IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CBS CORPORATION, SCRIPPS NETWORKS INTERACTIVE, INC., THE WALT DISNEY COMPANY, TIME WARNER INC., TWENTY-FIRST CENTURY FOX, INC., UNIVISION COMMUNICATIONS INC., and VIACOM INC., *Petitioners*, v. FEDERAL COMMUNICATIONS COMMISSION, and UNITED STATES OF AMERICA, *Respondents.*	No. 14-1242

OPPOSITION OF THE FEDERAL COMMUNICATIONS COMMISSION TO EMERGENCY MOTION FOR A STAY

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November 17, 2014

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GLOSSARY

FCC or Commission	Federal Communications Commission
Bureau	Media Bureau of the Federal Communications Commission
Commission Order	Commission Order, *Applications of Comcast Corp. and Time Warner Cable Inc. and AT&T, Inc. and DIRECTV for Consent to Assign or Transfer Control of Licenses and Authorizations*, MB Dkt. Nos. 14-57 & 14-90, DA 14-202 (MB rel. Nov. 10, 2014)
Order on Reconsideration	Order on Reconsideration, *Applications of Comcast Corp. and Time Warner Cable Inc. and AT&T, Inc. and DIRECTV for Consent to Assign or Transfer Control of Licenses and Authorizations*, MB Dkt. Nos. 14-57 & 14-90, DA 14-1601 (MB rel. Nov. 4, 2014)
Order	Order, *Applications of Comcast Corp. and Time Warner Cable Inc. and AT&T, Inc. and DIRECTV for Consent to Assign or Transfer Control of Licenses and Authorizations*, MB Dkt. Nos. 14-57 & 14-90, DA 14-1463 (MB rel. Oct. 7, 2014)
Order on Objections	Order, A*pplications of Comcast Corp. and Time Warner Cable Inc. and AT&T, Inc. and DIRECTV for Consent to Assign or Transfer Control of Licenses and Authorizations*, MB Dkt. Nos. 14-57 & 14-90, DA 14-1605 (MB rel. Nov. 4, 2014)
Second Amended Modified Joint Protective Order	Second Amended Modified Joint Protective Order, *Applications of Comcast Corp. and Time Warner Cable Inc. and AT&T, Inc. and DIRECTV for Consent to Assign or Transfer Control of Licenses and Authorizations*, MB Dkt. Nos. 14-57 & 14-90, DA-1639, 1640 (MB rel. Nov. 12, 2014)

Amended Modified Joint Protective Order	Amended Modified Joint Protective Order, *Applications of Comcast Corp. and Time Warner Cable Inc. and AT&T, Inc. and DIRECTV for Consent to Assign or Transfer Control of Licenses and Authorizations*, MB Dkt. Nos. 14-57 & 14-90, DA 14-1602, 1604 (MB rel. Nov. 4, 2014)
Submitting Party	A person or entity who submits a Stamped Confidential Document or a Stamped Highly Confidential Document.
Confidential Information	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.
Highly Confidential Information	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.
VPCI	Video Programming Confidential Information, a subset of Highly Confidential Information for which the Commission has afforded special protection, which concerns programming agreements to which an Applicant is a party.

INTRODUCTION

The Federal Communications Commission opposes Petitioners' motion for an emergency stay pending judicial review of a November 10, 2014, Commission Order approving protective orders in the Commission proceedings for the review of two mergers (and related transactions), Comcast–Time Warner Cable–Charter and AT&T–DIRECTV. Contrary to Petitioners' assertions, the protective orders provide robust safeguards against the unauthorized disclosure of competitively sensitive information while at the same time ensuring that—in keeping with the Commission's commitment to transparency and the dictates of the Administrative Procedure Act (APA)—interested third parties can participate effectively in the proceedings. The Commission's eminently reasonable exercise of its broad discretion to dictate the procedures for its review of the two mergers (including permitting participation by interested parties) will help to ensure that the proposed transactions are consonant with "the public interest, convenience, and necessity," 47 U.S.C. § 310(d), as well as with the APA.

Petitioners fail to demonstrate a likelihood of success on the merits, nor will they suffer irreparable harm if a stay is not granted. *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977). Further, a stay would harm other interested parties and serve no public interest by substantially delaying the Commission's review. *Id.* The motion should be denied.

BACKGROUND

The Communications Act of 1934 specifies that FCC broadcast licenses and

other authorizations may not be transferred except upon a determination by the Commission that the proposed transfer will serve "the public interest, convenience, and necessity." 47 U.S.C. § 310(d). This case arises from the Commission's review of the proposed transfer of certain FCC licenses and other authorizations as part of two proposed mergers and related transactions, the first among Comcast Corporation, Time Warner Cable Inc., and Charter Communications ,Inc.; the second between AT&T, Inc. and DIRECTV (collectively, the "merger applicants"). These transactions, taken together, are both large in size and important for their potential impact on internet broadband access and video programming.

In the course of the proceedings, on August 21, 2014, and September 9, 2014, the Commission's Media Bureau (Bureau) issued formal requests for information to the merger applicants. The Bureau sought "among other things, certain types of contracts entered into by the Applicants (*e.g.*, programming and retransmission consent agreements)" that contain commercially sensitive information.[1] This information is referred to as video programming confidential information (VPCI).[2]

Certain programmers and broadcasters, including Petitioners—who, for

[1] The Commission has not sought any programming contracts to which a merger applicant is *not* a party.

[2] Media Bureau Order, *Applications of Comcast Corp. and Time Warner Cable Inc. and AT&T, Inc. and DIRECTV for Consent to Assign or Transfer Control of Licenses and Authorizations*, MB Dkt. Nos. 14-57 & 14-90 (MB rel. Oct. 7, 2014) ¶ 2 [A-81].

reasons explained below, may not benefit from the proposed mergers because of the asserted effects of the mergers in lowering the prices they receive for their programming, and who thus have no apparent reason to want the Commission's review to be expeditious—expressed concern that the existing protective orders in the merger-review proceedings did not provide adequate protection for this requested information. *Id*. On September 23, 2014, the Bureau issued a Public Notice seeking comment on these concerns as well as proposals for additional protections. *Id.* ¶ 3 [A-81]; *Order on Recon.* ¶ 13 [A-34].

1. *The Bureau Order*. After considering the submitted comments, on October 7, 2014, the Media Bureau issued an Order adopting modified protective orders governing both proceedings. *See Order* [A-80-109]. The modified protective orders offered extraordinary protections, and strictly limited access to highly confidential information, including VPCI, to "Outside Counsel of Record and Outside Consultants, which excludes businesspeople and in-house counsel, who "are not involved in 'Competitive Decision-Making"—that is, who are not involved in negotiating or reviewing business deals like the ones discussed in the VPCI.[3] *Id.* ¶ 8 [A-84]. The orders required that all qualified individuals who intended to review VPCI execute and file an Acknowledgment of Confidentiality

[3] "Competitive Decision-Making" is defined to mean "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 relation with the Submitting Party." *Second Amended Modified Joint Protective Order*, MB Dkt. No. 14-57 (DA- 1639), rel. Nov. 12, 2014 [A-8].

prior to gaining access to such material, and provided a process by which third parties could object to an individual's access. *Order* ¶¶ 5, 10 [A-83]; [A-98].

The Bureau also prohibited reviewing parties from printing, copying, or transmitting any document containing VPCI, and further made clear that "[o]ther than limited specified circumstances, individuals may not keep any materials" containing confidential information, including VPCI, "beyond the close of the proceeding, even for strictly individual reference," and that the restrictions on the use of confidential information governed by the orders "do not terminate at the end of the . . . proceedings but remain in perpetuity." *Order* ¶ 6 [A-83]. The Bureau also emphasized that "the Commission retains full authority to fashion and impose appropriate sanctions for violations of its protective orders," and that the Commission would "not hesitate to take swift and decisive enforcement action where warranted for violation of its orders." *Id*. ¶ 7 [A-84].

The Bureau recognized that "VPCI contain[s] highly sensitive information that is central to the contracting parties' (including both the [merger] Applicants' and third parties') business strategies." *Id*. ¶ 13 [A-86]. It found, however, that such information reflecting the applicants' business strategies is also "critical to a full and effective review" of the proposed mergers, and that making the information available to third parties using the "additional procedures included in the [protective orders]" was necessary to "provide an appropriate balance between the legitimate interests of the applicants, contracting parties, and the Commission in safeguarding competitively sensitive information and the need to make such information available to encourage meaningful participation by other parties in

these proceedings." *Id*.

2. *The Order on Reconsideration*. On October 14, 2014, a group that included Petitioners filed with the full Commission a petition for stay and an Application for Review of the Bureau Order, which requested additional modifications of the protective orders. Application for Review, MB Docket Nos. 14-57, 14-90 (Oct. 14, 2014) at 9-14.

On November 4, 2014, the Bureau issued an Order on Reconsideration, in which it more fully explained the basis for its prior orders. FCC No. 14-1601 (rel. Nov. 4, 2014) (*Order on Recon.*) [A-28-46].[4] "[B]ecause VPCI is central to some of the most significant and contested issues pending in these transactions," the Bureau concluded, the information "must be part of the record available to commenters, subject to the multiple protections in the Modified Protective Orders that minimize any risk of competitive harm as a result of the production." *Id*. ¶ 17 [A-36]. "To decide otherwise," the Bureau explained, "would subject the Commission's ultimate decision . . . to judicial challenge as arbitrary and capricious in denying interested parties the ability to analyze whether additional documents undercut evidence on which the Commission relied, in violation of the Communications Act and the Administrative Procedure Act." *Id*.

The Bureau nonetheless decided to amend the modified protective orders in

[4] In the meantime, a number of individuals executed and filed Acknowledgments to gain access to the VPCI. FCC No. 14-1605 (rel. Nov. 4, 2014) ¶ 3 [A-70]. Beginning October 15, 2014, various third parties (including Petitioners) filed objections to every such individual. *Id.*

one respect. In light of the objections that had been filed against *every* individual who sought access to the VPCI, and in order to prevent a party from being "able to suspend indefinitely another party's (or every other party's) effective participation in the proceeding simply by filing an objection," the Bureau amended the protective orders to state that any given individual would have access to VPCI "five (5) business days after any objection is resolved by the Bureau in favor of the person seeking access." *Id.* ¶ 36 [A-45]. By thus providing objecting parties with a defined window within which to seek review (and a further stay of any individual's access) with the Commission or a court, the Bureau sought to balance appropriately the "opportunity for the consideration of legitimate objections" with the need to "proceed[] with the merger review in a timely manner." *Id.*[5]

On November 7, 2014, the same group (including Petitioners) filed another Application for Review and Emergency Request for Stay with the Commission, this time of the Bureau's *Order on Reconsideration*. Application for Review, MB Docket Nos. 14-57, 14-90 (Nov. 7, 2014), at 10-12. They asserted that the Bureau usurped the Commission's authority by issuing the November 4 Order, and departed from Commission precedent by providing for access to the VPCI before the Commission had ruled on their application for review. *Id.* Petitioners also

[5] Also on November 4, the Bureau rejected 244 of the 266 objections Petitioners had filed against individuals who filed Acknowledgments to the protective orders. FCC No. 14-1605 (rel. Nov. 4, 2014) [A-69-79]. In the case of 234 individuals, the Petitioners' objections failed to provide any individualized basis to challenge access. In the remaining 10 instances, the objections failed properly to apply the definitions contained in the protective orders. *Id.*¶ 1 [A-69]. The remaining objections are pending.

renewed their request for additional modifications to the protective orders. *Id.*

3. *The Commission Order*. On November 10, the Commission denied Petitioner's applications for review and, "for the reasons stated by the Bureau," affirmed the adoption of the protective orders with one modification. FCC No. 14-202 (rel. Nov. 10, 2014) (*Commission Order*) [A-1-2]. The Commission ordered that any party seeking to review VPCI could not do so via remote access, as originally allowed by the Bureau, but instead could do so only at "the offices of the Submitting Party's Outside Counsel of Record or at other secure locations that may be established by the Submitting Party." *Commission Order*, ¶ 2 [A-1-2].

In the same Order, the Commission denied Petitioners' requests for stay, expressing its "considered judgment that permitting access" to confidential information including VPCI "under the terms of the Amended Modified Joint Protective Orders will aid the Commission in the expeditious resolution of these proceedings." *Id*. ¶ 3 [A-2]. But "[t]o allow the parties time to seek judicial review," the Commission ordered that access to VPCI (and other confidential information), be delayed from November 13 until "seven calendar days after [the] Order," or November 17. *Commission Order* ¶ 3.[6]

Petitioners have now filed a petition for review of the *Commission Order*, and seek an emergency stay of that order. They contend that despite all the steps

[6] Earlier in the day on November 10, Petitioners filed a Petition for a Writ of Mandamus, a Petition for Review, and a Motion for Emergency Stay with this Court, all addressed to the Bureau's *Order on Reconsideration*. *CBS Corp. v. FCC*, Nos. 14-1236, 14-1237 (D.C. Cir.). In light of the *Commission Order*, Petitioners dismissed those cases on November 12.

the Commission has taken, providing limited access to the applicants' VPCI to participants in the merger-review proceedings pursuant to the safeguards of the second amended protective orders nonetheless violates the Trade Secrets Act and the Administrative Procedure Act, and will cause them irreparable harm.

ARGUMENT

To obtain a stay, Petitioners must show that (1) they will likely prevail on the merits; (2) they will suffer irreparable harm unless the Court grants a stay; (3) a stay will not harm other interested parties; and (4) a stay will serve the public interest. *Holiday Tours, Inc.*, 559 F.2d at 843; D.C. Cir. Rule 18(a)(1). A stay is an "intrusion into the ordinary processes of administration and judicial review" and "is not a matter of right, even if irreparable injury might otherwise result." *Nken v. Holder*, 556 U.S. 418, 427 (2009) (quotation marks omitted). To merit such an "extraordinary remedy," the Petitioners must make "a clear showing" that they are "entitled to such relief." *Winter v. NRDC*, 555 U.S. 7, 22 (2008). They have failed to do so.

As we explain, the Commission acted well within its discretion to adopt the protective orders for the reasons stated by the Bureau. First, the Bureau reasonably determined that comment by interested parties on the potential relevance of confidential information (including VPCI) will be critical to the agency's review of the pending mergers. Second, the Bureau rightly recognized that the multiple safeguards of the protective orders were ample to prevent the disclosure of VPCI in a manner that could cause Petitioners competitive harm. Third, the Bureau correctly rejected Petitioners' alternatives to the modified protective orders as

unworkable.

Petitioners' request for a stay pending appeal would thus result in an unjustified delay of the expeditious review of these mergers and would inevitably lead to multiple appeals in this and future proceedings that would unduly hamper the Commission's work.

I. Petitioners are Unlikely to Prevail on the Merits of their Claims.

Petitioners bear a heavy burden to establish that the Commission's Order is "arbitrary, capricious, [or] an abuse of discretion." 5 U.S.C. § 706(2)(A). Under this "highly deferential" standard, the Order is entitled to a presumption of validity. *E.g.*, *Verizon Tel. Cos. v. FCC*, 357 F.3d 88, 93 (D.C. Cir. 2004). The Court must affirm unless the Commission failed to consider relevant factors or made a clear error in judgment. *E.g.*, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). And it is well settled that the Commission has "broad discretion to prescribe rules" for determining how documents are protected in its proceedings. *See FCC v. Schreiber*, 381 U.S. 279, 289 (1965).

A. The availability of VPCI to merger commenters is likely to be highly relevant to the Commission's review of the proposed transactions.

As the Commission reasonably determined, "permitting access" to confidential information, including VPCI, "under the terms of the Amended Modified Joint Protective Orders will aid the Commission in the expeditious resolution" of the Comcast-Time Warner-Charter and AT&T-DIRECTV merger proceedings. *Commission Order* ¶ 3 [A-2].

As the Bureau explained (in analysis the Commission formally endorsed, *see*

id. ¶ 2 [A-1]), a "critical issue in each of the transactions under review is how the proposed transaction will alter the incentives and abilities of the resultant companies as they bargain with video programming companies." *Order on Recon.* ¶ 11. Although "Comcast's economist opines that the merger is 'unlikely to affect the relative bargaining position of Comcast and content companies in any material fashion," *id.* ¶ 13 [A-34], other commenters "express[ed] concern that an increase in bargaining power would enable the Applicants to demand exclusionary provisions and other preferential terms from programmers," *id.* ¶ 14 [A-35]. Such an increase in bargaining power, if demonstrated, could significantly lower prices for programmers, such as the Petitioners. *Id.* ¶ 11 [A-33].

"VPCI includes two critically important and highly relevant elements related to the issues in these proceedings—price and exclusive contracting terms." *Id.* ¶ 12 [A-34]. The information sought by the Commission thus will "demonstrate what three distribution companies in one case" (Comcast, Time Warner Cable, and Charter) "and two in the other" (AT&T and DIRECTV), each "with very different characteristics (*e.g.*, size, geographical location, vertical integration, possession of 'must have' programming) have sought and/or been able to achieve in past negotiations with various video programmers which themselves differ in size, breadth and attractiveness of programming." *Id.* ¶ 11 [A-33]. For that reason, the Bureau explained, the "documents thus provide what is likely the best evidence available to test the validity of allegations as to how incentives and abilities (and thus potential harms and benefits) vary with size, integration, and other

characteristics that the transactions would alter." *Id.*[7]

Petitioners counter that they do not contest the relevance of the VPCI to the Commission's *own* review of the mergers. On the contrary, they freely acknowledge that "the FCC has access to all of the materials at issue," and they emphasize that "Petitioners have not sought to block FCC access." Petitioners' Motion (Mot.) at 19. Instead, Petitioners object to disclosure of VPCI to participating third parties.

The Bureau recognized, however, that "because VPCI is central to some of the most significant and contested issues pending in these transactions, it *must* be part of the record available to commenters." *Order on Recon.* ¶ 17 [A-36] (emphasis added). If "a large number of . . . documents [were excluded] from review by commenters, it would deprive the commenters of the opportunity to argue that the documents have significance in ways that are not apparent to the Commission." *Id*. ¶ 16 [A-35].

Thus, the Commission rightly pointed out that to withhold relevant documents from participants in the merger review proceedings "would subject the Commission's ultimate decision . . . to judicial challenge as arbitrary and capricious in denying interested parties the ability to analyze whether additional documents undercut evidence on which the Commission relied, in violation of the

[7] Thus, the Commission noted that it sought access here as it would "aid the Commission in the expeditious resolution of *these proceedings*." *Commission Order* ¶ 3 [A-2] (emphasis added). In other circumstances, VPCI might not be as relevant or informative. *Cf. Pet'rs Emergency Mot. for Stay Pending Judicial Review* (Mot.) at 13-14 nn. 3, 4.

Communications Act and the Administrative Procedure Act." *Id.* ¶ 17 [A-36]. As this Court has explained, "at least the most critical factual material that is used to support the agency's position on review must have been made public in the proceeding and exposed to refutation." *Ass'n of Data Processing v. Bd. Of Governors*, 745 F.2d 677, 684 (D.C. Cir. 1984).

Consumer Fed'n of Am. v. FCC, 348 F.3d 1009, 1010 (D.C. Cir. 2003), is instructive. That case involved a challenge to a proposed merger between AT&T Broadband Corp. and Comcast Corp., in which the Commission "rejected a request from several consumer groups to place in the record an agreement between AT&T and Time Warner, Inc. . . . establish[ing] the terms by which Time Warner's AOL subsidiary would provide internet service to customers of the merged firm." *Id.* This Court affirmed the FCC's decision not to include the agreement in the record as "at worst harmless error." *Id.* at 1013. But the Court specifically noted that "[i]f [the consumer groups] needed the AOL ISP Agreement to make" their argument that the Commission should change its policy, "perhaps the Commission would have erred in excluding it." *Id.* That is the case here.

Given the need for access, Petitioners' challenges to the protective orders are doomed to failure. "It is well established 'that it is the agencies, not the courts, which should, in the first instance, establish the procedures for safeguarding confidentiality.'" *United States v. Cal. Rural Legal Assistance, Inc.*, 722 F.3d 424, 429 (D.C. Cir. 2013). The protective orders here are well within the broad power of the Commission to "conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice." 47 U.S.C.

154(j); *Schreiber*, 381 U.S. at 290 (upholding FCC decision refusing request for *in camera* hearing to protect trade secrets).[8] As the Supreme Court in *Schreiber* observed, "a presumption in favor of public proceedings[] accords with the general policy favoring disclosure of administrative agency proceedings." 381 U.S. at 293. "The question for decision," here as in *Schreiber*, "[is] whether the exercise of discretion by the Commission was within permissible limits." *Id*. at 291. It was.[9]

B. The Commission's protective orders are ample to prevent against unauthorized disclosure.

Despite Petitioners' overheated rhetoric, it is entirely clear that the protective orders adopted by the Commission contain multiple safeguards against unwarranted disclosure of VPCI, and that Petitioners' fears are without any basis in

[8] Petitioners' suggestion that access to VPCI pursuant to the protective orders violates the Trade Secrets Act, 18 U.S.C. § 1905, *see* Mot. 11, is thus baseless. The Commission reasonably concluded that third-party participants had made the "persuasive showing" necessary for access under 47 C.F.R. § 0.457(d)(1).

[9] Petitioners contend that the Commission "failed to justify its exercise of agency discretion" because it rejected their arguments "without articulating any rationale." Mot. 10. That is incorrect. Under the Communications Act, "[i]n passing upon applications for review, the Commission may grant, in whole or in part, or deny such applications *without specifying any reasons therefor*." 47 U.S.C. § 155(c)(5) (emphasis added). In this case, though, the Commission *did* explain the basis for its decision. It denied the applications for review and affirmed the adoption of the protective orders, as modified, "for the reasons stated by the Media Bureau in its November 4, 2014 Order on Reconsideration." *Commission Order*, ¶ 1 [A-1]. Petitioners' arguments in their subsequently filed November 7 application for review that the Bureau had "deprived the Commission of an opportunity to review" the Bureau's prior rulings Application for Review, MB Docket Nos. 14-57, 14-90 (Nov. 7, 2014), at 10-12, were rendered moot by the *Commission Order*; their remaining arguments (*id.* at 12-17) simply recapitulated their earlier substantive contentions.

the record before the Court.

First, only a very restricted category of persons will be allowed access to confidential information, including VPCI. The protective orders limit access to outside counsel of record and outside consultants for participants in the merger-review proceedings (and their employees and agents) who do not engage in "Competitive Decision-Making." Second Amended Modified Joint Protective Order ¶ 7 [A-9]. This restriction "excludes persons whose activities on behalf of their clients would place them in a situation where their obligations under a protective order are likely to be put at risk, even if unintentionally or unconsciously." *Order on Recon.* ¶ 25 [A-41].

Second, any qualified individual who seeks access to the VPCI must "file a supplemental Acknowledgment of Confidentiality form with the Commission and to serve it on the parties submitting VPCI." *Id.* ¶ 25 [A-41]. No individual "whose activities on behalf of their clients would place them in a situation where their obligations under a protective order are likely to be put at risk, even if unintentionally or unconsciously" may access to the VPCI. *Order on Recon.* ¶ 25 [A-40-41]. Any party to a VPCI agreement has the right to object to the disclosure of the materials to a particular individual. *Id.* ¶ 8 [A-32].

Third, individuals who seek to view VPCI must do so "only through a document review platform at the offices of the party's [o]utside [c]ounsel of [r]ecord or other secure locations." Second Amended Modified Joint Protective Order ¶ 10 [A-22]. In addition, those individuals are specifically barred from "print[ing], copy[ing] or transmit[ing]" any document containing VPCI. *Id.*

Fourth, after the conclusion of the proceeding, any material containing or derived from confidential information, including VPCI, must be returned or destroyed. *Id*. ¶ 22 [A-13].

Fifth, potential sanctions for violations of the protective orders are severe: they include possible criminal prosecution, as well as "suspension or disbarment of [c]ounsel or [c]onsultants from practice before the Commission, forfeitures [that is, financial penalties], cease and desist orders, and denial of further access to [confidential] information in this or any other Commission proceeding." *Id*. ¶ 21. [A-13]. The Bureau stated that the agency "will not hesitate to take swift and decisive enforcement action where warranted for violation of its orders." *Order* ¶ 7 [A-84].

"[D]ocument productions in Commission proceedings involving highly sensitive business material, including the types of documents and information at issue in these proceedings, under protective orders substantially similar" to those at issue here, "are not unique to the pending merger transactions." *Order on Recon*. ¶18 [A-37]. The adequacy of these protective orders is evidenced, so far as Comcast, Time Warner Cable, and Charter are concerned, by the fact that other types of their highly confidential information has been produced to the Commission subject to such orders without incident. *See Order on Recon.* ¶ 6 [A-31]. Similarly, AT&T and DIRECTV described a 20-year history of Commission proceedings using protective orders similar to the ones in place in this proceeding for the production of AT&T's most sensitive business records and state that "[d]uring that entire period, AT&T is unaware of a single instance of a third party

misusing confidential information obtained pursuant to the Commission's protective orders." *See Order on Recon.* ¶ 7 [A-32]. And commenter DISH argued that in prior Commission cases, similar but *less* restrictive protective orders were used to govern the treatment of highly sensitive commercial information. *See Order on Recon.* ¶ 8 [A-33]. In short, FCC protective orders are "a time-tested means to protect highly sensitive information, including that of parties not directly involved in a transaction under review." *Id.* ¶ 22 [A-39].

Petitioners contend that disclosure of VPCI and similar highly sensitive commercial information pursuant to protective order is inconsistent with prior FCC practice. Mot. at 12. But as the Bureau noted, the "Commission first adopted a protective order similar to the ones at issue here as early as 1998 in the MCI/Worldcom proceeding." *Order on Recon.* ¶ 19 [A-37]. "Since that time, the Commission has adopted similar procedures in many proceedings which have involved highly competitively sensitive information," including the Commission's review of Comcast and Time Warner's purchase of Adelphia's cable systems, Liberty Media's application to acquire an interest in DIRECTV from News Corporation, and in both the Cingular/AT&T Wireless and AT&T/T-Mobile merger proceedings. *Id.* In particular, in the Adelphia proceedings, the Commission made confidential information including programming agreements like the ones at issue here "available for review by interested parties subject to the protections of a protective order." *Id.*[10]

[10] Petitioners' reliance on *Qwest Communications Int'l v. FCC*, 229 F.3d 1172 (D.C. Cir. 2000), *see* Mot. 13, is unavailing. In *Qwest*, this Court held that the

Petitioners' opposition to the protective orders appears to stem from an unalterable opposition to any form of protective order here. If Petitioners are correct, and the possible risk of an unauthorized disclosure despite all the safeguards of the protective orders here is sufficient to overturn the Commission's determination in this case, then it is difficult to see how protective orders could serve as a useful tool against unauthorized disclosure of sensitive information in any instance. But protective orders are common in agency practice and in litigation and have long been accepted as a "reliable means" by which to limit "the persons having access to information, their freedom to discuss the information to which they are given access, and the uses to which the information may be put." *Laxalt v. McClatchy*, 809 F.2d 885, 889 (D.C. Cir. 1987).

C. Petitioners' proffered alternatives would be unworkable.

Petitioners complain that the Commission failed "to explain adequately why it declined to adopt Petitioners' alternative proposal to release relevant VPCI in anonymized or redacted form." Mot. 15. But the Bureau expressly considered and rejected this proposal—in analysis specifically adopted by the Commission—concluding that "such an approach is unrealistic and inappropriate." *Order on Recon.* ¶ 34 [A-44]. The Bureau agreed with the merger applicants' contention "that it would be unworkable to prepare redacted or anonymized versions of the

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Commission had failed to explain why "only the release of raw audit data will achieve meaningful public comment." *Id.* at 1184. Here, the Commission has fully explained the importance of public comment on VPCI to its resolution of the pending merger applications. The Commission makes relevance determinations on a case-by-case basis.

hundreds of thousands of pages of programming contract materials that have been produced." *Id.* In addition, the Bureau determined that any effective anonymization would have to involve "extensive" redactions, "to ensure that the parties and programming involved are not identifiable from the material, which then, in turn, would likely render the material unusable for purposes of analyzing the issues pending in the merger." *Id.* Because understanding the particulars of "the parties" to an agreement, the "price and non-price terms," and "the programming content involved" would be "essential for parties to properly assess the significance of the material," even if anonymization could be implemented, the Bureau concluded, "it would not be appropriate as it would undermine the utility of making such documents available for limited review in the first place." *Id*. [A-45].

Petitioners also contend that the Commission should have limited "the universe of individuals who can access VPCI" to "individuals who demonstrate a particularized need to view VPCI." Mot. 16. In doing so, they note that "244 individuals" will have immediate access to the VPCI if this Court denies their request for a stay. Mot. 17.

At the outset, Petitioners fail to explain that those 244 individuals represent only a handful of entities, and that many of them are outside counsel and consultants for the merger applicants themselves, or work for public interest organizations. *Order on Recon.* ¶ 26 [A-41]. Further, Petitioners do not address how the showing of a particularized need would reduce the already minimized chance of an unauthorized disclosure. And they fail to explain how an individualized showing would be made or decided in a timely manner. In any

event, requiring the showing of a particularized need, without an explanation of what purpose would be served, would pose an inappropriate obstacle to public participation in the proceeding.

II. The Petitioners will not suffer irreparable harm.

"This court has set a high standard for irreparable injury." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006). The injury "must be both certain and great; it must be actual and not theoretical." *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (per curiam).

Petitioners claim that "[t]he harm from disclosure is acute" in this case. Mot. 16. But for the Petitioners to show a "certain and great" threat of irreparable injury, they must demonstrate not only that VPCI will be made available under the highly restrictive terms of the protective orders, but also that these protections will be breached. They cannot do so, and their motion offers no factual basis from which this Court may conclude that such violations will inevitably occur. Indeed, as noted above, the available evidence directly contradicts Petitioners' assertions. *See supra* p.p. 15-16.

III. A Stay Would Harm Third Parties and Disserve the Public Interest.

The public interest is served by the Commission proceeding in a timely fashion. *Braniff Master Exec. Council of Air Line Pilots Ass'n Int'l v. CAB*, 693 F.2d 220, 231 (D.C. Cir. 1982) (expeditious review and approval of a merger by the regulatory agency is important to "facilitate[e] stability in the financial markets by lessening the period of uncertainty faced by the parties to the merger.") Recognizing these realities, the Commission has established a 180-day "shot

clock"[11] to ensure that merger review proceeds in a timely and transparent manner. Currently, the shot clock for the Comcast –Time Warner Cable-Charter merger is at 85 days and the shot clock for the AT&T-DIRECTV merger is 76 days; if that schedule were maintained, the Commission's merger review would be completed in early spring 2015. Staying the order pending appeal will materially disrupt the current schedule for the Commission's expeditious review and resolution of the proposed mergers, and by itself, could impact the outcome of these applications. Delay would inevitably prolong the regulatory uncertainty associated with the applicants' business plans, and thereby disserve the public interest.

CONCLUSION

Petitioners' motion for a stay should be denied.

Respectfully submitted,

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[11] The "shot clock" is an informal, non-binding deadlines to which the Commission endeavors to comply.

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November 17, 2014

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CBS CORPORATION, SCRIPPS NETWORKS INTERACTIVE, INC., THE WALT DISNEY COMPANY, TIME WARNER INC., TWENTY-FIRST CENTURY FOX, INC., UNIVISION COMMUNICATIONS INC., and VIACOM INC.,	)	
Petitioners,	)	
	)	No. 14-1242
v.	)	
FEDERAL COMMUNICATIONS COMMISSION, and UNITED STATES OF AMERICA,	)	
Respondents.	)	

CERTIFICATE OF SERVICE

I, Jacob Lewis, hereby certify that on November 17, 2014, I filed the foregoing Opposition of The Federal Communications Commission to Emergency Motion For Stay with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by hand delivery and by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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