall destroy or return to the Submitting Party Stamped Confidential Documents and Stamped Highly Confidential Documents and all copies of the same. No material whatsoever containing or derived from Confidential and Highly Confidential Information may be retained by any person having access thereto, except Outside Counsel and Outside Consultants may retain, under the continuing strictures of this Protective Order, two copies of pleadings (one of which may be in electronic format) prepared in whole or in part by that party that contain Confidential or Highly Confidential Information, and one copy of orders issued by the Commission or Bureau that contain Confidential or Highly Confidential Information. All Reviewing Parties shall certify compliance with these terms and shall deliver such certification to Counsel for the Submitting Party and file such certification with the Commission not more than three weeks after conclusion of this proceeding. Such certification shall be made pursuant to 28 U.S.C. section 1746 and is subject to 18 U.S.C. section 1001. The provisions of this paragraph regarding retention of Stamped Confidential Documents and Stamped Highly Confidential Documents and copies of the same and Confidential and Highly Confidential Information shall not be construed to apply to the Commission or its staff.

22. *Questions.* Questions concerning this Protective Order should be addressed to Neil Dellar, Neil.Dellar@fcc.gov, (202) 418-8214, Transaction Team, Office of General Counsel, and to Joel Rabinovitz, Joel.Rabinovitz@fcc.gov, (202) 418-0689, Transaction Team, Office of General Counsel.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

**APPENDIX A****Highly Confidential Information and Documents**

As specified in paragraphs 1 and 3 of the Protective Order, only information and documents set forth in this Appendix and that otherwise meet the definition of Highly Confidential Information or Highly Confidential Documents may be designated as Highly Confidential. This Appendix will be updated as necessary.

1. Information that details the terms and conditions of or strategy related to a Submitting Party's most sensitive business negotiations or contracts (*e.g.*, marketing, service or product agreements, agreements relating to potential mergers and acquisitions, and comparably sensitive contracts).
2. Information that discusses specific steps that will be taken to integrate companies or discussions of specific detail or disaggregated quantification of merger integration benefits or efficiencies (including costs, benefits, timeline, and risks of the integration).
3. Information that discusses in detail current or future plans to compete for a customer or specific groups or types of customers (*e.g.*, business or wholesale customers), including specific pricing or contract proposals, pricing strategies, product strategies, advertising or marketing strategies, future business plans, procurement strategies, technology implementation or deployment plans and strategies (*e.g.*, engineering capacity planning documents), plans for handling acquired customers, and human resources and staffing strategies.
4. Information that discloses the identity or characteristics of specific customers or of those a company is targeting or with whom a company is negotiating (including identifying information about specific customer facilities, information about customers' levels of demand, and information regarding pricing proposals).
5. Information that provides granular information about a Submitting Party's current or future costs, revenues, marginal revenues, market share or customers.
6. Detailed information describing or illustrating how a Submitting Party analyzes its competitors, including sources and methods used in these analyses, any limits on use of these analyses or data, and how such analyses or data are used.
7. Information that provides numbers of customers and revenues broken down by customer type (*e.g.*, business) and zip code or market area (*e.g.*, CMA/MSA/RSA, DMA, state, regional cluster).
8. Information that discusses in detail the number or anticipated changes in the number of customers or amount of traffic, including churn rate data, broken down by zip code or market and detailed information about why customers discontinue service.
9. Information that provides detailed or granular engineering capacity information or information about specific facilities, including collocation sites, cell sites, or maps of network facilities.
10. Information that provides detailed technical performance data and test results.

**APPENDIX B****Acknowledgment of Confidentiality****MB Docket No. 15-149**

I am seeking access to [ ] only Confidential Information or [ ] Confidential and Highly Confidential Information.

I hereby acknowledge that I have received and read a copy of the foregoing Protective Order in the above-captioned proceeding, and I understand it.

I agree that I am bound by the Protective Order and that I shall not disclose or use Stamped Confidential Documents, Stamped Highly Confidential Documents, Confidential Information or Highly Confidential Information except as allowed by the Protective Order.

I acknowledge that a violation of the Protective Order is a violation of an order of the Federal Communications Commission (Commission). I further acknowledge that the Commission retains its full authority to fashion appropriate sanctions for violations of this Protective Order, including but not limited to suspension or disbarment of Counsel or Consultants from practice before the Commission, forfeitures, cease and desist orders, and denial of further access to Confidential or Highly Confidential Information in this or any other Commission proceeding.

I acknowledge that nothing in the Protective Order limits any other rights and remedies available to a Submitting Party at law or in equity against me if I use Confidential or Highly Confidential Information in a manner not authorized by this Protective Order.

I certify that I am not involved in Competitive Decision-Making.

Without limiting the foregoing, to the extent that I have any employment, affiliation, or role with any person or entity other than a conventional private law firm (such as, but not limited to, a lobbying or advocacy organization), I acknowledge specifically that my access to any information obtained as a result of the Protective Order is due solely to my capacity as Counsel or Outside Consultant to a party or as an employee of Counsel, Outside Consultant, or Outside Firm, and I agree that I will not use such information in any other capacity.

I acknowledge that it is my obligation to ensure that Stamped Confidential Documents and Stamped Highly Confidential Documents are not duplicated except as specifically permitted by the terms of the Protective Order and to ensure that there is no disclosure of Confidential Information or Highly Confidential Information in my possession, in the possession of those who work for me or in the possession of other Support Personnel, except as provided in the Protective Order.

I certify that I have verified that there are in place procedures at my firm or office to prevent unauthorized disclosure of Confidential Information and Highly Confidential Information.

Capitalized terms used herein and not otherwise defined shall have the meanings ascribed to them in the Protective Order.

Executed this \_\_\_ day of \_\_\_\_\_, 20\_\_.

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[Name]  
[Position]  
[Firm]  
[Telephone]  
[Party]

**STATEMENT OF  
COMMISSIONER AJIT PAI  
APPROVING IN PART AND DISSENTING IN PART**

Re: *Applications of Charter Communications Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership For Consent To Assign or Transfer Control of Licenses and Authorizations*, MB Docket No. 15-149.

Here we go again. Last year, in the Comcast/Time Warner Cable and AT&T/DirecTV merger proceedings, the Commission tried to give outside parties access to programming contracts and retransmission consent agreements. Notwithstanding the fact that the FCC had consistently processed such transactions over the years without making such agreements available for review, the Media Bureau suddenly claimed that these documents were “central to some of the most significant and contested issues pending in the transactions” and therefore “must be part of the record available to commenters.”<sup>1</sup>

Commissioner O’Rielly and I objected to disclosing these highly confidential documents to outside parties,<sup>2</sup> and the D.C. Circuit subsequently concluded that the Commission’s action was “both substantively and procedurally flawed.”<sup>3</sup> To be sure, the court left the door open for the FCC to try again in the Comcast and AT&T merger proceedings to disclose these programming agreements to outside parties. But the Commission did not do so. Instead, it approved the AT&T/DirecTV merger, and FCC staff advised parties that it would recommend rejecting the Comcast/Time Warner Cable transaction, leading to the withdrawal of that merger application. What about the prior claims regarding the importance of making programming contracts available for review? They were chimeras. Even though the programming contracts were never disclosed, neither the Commission nor staff had any problem reaching a decision regarding the merits of the transactions.

But now a new transaction is upon us, and the Commission sees another chance to give outside parties a sneak peek at confidential programming agreements. This *Order* is obviously the first step in the Commission’s misguided effort to do so. But the *Order* also does much more than that. It substantially revises the FCC’s policies regarding the treatment of confidential commercial information in *all* types of Commission proceedings. And it changes not only the Commission’s policy on disclosing confidential information pursuant to a protective order, but also the Commission’s approach to the release of such information to the general public. To put it another way, in order to set the stage for disclosing highly confidential programming contracts to parties with whom programmers must negotiate distribution agreements, the Commission is prepared to inflict a large amount of collateral damage along the way.

As explained in more detail below, I dissent from the vast majority of this item for four reasons. First, the process leading to this *Order* was seriously flawed. Second, the *Order* rewrites recent history. Third, the *Order* provides insufficient protection for confidential commercial information. And fourth, the *Order* has serious legal defects.

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<sup>1</sup> See *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, 29 FCC Rcd 13597, 13605, para. 17 (Media Bur. 2014) (*Comcast Order on Reconsideration*).

<sup>2</sup> *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, 29 FCC Rcd 14267 (2014) (Dissenting Statements of Commissioner Ajit Pai and Commissioner Mike O’Rielly) (*Comcast Order*).

<sup>3</sup> See *CBS Corp. v. FCC*, 785 F.3d 699, 700 (D.C. Cir. 2015).

## I.

Let's start with process. When the Commission last evaluated and revised its policies regarding the protection of confidential commercial information in the 1990s, it adopted a Notice of Inquiry and Notice of Proposed Rulemaking seeking comment from stakeholders and the general public.<sup>4</sup> Then, after carefully considering that feedback, the Commission issued a Report and Order.<sup>5</sup>

Contrast what took place during the Clinton Administration with what is happening here. Has the Commission sought comment on the critical issues addressed in today's item? No. Even though the important decisions made in this item will apply to *all* types of proceedings and *all* industries regulated by the FCC, the Commission cannot be bothered to go through the hassle of notice-and-comment rulemaking.

To be sure, the Commission does claim that public comment was not necessary here because the FCC is merely "clarifying" its regulations rather than "adopting or amending" regulations.<sup>6</sup> As will be discussed later, this claim is based on an inaccurate reading of recent regulatory history. But for present purposes, it is sufficient to point out that the Commission is "clarifying" that its regulations today, on fundamental issues regarding the protection of confidential commercial information, mean something different than what the Commission said they meant just last year. And if the Commission is going to change its approach on these important questions, it first should provide affected stakeholders with the chance to weigh in. Stakeholders likely will claim that the FCC was legally required to do so, and they might very well be right. But in addition to that, as a matter of sound administrative process, the Commission should have sought comment on the issues addressed here just as it did when it last examined them almost 20 years ago.

Speaking of sound administrative process, the resolution of these broad issues concerning the protection of commercially sensitive information should not have been tied to the release of a protective order and the start of the 180-day shot-clock in the Charter/Time Warner Cable transaction. The shot-clock for that transaction should have started in July, and the protective order for that proceeding should have been issued then as well. But the FCC's leadership refused to take these steps until Commissioners finished their consideration of the FCC's general policies on the protection of confidential information. This unnecessary and inappropriate hostage-taking was done solely to place pressure on Commissioners to short-circuit their review of the merits of the broader issues, much like when unrelated items are attached to must-pass legislation in Congress.

The Commission offers no explanation for why all of these broader issues had to be resolved contemporaneously with the issuance of the protective order for the Charter/Time Warner Cable merger. That is because there is none—none that relates to the merits, anyway.

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<sup>4</sup> 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 (1996).

<sup>5</sup> See *Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, Report and Order, 13 FCC Rcd 24816, 24838 (1998) (*Confidential Information Policy Statement*).

<sup>6</sup> *Order* at n.6.

## II.

The Commission's rules state that those seeking to review confidential commercial information are required to provide "a persuasive showing as to the reason for inspection."<sup>7</sup> But in the *Order*, the Commission claims that this "persuasive showing" requirement has not applied "to participants in proceedings where a protective order has been adopted" since at least 1998.<sup>8</sup> That claim, however, is nothing more than revisionist history.<sup>9</sup>

Last year, for example, when the Media Bureau was trying to make available programming contracts subject to a protective order in the Comcast/Time Warner and AT&T/DirecTV proceedings, it justified its decision as follows:

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. *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. These rules permit the disclosure of such information on a "persuasive showing" of the reasons in favor of its release.* The Commission permits disclosure where the Commission has identified a compelling public interest in disclosure. The rules also contemplate that the Commission will engage in a balancing of the interests favoring disclosure and nondisclosure. 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. Given the highly relevant nature of [video programming confidential information, or] 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.<sup>10</sup>

The import of this passage is clear; pursuant to the Commission's rules, a "persuasive showing" is required to release commercially sensitive information, even when such information is disclosed pursuant to a protective order.

Programmers then filed an application for review with the Commission, and the Commission affirmed the Bureau's decision "for the reasons stated by the Media Bureau."<sup>11</sup> Thus, the Commission adopted the Bureau's reasoning as its own, including its embrace of the "persuasive showing" test for the disclosure of information pursuant to protective orders.

The matter then went to the D.C. Circuit, and the Commission told the court: "[W]e're in a world where the persuasive-showing standard applies."<sup>12</sup> And what world was that? The world where commercially sensitive information was to be disclosed *pursuant to a protective order*, of course.

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<sup>7</sup> See 47 C.F.R. § 0.457(d)(1).

<sup>8</sup> *Order* at para. 47.

<sup>9</sup> Cf. *History of the World: Part I* (20th Century Fox 1981) (depicting, among other things, Moses dropping a tablet containing five of the original "15 Commandments" while descending Mount Sinai).

<sup>10</sup> *Comcast Order on Reconsideration*, 29 FCC Rcd at 13608, para. 23 (footnotes omitted) (emphasis added).

<sup>11</sup> See *Comcast Order*, 29 FCC Rcd at 13597, para. 1.

<sup>12</sup> *CBS Corp.*, 785 F.3d at 704.

Following oral argument, the Commission made no effort to walk back or disavow this representation, and the D.C. Circuit went on to decide the case applying the “persuasive showing” test.<sup>13</sup>

So what is the Commission’s response to all of this? The *Order* claims that the Commission merely *implied* that the “persuasive showing” standard applied, and that such an implication was incorrect.<sup>14</sup> But, as recounted above, the Media Bureau, in the words of the D.C. Circuit “*concluded* in its November *Order* that it must make the persuasive-showing finding.”<sup>15</sup> The Commission affirmed that decision. Its counsel subsequently took that position in front of the D.C. Circuit, which then applied it in resolving this dispute. So let’s be clear: This was not a casual implication. Instead, it was a considered decision by the Commission that the FCC is now summarily reversing.<sup>16</sup>

The *Order* also claims that this issue is not of “practical import” because “[i]n adopting a protective order, we are necessarily ‘persuaded’ that despite the interest in maintaining the confidentiality of competitively sensitive information, the balance of public interest favors allowing review of that information pursuant to the strictures of the protective order.”<sup>17</sup>

But it is difficult to take this argument seriously. When the Commission adopts a protective order at the outset of a transaction, it does not know what confidential information will come into the record. How, then, can the Commission at that point determine that a “persuasive showing has been made” permitting review of *all* of that information? It can’t—unless, of course, the “persuasive showing” standard in the Commission’s view does no work at all, a topic to which I will turn shortly.

Speaking of the “persuasive showing” standard, the *Order* also claims that the Commission long ago abandoned its “policy of . . . insist[ing] upon a showing that the information is a necessary link in a chain of evidence that will resolve an issue before the Commission.”<sup>18</sup> But this is just more revisionist history; the “necessary link” test was alive and well before today.

The Commission contends in the *Order* that the “necessary link” test was disavowed in the *Confidential Information Policy Statement*. But no such disavowal exists, and the *Order* is unable to point to any decision in which the Commission has specifically rejected it. First off, there’s no dispute that the “necessary link” test was the relevant standard prior to 1998. Second, in the relevant paragraphs of the 1998 *Confidential Information Policy Statement*, the Commission made clear that it was “retain[ing] the persuasive showing standard” and “the Commission’s current practices.”<sup>19</sup> There is no indication in those paragraphs that the Commission was relaxing the “persuasive showing” standard. Rather, it was simply rejecting proposals to strengthen it.

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<sup>13</sup> Notably, this was not the first case where the D.C. Circuit had done so. See *Qwest Communications Intern. Inc. v. FCC*, 229 F.3d 1172, 1181-83 (D.C. Cir. 2000) (applying the “persuasive showing” standard and 47 C.F.R. § 0.457(d) in evaluating the release of commercially sensitive information pursuant to a protective order).

<sup>14</sup> See *Order* at n.138.

<sup>15</sup> *CBS Corp.*, 785 F.3d at 704 (emphasis added).

<sup>16</sup> While the Commission rejects the charge that it is engaging in revisionist history, see *Order* at n.139, it is unable to contest the accuracy of the events set forth above. Indeed, it makes no attempt to do so. Moreover, it is unable to cite *any* Commission or Bureau decision before today holding that the “persuasive showing” standard does not apply to the disclosure of confidential information pursuant to a protective order.

<sup>17</sup> *Order* at n.138.

<sup>18</sup> *Confidential Information Policy Statement*, 13 FCC Rcd at 24823, para. 8.

<sup>19</sup> *Id.* at 24828-29, paras. 16-17.

For example, it is true that the Commission declined “to adopt a blanket rule requiring the requester to demonstrate that access is ‘vital’ to the conduct of a proceeding, necessary to the ‘fundamental integrity’ of the Commission process at issue, or that the information have a direct impact on the requester.”<sup>20</sup> But none of those standards existed prior to the *Confidential Information Policy Statement*, and notwithstanding the Commission’s perplexing and unexplained claim to the contrary,<sup>21</sup> each is different than simply requiring a showing that the information is a necessary link in a chain of evidence that will resolve an issue before the Commission.

Nor is there any inconsistency between the “necessary link” test and the Commission “engag[ing] in a balancing of public and private interests when determining whether the ‘persuasive showing’ standard has been met.”<sup>22</sup> This is made clear by paragraphs eight and nine of the *Confidential Information Policy Statement*. In evaluating whether the interest in disclosing commercially sensitive information is strong enough to overcome the harms caused by such disclosure, the Commission looks to whether confidential financial information is a necessary link in a chain of evidence that will resolve an issue before the Commission. And if it is not, then the interest in disclosure is not sufficient to overcome the interest in maintaining confidentiality.

In considering whether the “necessary link” test was applicable before today, perhaps the D.C. Circuit put it best earlier this year when it said that the “necessary-link finding is an unavoidable component of the persuasive showing the regulations require.”<sup>23</sup> Consequently, the Commission’s decision today that the “necessary link” test no longer applies is not a clarification of FCC policy. It is a change of policy.

### III.

Shifting to the merits of the new policies adopted by the Commission today, I do not believe that they provide sufficient protection for commercially sensitive information. The Commission decides here that it will publicly release commercially sensitive information when, in “balancing the various interests in light of all the factors, public disclosure of the confidential information serves the public interest.”<sup>24</sup> Gone is the requirement that the information be “a necessary link in a chain of evidence that will resolve an issue before the Commission.”<sup>25</sup> Gone is the “presumption against disclosure of confidential information.”<sup>26</sup> Gone is the “sensitiv[ity] to ensuring that the fulfilment of [the FCC]’s regulatory responsibilities does not result in the unnecessary disclosure of information that might put its regulatees at a competitive disadvantage.”<sup>27</sup> Instead, the Commission embraces an essentially content-free standard that will allow it to expose a company’s most commercially sensitive information to the public whenever it feels like it.<sup>28</sup>

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<sup>20</sup> *Id.* at 24828, para. 16.

<sup>21</sup> *See Order* at n.134.

<sup>22</sup> *Order* at para. 41.

<sup>23</sup> *CBS Corp.*, 785 F.3d at 705.

<sup>24</sup> *Order* at para. 38.

<sup>25</sup> *Confidential Information Policy Statement*, 13 FCC Rcd at 24823, para. 8.

<sup>26</sup> *CBS Corp.*, 785 F.3d at 707.

<sup>27</sup> *See supra* note 25.

<sup>28</sup> In footnote 122 of the *Order*, the Commission conflates two separate policy changes that it makes today. The first is its decision to change the “persuasive showing” standard so that it no longer includes the “necessary link” test, a test that the D.C. Circuit said earlier this year was “an unavoidable component of the persuasive showing the [FCC’s] regulations require.” *CBS Corp.*, 785 F.3d at 705. The second is the decision to no longer apply the

(continued....)

However, as the D.C. Circuit has explained, “[t]he Trade Secrets Act exists for an important reason—Congress has decided that confidential business information should remain private unless there’s good cause to disclose it.”<sup>29</sup> That is why the Commission previously made clear that disclosure of such information would occur “only in very limited circumstances.”<sup>30</sup> Here, however, the Commission opens the door to the wide dissemination of large swaths of confidential commercial information. This is not only bad for individual competitors in the marketplace, it is bad for competition itself. Moreover, it will negatively impact the Commission as our new policy will deter companies from voluntarily disclosing commercially sensitive information to the FCC.

Indeed, the D.C. Circuit warned the Commission earlier this year against the approach taken by the Commission today: “[B]ecause corporate business documents will almost always be relevant to a merger between two industry participants, allowing the Commission to disclose confidential information based on mere relevance would mean that such information *would*, subject to the governing protective orders, be routinely available for inspection. We must read the statute and the Commission’s precedents to avoid the construction if we were to be faithful to Congress’s plan and to the Commission’s historical approach.”<sup>31</sup> But today, the Commission abandons Congress’s plan for, the court’s admonitions about, and its own historical approach to the protection of confidential commercial information.

Moreover, it is not enough for the Commission to emasculate the “persuasive showing” standard governing the disclosure of competitively sensitive information. It even decides that the emasculated standard will not apply to the release of such information subject to a protective order. Apparently determined at all costs to disclose programming contracts to rival MVPDs, the Commission doesn’t require the parties to make any affirmative showing at all. Needless to say, I cannot sign on to this extreme approach.

#### IV.

Finally, the foundation of the Commission’s entire legal analysis rests on extremely shaky terrain. Specifically, the Commission’s decision today relies on Section 4(j) of the Communications Act. The *Order* refers to language in Section 4(j) providing that “[t]he Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of the Commission’s business and to the ends of justice”<sup>32</sup> and points out that the Supreme Court held in *FCC v. Schreiber* that this language “authorize[s] public disclosure of information, or receipt of data in confidence, as the agency may determine to be proper upon a balancing of public and private interests involved.”<sup>33</sup>

To be sure, this is a fair statement of the law as it stood in 1965 when the Court decided *Schreiber*. But more recent jurisprudence casts serious doubt on whether the Commission can currently rely on Section 4(j) to disclose confidential commercial information.

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“persuasive showing” standard to the disclosure of commercially sensitive information pursuant to a protective order, a position that contradicts what the Commission told the D.C. Circuit just a few months ago. *Id.* at 704 (quoting the Commission’s position at oral argument: “[W]e’re in a world where the persuasive-showing standard applies”).

<sup>29</sup> *CBS Corp.*, 785 F.3d at 706.

<sup>30</sup> *See supra* note 25.

<sup>31</sup> *CBS Corp.*, 785 F.3d at 706.

<sup>32</sup> 47 U.S.C. § 154(j).

<sup>33</sup> *FCC v. Schreiber*, 381 U.S. 279, 291-92 (1965).

Why? The Trade Secrets Act specifically prohibits federal agencies from disclosing trade secrets “to any extent not authorized by law.”<sup>34</sup> And in 1979, the Supreme Court held in *Chrysler Corp. v. Brown* that a general housekeeping statute does *not* provide agency officials with the requisite legal authorization under the Trade Secrets Act to disclose confidential commercial information.<sup>35</sup> Specifically, the statute found to be inadequate in that case authorized the head of an agency (in that case, the Secretary of Labor) to prescribe regulations “for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property.”<sup>36</sup>

Why does this matter? Because Section 4(j) of the Communications Act, just like the statute at issue in *Chrysler*, is a housekeeping statute. Specifically, it is a statute whose purpose “is to ensure ‘that agencies retain latitude in organizing their *internal* operations.’”<sup>37</sup> And such a statute, pursuant to *Chrysler*, cannot provide the requisite legal authorization under the Trade Secrets Act to disclose confidential commercial information.<sup>38</sup>

But one might ask, what about the Supreme Court’s earlier decision in *Schreiber*? Not only does it predate *Chrysler*, it nowhere mentions the Trade Secrets Act. Thus, it nowhere holds that Section 4(j) provides the legal authorization required under the Trade Secrets Act for federal officials to disclose confidential commercial information.

## V.

While I strongly disagree with much of what is in today’s *Order*, there is one bright spot that deserves mention. This *Order* at least ensures that companies objecting to the disclosure of their confidential commercial information will receive basic due process. In particular, should a Bureau reject a company’s objection, that party will have the opportunity for its application for review to be ruled on by the Commission and, if necessary, its stay request to be decided by a court before its confidential information will be released. Moreover, before sending confidential information to the Commission, a submitting party must notify any third parties which also have a confidentiality interest in that information; this will allow them to object to the disclosure of that information in a timely manner and thus preserve their rights. I am voting to approve those parts of the *Order*.

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<sup>34</sup> 18 U.S.C. § 1905.

<sup>35</sup> *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979).

<sup>36</sup> 5 U.S.C. § 301.

<sup>37</sup> *American Hosp. Ass’n v. Bowen*, 834 F.2d 1037, 1047 (D.C. Cir. 1987) (quoting *Batterton v. Marshall*, 648 F.2d 694, 704 (D.C. Cir. 1980)) (emphasis added). While the Commission claims that Section 4(j) is not an internal housekeeping statute, *see Order* at n.41, it is unable to point to anything in the text of the statute or its legislative history to support that argument. And even more critically, the Commission points to nothing in the text or legislative history of Section 4(j) “indicat[ing] it is a substantive grant of legislative power to promulgate rules authorizing the release of trade secrets or confidential business information,” which is the relevant test under U.S. Supreme Court jurisprudence. *Chrysler Corp.*, 441 U.S. at 310.

<sup>38</sup> *See also Qwest*, 229 F.3d at 1178 (“A mere housekeeping statute, on the other hand, whose history indicated that it was simply a grant of authority to the agency to regulate its own affairs, would not suffice to authorize the disclosure of confidential business information because it was not intended to provide authority for limiting the scope of the Trade Secrets Act.”).

**DISSENTING STATEMENT OF  
COMMISSIONER MICHAEL O'RIELLY**

Re: *Applications of Charter Communications Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership For Consent To Assign or Transfer Control of Licenses and Authorizations*,  
MB Docket No. 15-149.

Today, the majority of the Commission attempts to respond to the D.C. Circuit's ruling in *CBS Corp. v. FCC*,<sup>1</sup> but fails to do so in a constructive manner. Along the way, it creates vast exposure for communications providers' market sensitive information, including pricing and other contractual terms. And it subjects innumerable parties, even those not seeking Commission approval of a transaction, to potentially irreparable harm when information they thought would be protected is disclosed as well. In total, it is a wild over-reach that hopefully will be reviewed and rejected by the courts, or Congress.

The majority leverages the need for fair, expedient review of the proposed transaction before us to set new procedures for the treatment of confidential commercial information. Most egregiously, these policies will apply to all proceedings going forward, neatly sidestepping both the opportunity for any public input and the Administrative Procedure Act. Upon finally getting to see what is in this Order, the many entities that will be affected now and in the future will certainly have reactions and feedback, but the ship will have already sailed. What possible reason could the Commission have for denying any opportunity for public comment when the scope and impact of this Order so far exceeds the simple merger application supposedly triggering it?

It is ironic that such an item about process takes such unnecessary procedural short-cuts. For instance, the majority easily could have done as my colleague Commissioner Pai and I recommended and started the "aspirational" merger review shot clock, as the Commission already has access to most, if not all, of the documents needed to start its review. Meanwhile, as Commissioner Pai later suggested, the Commission could have issued a Public Notice describing and seeking comment on its proposed procedures for the treatment of confidential information going forward. That would have been a fair and transparent course of action. Unfortunately for everyone that will have to live with these new procedures, the majority could not resist the opportunity to use this merger application as a vehicle to enact sweeping policy changes, safely out of the spotlight of public scrutiny. This item is just another example of what I have referred to as this Commission's ends-justify-the-means approach.

As to the general substance underlying this order, I strongly disagree with the blithely dismissive finding that the risk of harm in allowing commenters in a proceeding to review competitively sensitive information is small. And, the assertion that allowing outside parties to review these materials will assist the Commission in its analysis is beyond plausibility, unless we are to assume that the work the Commission should be doing on its own needs to be farmed out.

More specifically, the Order barely and almost begrudgingly mentions the Trade Secrets Act, and without any real explanation of the Act or its intent, quickly concludes that proper consideration and weight has been given to its purposes in arriving at today's decision.<sup>2</sup> Such cursory treatment is unlikely to convince anyone that an explicit statute specifically controlling federal government treatment of confidential information, enforceable against individual employees with possible jail time, can or should be so easily trumped. While we might have authority to release information otherwise protected by the Act upon appropriate consideration and a balancing of the interests involved, that analysis here would rightfully result in much stronger protections for the sensitive information at stake.

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<sup>1</sup> 785 F. 3d 699 (D.C. Cir. 2015).

<sup>2</sup> See *Order* at para. 17.

There seems to be a profound misunderstanding of the sensitive nature of some of this material, which will be now be exposed under inconsequential and ineffective protections. In today's environment, when we regularly see public reports of information that is supposed to be kept within the Commission, there are simply some issues with keeping a lid on information even before outside parties are involved. Sign-in sheets and restricting disclosure to non-decisionmakers will not contain the damage, because there is no way for a person who sees such information to "unremember" it either when engaging with the Commission in future proceedings or in future interactions within the hypercompetitive and sometimes very small media and telecommunications business world. I am troubled that anyone could so easily conclude that providing access to those who may have a direct interest in using the extremely valuable commercial information for other purposes can be done with minimal risk. In hindsight, this finding will likely come to be viewed as hopelessly naïve, and the "safeguards" proffered in this Order will be insufficient to provide any real protection.

On top of all of this, the biggest problem with this item is the replacement of the "necessary link" standard for public disclosure of confidential information with an incomprehensibly vague new standard based on relevance.<sup>3</sup> While the court may have left the door open for the Commission to meet its existing standard or potentially establish a new one grounded in sound policy, in this latest iteration the Commission eliminates any sort of rational test and instead gives itself complete discretion to disclose materials upon a persuasive showing of relevance. In effect, the Commission is asserting the right to demand documents not necessary to a transactional review, call them relevant, and disclose them to outside entities.

It is hard to imagine any document or information within any communications-related company that could ever be excluded under this standard, confirming its boundlessness. The Commission could reveal wholesale prices, volume discounts, and other sensitive contractual terms or even future business plans to interested parties. And nothing limits the information that could be disclosed to only communications-related contracts – private contracts with suppliers like semiconductor manufacturers or equipment vendors could be classified as relevant inputs. While such disclosures may be acceptable to those voluntarily participating in a transaction, the item provides little to no recourse for third parties that have their information submitted against their will to the Commission.

The practical effect of this item will be to expose sensitive details of business decisions made by content providers, programmers, and others to their competitors and potential partners. The inevitable result will be a chilling impact on the creativity of productions and business dealings in a video programming industry that is already subject to a highly competitive and rapidly changing marketplace.

Accordingly, I can find nothing in either the means or the ends of this item that merits my support, and therefore dissent.

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<sup>3</sup> See *Order* at para. 38-41.