

**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.

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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).

Third, the *Order* provides insufficient protection for confidential commercial information. And fourth, the *Order* has serious legal defects.

## 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.

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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.

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. 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

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

<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.

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.

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

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

<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.

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>

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

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<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 “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.

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.

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.

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<sup>32</sup> 47 U.S.C. § 154(j).

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

<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.").

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*.