

**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*,¹ 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.² Such cursory treatment is unlikely to convince anyone that an explicit statute specifically controlling federal government

¹ 785 F. 3d 699 (D.C. Cir. 2015).

² See *Order* at para. 17.

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.

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.³ 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.

³ See *Order* at para. 38-41.