

August 12, 2015

Marlene H. Dortch, Esq.
Secretary
Federal Communications Commission
445 12th Street SW
Washington DC 20554
VIA ECFS

Re: Written Ex Parte Communication in MB Docket No. 15-149

Dear Ms. Dortch:

Digital Content Next (DCN), the Motion Picture Association of America (MPAA), and the National Association of Broadcasters (NAB) (collectively, the Associations) hereby express our interest in and serious concern about the FCC's current consideration of changes to its procedures and policies for protecting confidential information.¹ According to various reports, these changes in rules governing access to commercially sensitive information would apply not just to the FCC's pending review of the proposed merger between Charter Communications, Inc. and Time Warner Cable, Inc. (TWC), but also to future transactions *and* to Commission proceedings generally. Particularly in light of the reported breadth of the FCC's considerations, the Associations urge the Commission to move forward only after careful deliberation, including sufficient time for public comment on any new proposed policies and procedures for protecting highly confidential information.

The Associations, representing thousands of members across a range of communications industries, all agree on the importance of protecting proprietary and commercially sensitive information from disclosure to third parties during the review of merger transactions and in FCC proceedings generally. Indeed, the Commission recently faced court challenges relating to protective orders that did not adequately protect confidential materials from disclosure to third parties, including entities that would competitively benefit from obtaining such information.² While the Associations do not object to the *Commission's* review of sensitive information, we see no persuasive reason why third parties in a highly competitive

¹ These procedures and policies are set forth in 47 C.F.R. § 0.457 and *Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, 13 FCC Rcd 24816 (1998).

² See *CBS Corporation, et al. v. FCC*, 785 F.3d 699 (D.C. Cir. 2015) (finding the "Commission's action both substantively and procedurally flawed").

communications marketplace need access to confidential materials – particularly confidential information pertaining to entities who may not be among the merging parties.

The FCC's current consideration of an order reportedly modifying its policies and procedures for protecting confidential information raises two major problems. First, the Associations and our members oppose changes to the FCC's policies that would reduce the protections for confidential information, including their disclosure to third parties likely to gain competitively from obtaining that information. Such a result is not only unfair but also unnecessary.

The Commission clearly has been able to review major mergers, including the Comcast/NBC and the very recent AT&T/DirecTV mergers, without disclosing competitively sensitive information to third parties. Specifically, in prior mergers, the Commission has successfully reviewed the most sensitive materials at the Department of Justice, rather than placing those materials in the public record where they would be made available to potentially large numbers of third parties that sign the applicable protective order acknowledgement. There appears no reason for the Commission to alter its previous procedures and third-party disclosure policies to review the proposed Charter/TWC merger.

Second, to the extent the Commission is considering altering its rules and policies governing access to commercially and competitively sensitive information that would apply to all transactions and FCC proceedings generally, then it should request public comment on its proposals. Reviewing courts have not hesitated to overturn agency orders where the agency did not provide the requisite meaningful opportunity for comment.³ Beyond complying with basic Administrative Procedure Act requirements, seeking input from all interested parties

³ See, e.g., *N.C. Growers' Ass'n, Inc. v. United Farm Workers*, 702 F.3d 755, 770 (4th Cir. 2012); *Int'l Union, United Mine Workers of America v. Mine Safety and Health Administration*, 407 F.3d 1250, 1259, 1261 (D.C. Cir. 2005); *Nat'l Black Media Coalition v. FCC*, 791 F.2d 1016, 1022 (2d Cir. 1986).

would also improve the FCC's decision-making on these important issues.⁴

Respectfully submitted,

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cc: Chairman Tom Wheeler, Commissioner Mignon Clyburn, Commissioner Jessica Rosenworcel, Commissioner Ajit Pai, Commissioner Michael O'Rielly, Maria Kirby, Chanelle Hardy, Valery Galasso, Matthew Berry, Robin Colwell

⁴ See *N.C. Growers' Ass'n*, 702 F.3d at 763 (the importance of notice and comment procedures "cannot be overstated," because the "agency benefits from the experience and input of comments by the public, which help 'ensure informed agency decisionmaking'" (citations omitted); *Nat'l Black Media*, 791 F.2d at 1023-24 (FCC's use of unpublished data to reach conclusions without public comment precluded the agency from considering all relevant factors in making its decision and rendered its order arbitrary and capricious).