

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

In the matter of)	
)	
Applications of Comcast Corporation,)	
General Electric Company)	MB Docket No. 10-56
And NBC Universal, Inc.)	
)	
For Consent to Assign Licenses and)	
Transfer Control of Licensees)	
)	

APPLICATION FOR REVIEW OF MEDIA BUREAU ORDER DA 12-1950

Submitted by:

CBS Corporation

News Corporation

Sony Pictures Entertainment Inc.

Time Warner Inc.

Viacom Inc., and

The Walt Disney Company

Dated: January 3, 2013

Table of Contents

	<u>Page</u>
I. SUMMARY	1
II. THE ORDER FUNDAMENTALLY ALTERS THE MERGER DECISION'S BENCHMARK CONDITION.....	3
III. THE COMMISSION SHOULD REVERSE THE ORDER ON SEVERAL GROUNDS	12
A. The C-NBCU Request is an Untimely Petition for Reconsideration, not a Request for Clarification.....	13
B. The Relief C-NBCU Sought is Beyond What the Bureau has Power to Provide	15
C. The Commission Cannot Abrogate Contracts Without Statutory Authority	16
D. The Order Took Unprecedented, Unauthorized, and Unanticipated Action	17
1. The Order Constitutes a Regulatory Taking by Depriving Content Providers of the Economic Value of Confidential Contract Terms.....	18
2. In Analogous Situations, Courts and Federal Rules Do Not Automatically Mandate Disclosure of Confidential Information by Non-Parties.	20
E. The Order Violates the Trade Secrets Act	23
IV. THE COMMISSION SHOULD REVERSE THE ORDER.....	24

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CBS Corporation, News Corporation, Sony Pictures Entertainment Inc., Time Warner Inc., Viacom Inc., and The Walt Disney Company (together and on behalf of their affiliated businesses, the “Content Companies”), pursuant to Section 1.115 of the Commission’s rules, request a review by the full Commission of the Media Bureau (the “Bureau”) order in the above-captioned proceeding released on December 4, 2012 (the “Order”).¹

I. SUMMARY

The Order modifies the Commission’s decision granting its consent to the joint venture of Comcast Corporation and NBC Universal, Inc. (“C-NBCU”).² It requires disclosure of the Content Companies’ most sensitive and highly confidential information as requested by C-NBCU within the process of negotiations to which the Content Companies are not even parties.

¹ *Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees*, DA 12-1950, 2012 WL 6039368 (Order by the Chief, Media Bureau, released December 4, 2012).

² *Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees*, Memorandum Opinion and Order, MB Docket No. 10-56, 26 FCC Rcd 4238 (January 20, 2011) (the “Merger Decision”).

Now, under the provisions of the Order, the Content Companies face even more severe threats to their confidential commercial interests.³ The Bureau adopted the Order without authority and in contradiction of established Commission policy without rationale on several points. The Order causes irreparable harm to the Content Companies and the marketplace for programming, and it contravenes Commission precedent as well as Federal law designed to protect private business information against the threat of disclosure.

The Commission must review and reverse the Order issued by the Bureau under delegated authority because:

- The Order fundamentally alters the OVD negotiation process by making disclosure of highly confidential materials routinely available to C-NBCU representatives before negotiations, rather than within arbitration. This alteration, in fact, transforms a condition intended as a check on C-NBCU's competitive advantage over OVDs into a *benefit* for C-NBCU.⁴ This modification, without reasoned explanation or even an acknowledgment of the substantial change created by the Order, reflects arbitrary and capricious decision-making.
- The Order responded to a request by C-NBCU that constituted an untimely petition for reconsideration.⁵
- The Order, issued by the Media Bureau, conflicts with the policy and explicit directions provided by the full Commission in the Merger Decision, thus exceeding the Bureau's authority.⁶

³ Because the Order took effect upon its publication, the threats to the Content Companies are imminent: the Content Companies have no control over when an unaffiliated party might trigger the offending provisions of the Order. For this reason, the Content Companies filed a request for immediate stay of the Order on December 18, 2012.

⁴ See 47 C.F.R. § 1.115(b)(2) (stating the requirements for an application for review and the specific factors that warrant Commission review, including § 1.115(b)(2) (iii) (review of an action that “involves application of a precedent or policy which should be overturned or revised.”) and § 1.115(b)(2)(i) (“The action taken pursuant to delegated authority is in conflict with statute, regulation, case precedent, or established Commission policy.”)).

⁵ See 47 C.F.R. § 1.115(b)(2)(v) (noting that “prejudicial procedural error” warrants Commission review).

⁶ See 47 C.F.R. § 1.115(b)(2)(i) (“The action taken pursuant to delegated authority is in conflict with statute, regulation, case precedent, or established Commission policy.”).

- The Order takes the unprecedented step of overriding confidentiality and nondisclosure provisions and agreements without any authority – action not previously taken by the Commission.⁷
- By depriving the Content Companies and OVDs of the economic value of confidential contract terms, the Order constitutes a regulatory taking.
- The Order ignores the type of protections routinely provided for confidential information of third parties by federal rules and courts.⁸
- The Order violates the Trade Secrets Act.⁹

The Content Companies Application for Review, therefore, meets several of the factors specified in Section 1.115(b)(2) of the Commission’s rules, any one of which would justify grant of the requested review and provide an adequate basis for reversal of the Order.

II. THE ORDER FUNDAMENTALLY ALTERS THE MERGER DECISION’S BENCHMARK CONDITION

In the Merger Decision, the Commission imposed a range of conditions it viewed as necessary to protect against potential anti-competitive and abusive effects.¹⁰ With regard to online video distribution, the FCC was concerned that C-NBCU could have the incentive and the ability to hinder competition in the distribution arena. The Commission thus adopted several conditions with a stated goal of promoting online video distribution.¹¹ These conditions included the “Benchmark Condition.”¹²

⁷ See 47 C.F.R. § 1.115(b)(2)(ii) (noting the need to review action that “involves a question of law or policy which has not previously been resolved by the Commission”).

⁸ See 47 C.F.R. § 1.115(b)(2)(i) (“The action taken pursuant to delegated authority is in conflict with statute, regulation, case precedent, or established Commission policy.”).

⁹ *Id.*

¹⁰ Merger Decision, ¶ 4.

¹¹ Content Companies have previously raised concerns with the Commission about this type of condition. See, e.g., Letter from Susan L. Fox, The Walt Disney Company, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 10-56 (filed Jan. 14, 2011).

¹² Merger Decision, App. A., § IV, A.2.b

Under the Benchmark Condition, a qualified OVD may request that C-NBCU provide online video programming at prices, terms, and conditions that are the economic equivalent of what the OVD pays for “Comparable Programming” in a peer programming agreement.¹³ The condition explicitly provides that, if negotiations fail to result in a mutually acceptable set of price, terms, and conditions, the qualified OVD may submit the dispute to commercial arbitration in accordance with specified procedures and pursuant to a highly confidential protective order.¹⁴ If disclosure of highly confidential information of OVDs or their programming partners is requested during the proceeding, the arbitrator must consider such proposed disclosure and may, in its discretion, direct production of contracts.¹⁵ Generally, arbitrators making these types of determinations will consider disclosure in the particular context of arbitration and assess the actual need for the disclosure and whether less intrusive means are available to satisfy the need for information. Likewise, arbitrators typically limit the scope and use of the disclosures, as appropriate to that context. The FCC adopted a model protective order designed to protect highly confidential information in this arbitration context.¹⁶

¹³ *Id.*

¹⁴ *Id.* at A.3. As detailed in Appendix A, C-NBCU and the OVD begin by attempting to negotiate a mutually acceptable set of price, terms, and conditions. If these negotiations fail, the OVD may submit the dispute to commercial arbitration subject to procedures specific to OVD arbitrations. Each party must present the arbitrator with “final offers.” The first consideration for the arbitrator is the scope of the Comparable Programming if that is an issue. Then, after the arbitrator has resolved any dispute about the scope of programming, each party submits its final offer of an agreement to cover the subject programming. Within the arbitration proceeding, the arbitrator *may* require the production of peer programming agreements containing highly confidential information, which may, at the request of a party, and upon the order of the arbitrator, be disclosed only to the arbitrator, outside counsel, and outside experts.

¹⁵ Merger Decision, App. A, VIII. 4. In light of what C-NBCU requested and the Bureau’s subsequent Order, it is now clear that the provision governing production of peer contracts in the Merger Decision itself is unacceptable and should be removed, as it requires disclosure of the Content Companies’ highly confidential business materials without sufficient justification. The Content Companies reserve their right to argue that even an arbitrator in this context would lack authority to abrogate the confidentiality provisions of private contracts, particularly contracts of third parties who are not participants in the arbitration.

¹⁶ Merger Decision, App. E.

That the Benchmark Condition as originally designed by the Commission has operated without the need for contract disclosure has been confirmed by C-NBCU itself. In its February 28, 2012 annual report documenting compliance with all of the transaction conditions the Commission had imposed in the Merger Decision, C-NBCU stated unequivocally that NBCUniversal “has received many . . . requests [for online video programming distribution licenses] from OVDs for film, broadcast, and cable programming.”¹⁷ Furthermore, C-NBCU reported that “[t]he majority of these OVDs have relied on the so-called ‘Benchmark Condition’.”¹⁸ Most importantly, NBCUniversal acknowledged that it “has negotiated and executed license agreements with several OVDs on mutually agreeable commercial terms without resort to the specific processes of the Conditions.”¹⁹

Despite the absence of problems with the operation of the Benchmark Condition, on February 17, 2012, C-NBCU requested “clarification” from the Media Bureau: It asked that the Benchmark Condition actually permit C-NBCU agents to have automatic and immediate access to the underlying highly confidential programming agreements between OVDs and other content companies if an OVD merely invokes the Benchmark Condition and seeks to begin negotiations with C-NBCU. The only justification for this unprecedented alteration of a Commission decision cited by the company was a purported lack of efficiency.²⁰ The effect of

¹⁷ *Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc.*, Annual Report of Compliance with Transaction Conditions (filed Feb. 28, 2012), at 8-9 (the “Annual Compliance Report”).

¹⁸ *Id.* at 8.

¹⁹ *Id.* at 9.

²⁰ “Request for Clarification Regarding Implementation of the Benchmark Condition,” Letter from David P. Murray, Counsel for C-NBCU, to William T. Lake, Chief, Media Bureau, FCC, MB Docket No. 10-56, at 1 (February 17, 2012) (noting the need of Bureau guidance “. . . to ensure that OVDs can make efficient use of the Benchmark Condition . . .”) (the “Request”).

such clarification, however, not only potentially harms competition in the market for online video *distribution*, but in the market for online content itself.

The Content Companies formally opposed the “clarification,” first in a letter to the Chief of the Bureau on February 27, 2012 and then in greater detail on April 3, 2012, following the Bureau’s Public Notice seeking comments on C-NBCU’s request.²¹

On December 4, 2012, the Bureau issued the Order modifying the Benchmark Condition. As C-NBCU requested, the Order now requires any OVD invoking the Benchmark Condition to disclose the highly confidential peer programming agreements to C-NBCU representatives, notwithstanding any contractual confidentiality or nondisclosure provisions that restrict or prohibit such disclosure. The Order requires an OVD to disclose these agreements at the request of C-NBCU when the OVD first invokes the Benchmark Condition, even before negotiations have begun. In contrast, the Merger Decision specifically reserved the potential disclosure of this highly confidential material to the fact-finding, judgment, discretion, and order of an impartial arbitrator during arbitration, a process that occurs if and only if negotiations fail.²² Although the Order placed some limitations on disclosure of the agreements, it included the crux of the C-NBCU request: **C-NBCU’s agents will now routinely have access to the actual commercial agreements of its direct content competitors.** This routine access will be granted without: (1) any showing of necessity of disclosure by C-NBCU; (2) any creation of a factual record demonstrating the necessity of disclosure; (3) any weighing of that record by a neutral third party arbitrator; and (4) any decision by a neutral third party arbitrator. The process

²¹ “Media Bureau Seeks Comment on Whether Comcast-NBCU Benchmark Condition Needs Clarification and Whether a Proposed Third Protective Order for Compliance Should Be Adopted,” DA 12-394 (March 13, 2012) (the “Public Notice”).

²² Merger Decision App. A., § VIII. (4).

established by the Order is thus radically different from that formulated by the Commission in approving the C-NBCU merger.

In addition to moving the disclosure of highly confidential information to a much earlier point in the process, the Order also makes it significantly more likely that highly confidential agreements will be disclosed. Under the process created by the Merger Decision, the possibility of arbitration served as a potent incentive for parties to negotiate in good faith to avoid the expense, inconvenience, and uncertainty of arbitration. This process was effective as evidenced by C-NBCU's report of agreements reached with OVDs, some of which involved the Benchmark Condition.²³ Only one OVD negotiation with C-NBCU resulted in arbitration. Under the Order, however, with actual agreements available to C-NBCU for the asking, without any requirement to exhaust negotiation possibilities, and without the intervening discretion of an arbitrator, there will be little incentive to negotiate and no reason for C-NBCU to offer anything other than the deal reflected in the OVD's peer programming contract.

Recognizing the competitive sensitivity and importance of programming arrangements, the Content Companies typically ensure the highest possible level of confidentiality for their programming agreements. Among other protections, Content Companies routinely restrict disclosure to third parties and sometimes even limit the number of counterparty employees who may review the agreements within the bilateral relationship. The Commission itself has long acknowledged that these precautions are warranted and serve compelling interests:

²³ Annual Compliance Report at 8-9.

“disclosure of programming contracts between multichannel video program distributors and programmers can result in substantial competitive harm to the information provider.”²⁴

Competition and antitrust laws discourage and prevent the sharing of confidential contractual terms among competitors to avoid agreements in restraint of trade.²⁵ These laws guard against sharing sensitive business information with competitors in order to promote competition. The Order would permit C-NBCU to subvert these principles by allowing its representatives to demand confidential information from OVDs that antitrust laws would otherwise restrict if sought directly from the Content Companies.²⁶ The fact that these representatives are limited to C-NBCU’s outside counsel and outside experts in no way ameliorates the harmful impact of the Order. These outside agents are hired by C-NBCU to regularly counsel, advise, and represent it on its range of agreements. It is utterly unrealistic, to think that the knowledge of these outside agents will not benefit C-NBCU even if they proceed in good faith to try not to disclose what they have learned.

The very purpose the agents serve – and the reason the Order gives them access to highly confidential information – is to advise C-NBCU as to whether C-NBCU’s programming is “comparable” and whether C-NBCU’s offer is the “economic equivalent” of a peer

²⁴ See *Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, 13 FCC Rcd 24816, 24852 (August 4, 1998) (the “1998 Policy Statement”).

²⁵ See 15 U.S.C. § 1; see also *e.g.*, *United States v. Container Corp. of Am.*, 393 U.S. 333 (1969) (holding exchange of price information violated the Sherman Act).

²⁶ Access to this information will diminish C-NBCU’s incentives to compete vigorously in the short term and over time. Accordingly, full access by C-NBCU will likely lead to distortions in the terms and conditions in the OVD programming market, increasing C-NBCU’s profits, injuring other market participants, and ultimately raising costs for consumers.

programmer’s deal with the OVD.²⁷ An agent must engage in a “too high / too low” or “hotter / colder” exercise to advise C-NBCU while avoiding disclosure of the highly confidential details of an agreement to decision-making C-NBCU personnel. Over a series of iterations, the agent would likely have to provide strong clues amounting to an approximation of the highly confidential information in a peer programming agreement.²⁸ Over time, the C-NBCU agents will review many OVD peer contracts and will develop an unparalleled view of the OVD programming realm – knowledge otherwise unavailable to any OVD or content provider competing with C-NBCU.

The competitive harm resulting from the resulting large volume of disclosures of OVDs’ and content providers’ programming agreements would be irreparable. Even with a mandate from the Commission that this confidential commercial information be used for limited, non-competitive purposes, and even with the threat of *ex post facto* sanctions for violations, the Commission could never repair the damage to the Content Companies’ business that would ensue with the widespread disclosure to one company’s agents of the highly proprietary information of its competitors. Indeed, the Commission may never know the full extent of damage to the Content Companies’ business. Once an individual gains access to confidential information, that knowledge cannot be erased. Even an individual’s best intended efforts cannot prevent him or her from being influenced by the information obtained from viewing confidential materials. Federal courts have emphasized that once a person sees information, there is a high risk of inadvertent use because a person cannot “perform a prefrontal lobotomy on himself or

²⁷ Merger Order, App. A., IV (A)(2)(b); Order, ¶9.

²⁸ This discussion is in no way meant to impugn C-NBCU, its personnel, or its agents. The end results are a product of the Benchmark Condition, the Order, and human nature.

herself.”²⁹ This is just as true for C-NBCU’s outside counsel and experts – who may act for Comcast in many different negotiation settings and who may subsequently become decision-making C-NBCU employees.

Fundamentally, the Order stands the Benchmark Condition on its head. A condition adopted by the Commission to guard against potential anti-competitive conduct by C-NBCU now has become a powerful and unprecedented weapon providing a unique competitive advantage to C-NBCU vis-à-vis the six named Content Companies, none of which were parties to the transaction or were given a formal opportunity to comment or object during the condition-drafting process. Indeed, because the Order enables disclosure in all cases where the Benchmark Condition is invoked and at a much earlier point in the negotiation process, there will likely be a greater volume of disclosures than the Commission originally anticipated (when it said that disclosure should occur only at the arbitration stage). The protective order adopted in the Order – which mirrors the model order established by the Commission *for arbitration* if the arbitrator finds the order appropriate to adopt in a particular situation – does not take these considerations into account, including as it relates to the significant role of C-NBCU’s agents, and their possible future employment in other situations adverse to a C-NBCU competitor.

Knowledge of the terms of third parties’ agreements with OVDs would grant C-NBCU an unprecedented advantage both as a programming distributor seeking access to content owned by the Content Companies and as a content licensor seeking to compete with the Content Companies and other content licensors. That the Content Companies are not parties to any

²⁹ *AMP, Inc. v. Fleischhacker*, 823 F.2d 1199, 1201 (7th Cir. 1987), citing *MBL (USA) Corp. v. Dickman*, 112 Ill.App.3d 229, 236-37 (1st Dist. 1983); see also *Fleming Sales Co., Inc. v. Bailey*, 611 F. Supp. 507, 514 (N.D. Ill. 1985); and *Autotech Tech. Ltd. P’ship v. Automationdirect.com, Inc.*, 237 F.R.D. 405, 408 n.3 (N.D. Ill. 2006) (footnote omitted).

controversy between C-NBCU and an OVD that might lead to a C-NBCU request for access makes the Order even more inequitable.

The Content Companies named as “peer” programmers may be reluctant to license their content to OVDs, particularly smaller OVDs and new entrants, given the potential for disclosure of their highly confidential information to their competitor, C-NBCU. In addition, unlike its content competitors who will not know what price to accept for rights, C-NBCU will have perfect information and therefore the ability to avoid accepting less than its competitors. As a result, C-NBCU will enjoy an unfair advantage as its competitors will not have access to this same information, creating an imbalance in the marketplace. By overhauling the Benchmark Condition, the Order would itself create the adverse effects on competition that the Commission hoped to prevent.

The Department of Justice conducted a separate review of the transaction under the antitrust laws.³⁰ In ordinary circumstances, the DOJ defers to the Commission’s process calling for negotiation followed by arbitration if, and only if, negotiations prove unsuccessful. In its own Final Judgment, the DOJ reserved the right to permit arbitration.³¹ In doing so, it held arbitration until after failed negotiations³² and required the submission of peer programming agreements only as part of the arbitration process³³ – and only after the DOJ has already approved an OVD’s request for arbitration.³⁴ The DOJ’s conclusion that safeguards were

³⁰ Competitive Impact Statement, *U.S. v. Comcast Corp.*, Case No. 1:11-cv-00106, at 2, 20-30 (D.D.C. Jan. 18, 2011) available at <http://www.justice.gov/atr/cases/comcast.html>.

³¹ *Id.*, at 2-3, 32-33.

³² Final Judgment, *U.S. v. Comcast Corp.*, Case No. 1:11-cv-00106 (D.D.C. Sept. 1, 2011) at 13-14, available at <http://www.justice.gov/atr/cases/comcast.html>.

³³ *Id.*, at 25.

³⁴ *Id.*

necessary to limit disclosure mirrors the Commission’s intent in the Merger Decision, minimizing the risk inherent in requirements of this nature and including measures to mitigate the exposure of confidential information.

The Order takes far-reaching steps that modify the process designed by the Commission and the DOJ without adequate explanation, and, indeed, without even recognizing the nature or significance of the changes they represent.³⁵ Such a lack of reasoned explanation – and the failure to acknowledge, much less explain, a substantial change – reflects arbitrary and capricious decision-making.³⁶

III. THE COMMISSION SHOULD REVERSE THE ORDER ON SEVERAL GROUNDS

In addition to subverting the procedures that the Commission designed in the Merger Decision, the Order is fundamentally flawed on several other grounds, any one of which would justify reversing the Order. First, the C-NBCU request was actually an untimely petition for reconsideration, not a request for clarification. Second, the Bureau did not have the power to grant the request sought by C-NBCU. Third, the Bureau – indeed, the Commission – has no authority to abrogate contracts without specific statutory authority. Fourth, the Order abrogated contracts in a manner not anticipated either by the C-NBCU Request or the Public Notice, creating an unexpected regulatory taking subject to the Fifth Amendment and violating protections for confidential information available to litigants under statutes and court rules. And,

³⁵ See, e.g., *Prometheus Radio Project v. FCC*, 373 F.3d 372, 389-90 (3rd Cir. 2004) (noting that in a review under the “arbitrary and capricious” standard, courts must ensure that an agency examined the relevant data and articulated a satisfactory explanation for its action, including a rational connection between the facts found and the choice made).

³⁶ *FCC v. Fox Television Stations, Inc.* 556 U.S. 502, 515 (2009) (“To be sure, the requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it is changing position. An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books. See *United States v. Nixon*, 418 U.S. 683, 696, 94 S.Ct. 3090, 41 L.Ed 2d 1039 (1974). And of course the agency must show that there are good reasons for the new policy”).

fifth, the Order is in clear violation of the Trade Secrets Act, which carefully protects confidential business information as a matter of federal law.

A. The C-NBCU Request is an Untimely Petition for Reconsideration, not a Request for Clarification.

C-NBCU's February 17, 2012 letter to the Bureau, styled as a "Request for Clarification Regarding Implementation of the Benchmark Condition," is as an out-of-time petition for reconsideration of the Merger Decision. C-NBCU sought a complete transformation of the limited right of access to highly confidential information that the FCC contemplated in the Merger Decision. For at least two reasons, the Bureau lacks the power to grant C-NBCU's request.

First, the Communications Act (the "Act") mandates that petitions for reconsideration of a final Commission action *must* be filed *with the Commission* within 30 days following public notice of the action in question.³⁷ As the United States Court of Appeals for the District of Columbia Circuit has noted, Section 405's time limit is mandatory, and can be extended only in extraordinary circumstances such as "where the late filing is in some sense attributable to a procedural violation by the Commission."³⁸ Here, C-NBCU claimed no procedural defect by the Commission to justify the late filing – attempting instead to circumvent this limitation by artfully styling its submission.³⁹

³⁷ See 47 U.S.C. § 405(a) (petition for reconsideration of order is filed "only to the authority making or taking the order . . . [and] *must* be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of.") (emphasis added); 47 C.F.R. § 1.106(f) (same).

³⁸ *Nat'l Black Media Coalition v. FCC*, 760 F.2d 1297, 1299 (D.C. Cir. 1985); see also *Reuters Ltd. v. FCC*, 781 F.2d 946, 950, 952 (D.C. Cir. 1986) (noting that 30-day period for filing reconsideration petitions with FCC is mandated by statute and regulation and "it is elementary that an agency must adhere to its own rules and regulations.").

³⁹ Furthermore, C-NBCU did not position its request for clarification as a petition for modification of a condition, though it clearly was. To qualify for a modification under the terms of the Merger Decision, C-NBCU would
(cont'd)

Second, C-NBCU's request can be construed no other way than as a petition for reconsideration of the Merger Decision. The caption on its request notwithstanding, C-NBCU's application for relief does not seek a mere "clarification." There is no ambiguity about the Benchmark Condition in the Merger Decision or the full Commission's expectations that could require clarification.⁴⁰ In the C-NBCU merger and in a long line of Commission decisions, programming agreements are classified as highly confidential materials. The Merger Decision expressly set forth the circumstances in which highly confidential materials may be produced in the context of arbitration: by the careful, context-specific determination of an impartial arbitrator – *not* at the request of C-NBCU outside of an arbitration proceeding.

In truth, C-NBCU sought a substantive change from the procedure already established in the Merger Decision. However, with its request untimely by nearly one full year, C-NBCU is not entitled to the relief it sought. It has not demonstrated, and in truth cannot, that there has been any material change in circumstances, nor any facts that it was unable to discover and present to the Commission during the exhaustive review of the C-NBCU transaction. Indeed, in its own Annual Report to the Commission as to the various merger conditions, C-NBCU concluded that the Benchmark condition was functioning well and exactly as anticipated by the Commission.⁴¹ As such, C-NBCU's proposal should be rejected by the Commission on this basis alone.

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need to demonstrate that there has been a material change in circumstances or that the condition has proven unduly burdensome – neither of which is the case. *See* Merger Decision, App. A, XX, n. 11.

⁴⁰ The "Request for Clarification" states with particularity the respects in which C-NBCU believes the Merger Decision should be changed and states specifically the relief sought (requiring access to the peer deal when the OVD invokes the Benchmark Condition), which are the requirements of a petition for reconsideration. 47 C.F.R. § 1.106(d)(1).

⁴¹ Annual Compliance Report at 8-9.

B. The Relief C-NBCU Sought is Beyond What the Bureau has Power to Provide.

Since the Merger Decision was a full Commission decision, any action to set aside or alter the fundamental terms of the Merger Decision can be taken only by the full Commission. Moreover, the Act makes clear that the Bureau can exercise only those functions that have been delegated to it by the Commission.⁴² The FCC's rules implementing the Act stress that the Bureau must refer to the full Commission "[m]atters that present novel questions of law, fact or policy that cannot be resolved under existing precedents and guidelines."⁴³ Neither the Act nor the FCC's rules permit the Bureau to take an action that would modify an order issued by the full Commission.⁴⁴

Here, C-NBCU requested that the Bureau command OVDs to produce their private commercial agreements with the Content Companies at the time that the OVDs avail themselves of the Benchmark Condition – to a wide range of C-NBCU agents outside the context of any arbitration. In the Merger Decision, however, the full Commission already had required that good faith negotiations be the starting point for C-NBCU and OVDs that seek to use the Benchmark Condition, and that the production of peer contracts could only be required in an arbitration proceeding as the backstop, should negotiations fail. Notably, the FCC said nothing about compelling an OVD to produce highly confidential programming agreements during these initial negotiations. Plainly put, the Bureau does not have the power to set aside a decision made by the full Commission. Its Order should be overturned.

⁴² See 47 U.S.C. § 155(c).

⁴³ 47 C.F.R. § 0.283(c).

⁴⁴ See *Sandwich Isles Commc'ns, Inc.*, 20 FCC Rcd 8999 (2005) ("The Bureau does not have the authority to alter the Commission's finding"); *Mintz, Levin, Cohn, Ferris, Glovsky, and Popeo, P.C.*, 17 FCC Rcd 16100, 16102 (2002) ("It is axiomatic that a delegated authority decision cannot conflict or otherwise reverse the decision of the full Commission.") (footnote omitted).

C. The Commission Cannot Abrogate Contracts Without Statutory Authority.

The Content Companies and other programming suppliers, as well as programming distributors, protect highly confidential information related to the rates and terms of program distribution agreements through confidentiality or non-disclosure provisions or separate agreements. The Order recognized this fact, but treated it as an obstacle to be overcome, rather than as a protected right of private companies to enter mutually acceptable binding agreements.⁴⁵ The Order cited no specific authority for the ability to override these non-parties' private agreements and, indeed, there is none.

By contrast, the Merger Decision recognized that some programming agreements include provisions that address the disclosure of confidential information in response to a government order and it provided the arbitrator with the authority, in its discretion, to issue an order that would enable such disclosures in the limited context of an arbitration and pursuant to a highly confidential protective order.⁴⁶ The Order, however, rather than maintaining respect for these peer contracts, completely “override[s] any such confidentiality or non-disclosure provisions or agreements.”⁴⁷ This is a major change, and one made without any authority or justification.

The Commission's authority arises from statutes.⁴⁸ Courts have consistently held that Commission regulation in the absence of specific statutory authority falls outside its jurisdiction. For example, because pole attachments do not constitute wire or radio communications, the Commission had been precluded from regulating them until Congress took

⁴⁵ Order, ¶ 12.

⁴⁶ Merger Decision, App. A., § VIII, 4.

⁴⁷ Order, ¶ 12.

⁴⁸ *Am. Library Ass'n v. FCC*, 406 F.3d 689, 691, 698 (D.C. Cir. 2005).

action.⁴⁹ Likewise, prior to the Telecommunications Act of 1996, physical colocation of a competitor's equipment in a local exchange carrier's central office was found to be a "physical taking" without express statutory authority.⁵⁰

It has long been established that the Communications Act does not give the Commission authority to directly affect or determine the validity of contracts between private parties.⁵¹ The Commission may impose conditions on regulated parties that must be met before the parties are granted licenses, "but the imposition of the conditions cannot directly affect the applicant's responsibilities to a third party dealing with the applicant."⁵² And, unlike the Content Companies, C-NBCU as a party to the merger approval and its conditions, was free to accept or reject such conditions. By consummating its merger, C-NBCU accepted those conditions.

D. The Order Took Unprecedented, Unauthorized, and Unanticipated Action.

Because the Commission cannot abrogate private contracts without statutory authority, the Bureau's action doing so was unprecedented and unexpected. Indeed, C-NBCU's Request only noted that "OVDs suggest that they cannot share their peer deals due to confidentiality restrictions in those agreements."⁵³ The request did not explicitly ask the Bureau

⁴⁹ *California Water and Tel. Co., et. al.*, Mem. Op. and Order, 64 F.C.C.2d 753 ¶ 17 (1977) (noting that the power to regulate private contractual agreements, even where they directly affect communications activities, "must be conferred by Congress. [It] cannot be merely assumed by administrative officers.").

⁵⁰ *Bell Atlantic Telephone Companies v. FCC*, 24 F.3d 1441, 1446 (D.C. Cir. 1994) (finding that, without express delegation of authority from Congress, the Commission may not order a regulated entity to provide a competitor access to its facilities).

⁵¹ *Regents of the University System of Georgia v. Carroll*, 338 U.S. 586, 602-03 (1950) (finding that although the Commission can require an applicant to repudiate a contract as a condition of receiving a license renewal, that condition did not invalidate the contract under state law); *see also*, *Thomas K. Kurian*, 25 FCC Rcd 13863, ¶ 3 (2010) and *Echostar Communications Corp. v. Fox/Liberty Networks LLC*, 14 FCC Rcd 10480 ¶ 14 (1999) (noting that public policy requires minimal regulatory interference with private contracts entered into by consenting parties).

⁵² *Regents*, 338 U.S. at 600.

⁵³ Request at 1.

to override those restrictions. The Public Notice mentioned the issue of confidentiality provisions, but did not request comment on whether the relief requested by C-NBCU would abrogate private agreements, even those already in place. C-NBCU's Reply Comments were also silent on the issue. Yet, the Order unhesitatingly declared that "it is the intent of this Order to override any such confidentiality or non-disclosure provisions or agreements."⁵⁴ This unqualified abrogation of private agreements without statutory authority created a Constitutional "takings" issue. Additionally, it went far beyond the requirements of third-party disclosures of confidential information that federal rules or courts would require or allow.⁵⁵

1. The Order Constitutes a Regulatory Taking by Depriving Content Providers of the Economic Value of Confidential Contract Terms.

The Order interferes with the rights of programming providers, who will suffer a "regulatory taking" under the Fifth Amendment.⁵⁶ The Commission has relied on an examination of three factors to identify a taking forbidden by the Fifth Amendment: "(1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action."⁵⁷

First, with regard to "economic impact," the Order would transfer the programming providers' sensitive and highly confidential information to one of their fiercest and

⁵⁴ Order, ¶ 12.

⁵⁵ These two issues could not have been raised earlier in the proceeding because the Bureau did not make its intent to abrogate contracts the subject of comment. Accordingly, they may be appropriately discussed at this stage without conflicting with Section 1.115 of the Commission's rules. Additionally, a Commission decision to reverse the Order need not *rely* on these points of law.

⁵⁶ U.S. Const., amend V ("nor shall private property be taken for public use, without just compensation.").

⁵⁷ *Exclusive Service Contracts for Provision of Video Services*, 22 FCC Rcd 20235, ¶ 56, citing *Connolly v. Pension Ben. Guaranty Corp.*, 475 U.S. 211, 224-25 (1986).

strongest competitors. In doing so, the Order would have a severe economic impact on the Content Companies (as well as on other companies providing content). The economic impact is particularly striking because the Commission does not generally regulate companies that are engaged simply in content creation; the substantial economic harm here is collateral damage, completely unexpected, and in the nature of “friendly fire” coming from a government agency charged with fostering diverse channels of communication in the public interest.

Second, the regulation interferes with investment-backed expectations. Quality video programming is expensive to produce and distribution rights are expensive to acquire. Programming companies build financial models to determine whether the investments in new programs or channels will be rewarded with adequate revenues. These models are based on a continuation of the current contract negotiation regime, where deals are confidential and based on the value of programming as perceived by the producer and distributor, not on what another party has agreed to pay. The Order will inevitably transfer detailed knowledge of peer programming contracts to a uniquely positioned competitor and will significantly interfere with the existing models.

Third, the character of the Bureau’s action in the Order is “extraordinary.”⁵⁸ It abrogates the contractual rights of private parties and interferes with their ability to protect the bargains that they strike. The action was taken without statutory authority, and even without action by the full Commission. It was not inescapably dictated by any part of the Merger Decision.

⁵⁸ See, e.g., *Cienega Gardens v. U.S.*, 331 F.3d 1319, 1338 (Fed. Cir. 2003) (citing *Hodel v. Irving*, 481 U.S. 704, 715-16 (1987) which found that government action abrogating a common law right to devise even a small amount of property was a taking, even absent a showing of the other two factors: economic harm or interference with investment-backed expectations, because the character of the government action was “extraordinary”).

Indeed, even under the Bureau’s own rendering, any allowance for its action was merely “implicit.”⁵⁹ There was nothing reasonably implied in the Merger Decision that would lead to the conclusion that the abrogation of private contracts is proper. Such an interpretation, in fact, is antithetical to the process designed by the Commission.

Thus, the Order creates an unconstitutional taking of the property rights of the Content Companies and should be reversed.⁶⁰

2. In Analogous Situations, Courts and Federal Rules Do Not Automatically Mandate Disclosure of Confidential Information by Non-Parties.

In analogous civil litigation scenarios, federal courts carefully guard against mandating disclosure of confidential information by non-parties. Courts recognize that an entity’s status as a non-party and the harm from exposing confidential commercial information both weigh against such disclosure. Indeed, the risk to a non-party is obvious because “It would be divorced from reality to believe that either party . . . would serve as the champion of its [non-party competitor] either to maintain the confidentiality designation or to limit public disclosure as much as possible. . . .”⁶¹ In the same vein, the Federal Rules protect non-parties by authorizing courts to quash or modify a subpoena if the subpoena directs the non-party to produce confidential commercial information.⁶²

⁵⁹ Order, ¶24.

⁶⁰ Additionally, these disclosure requirements impose a burden on speech and consequently will also not survive without furthering a governmental interest unrelated to the suppression of free expression. *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622 (1994). An incidental restriction on First Amendment freedoms must be no greater than is essential to the furtherance of that interest. *Id.*

⁶¹ *Micro Motion, Inc. v. Kane Steel Co. Inc.*, 894 F.2d 1318, 1325 (Fed. Cir. 1990).

⁶² Fed. R. Civ. P. 45(c)(3)(B)(i) (“To protect a person subject to or affected by a subpoena, the issuing court may, on motion, quash or modify the subpoena if it requires: (i) disclosing a trade secret or other confidential research, development, or commercial information”); *see also Education Logistics, Inc. v. Laidlaw Transit, Inc.*, No. 3-11-MC-036-L-BD, 2011 WL 1348401, at 2 (N.D. Tex. Apr. 8, 2011) (applying Rule 45).

In civil litigation, courts are required to balance the need for discovery against the burdens imposed when ordering the production of information or materials.⁶³ In so balancing, the status of an entity as a non-party weighs against the burden of disclosure.⁶⁴ Indeed, courts understand that non-parties should not be subject to the same burdens of discovery as parties.⁶⁵

In addition to avoiding the burden on non-parties, courts in civil litigation also consider whether the non-party information includes confidential commercial information that should not be disclosed.⁶⁶ Ordinarily, confidential commercial information warrants special protection in civil discovery.⁶⁷ Courts may deny access to confidential business information, even when otherwise relevant, when the potential harm in disclosing the information outweighs any benefit.⁶⁸

Where requiring the disclosure of confidential business information would damage a non-party's ability to compete in the marketplace, courts have rejected disclosure.⁶⁹ Civil courts recognize that the disclosure of confidential documents – including those addressing

⁶³ *Echostar Commc'ns Corp. v. News Corp. Ltd.*, 180 F.R.D. 391, 394 (D. Colo. 1998) (denying motion to compel production of nonparties' materials).

⁶⁴ *See, e.g., Mannington Mills Inc. v. Armstrong World Indus., Inc.*, 206 F.R.D. 525, 528 (D. Del. 2002) (citing *Am. Standard, Inc. v. Pfizer, Inc.*, 828 F.2d 734, 738 (Fed. Cir. 1987); *Spacecon Specialty Contractors, LLC v. Bensinger*, 2010 WL 3927783, at 3 (D. Colo. Oct. 1, 2010).

⁶⁵ *Cusumano v. Microsoft Corp.*, 162 F.3d 708, 717 (1st Cir. 1998) (affirming denial of motion to compel). As a result, a burden of proof heavier than the ordinary burden imposed is required for non-party discovery requests. *See Spacecon Specialty Contractors, LLC*, 2010 WL 3927783, at 3.

⁶⁶ *Mannington Mills*, 206 F.R.D. 525, 528 (D. Del 2002) (considering application of Fed. R. Civ. P. 45).

⁶⁷ *See Micro Motion, Inc.*, 894 F.2d 1318, 1325; *cf. Federal Trade Commission v. OSF Healthcare System*, 2012 WL 1144620, at 8 (N.D. Ill. 2012) (recognizing the manner in which a business prices its products and services is generally confidential).

⁶⁸ *Education Logistics, Inc. v. Laidlaw Transit, Inc.*, 2011 WL 1348401, at 4 (N.D. Tex. Apr. 8, 2011).

⁶⁹ *Id.*; *Mannington Mills*, 206 F.R.D., at 528-29.

prices and contractual terms – provide competitors an unfair advantage.⁷⁰ Further, courts understand that non-parties are essentially powerless to protect their interests following the disclosure of their confidential information – even under the shield of a protective order – leaving their respective positions in the marketplace increasingly vulnerable.⁷¹

Significantly, courts also consider to whom the information is being released or who may potentially receive the information. Courts recognize that confidential commercial information can be improperly used to compete with the disclosing party (or can be disclosed by a competitor), substantially decreasing the value of the confidential commercial information.⁷² As a result, “[c]ourts have presumed that disclosure to a competitor is more harmful than disclosure to a non-competitor.”⁷³

Even where the requested information is relevant, disclosure will not be required if the potential harm outweighs the benefit.⁷⁴ The Bureau’s Order here requires the automatic disclosure of content providers’ confidential commercial information, specifically targeting pricing and contractual material essential to competing in the marketplace. As part of that disclosure, the Order places that same information in the hands of a competitor without any attempt at balancing, without review by a neutral third party, and without any opportunity to participate by the non-party content providers. In doing so, the Order imposes a requirement that

⁷⁰ See *Wauchop v. Domino’s Pizza, Inc.*, 138 F.R.D. 539, 548-49 (N.D. Ind. 1991) (declining to require production of all governing board minutes where likely to reveal confidential commercial information).

⁷¹ See *Education Logistics, Inc.*, 2011 WL 1348401, at 4.

⁷² See *Echostar Commc’ns Corp.*, 180 F.R.D. 391, 395.

⁷³ *Am. Standard Inc.*, 828 F.2d 734, 741 (citations omitted). See, e.g., *Education Logistics, Inc.*, 2011 WL 1348401, at 2; *Echostar Comm’ns Corp.*, 180 F.R.D. at 395; *R & D Business Sys. v. Xerox Corp.*, 152 F.R.D. 195, 196 (D. Colo. 1993).

⁷⁴ See, e.g., *Education Logistics, Inc.*, 2011 WL 1348401, at 2.

flatly contradicts the standards of civil procedure, which recognize the special consideration appropriate for non-parties as well as the risks inherent in requiring the disclosure of their confidential commercial information.

E. The Order Violates the Trade Secrets Act.

Federal law mandates that agencies proceed cautiously with regard to confidential business information. In particular, the Trade Secrets Act prohibits government personnel from disclosing sensitive business data unless “authorized by law” to do so.⁷⁵ The central question under the Trade Secrets Act is whether a disclosure of highly confidential business information is “authorized by law,” as required by that Act. If not, disclosure is forbidden.⁷⁶ An agency’s disclosure decision is “authorized by law” under the Trade Secrets Act if the disclosure takes place pursuant to a regulation that: (i) is substantive in that it affects individual rights and obligations, (ii) is rooted in a grant of power by Congress and (iii) was promulgated in conformance with any procedural requirements established by Congress, such as those found in the Administrative Procedure Act.⁷⁷ In the context of the Benchmark Condition, the disclosures required by the Order are not “authorized by law” within the meaning of the Trade Secrets Act.

There is no FCC regulation authorizing, or even contemplating, the compelled disclosure of confidential information by one private entity to another, let alone mandating one entity to disclose a *third party*’s confidential materials to one of its chief competitors. Yet this is precisely the result the Order requires. Because the Order was neither “rooted in a grant of

⁷⁵ 18 U.S.C. § 1905.

⁷⁶ See *Chrysler Corp. v. Brown*, 441 U.S. 281, 318 (1979) (“[W]e believe any disclosure that violates § 1905 is ‘not in accordance with law’ within the meaning of” the Administrative Procedure Act (“APA”)).

⁷⁷ See *Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, 13 FCC Rcd 24816, 24820-21 (1998) (the “1998 Policy Statement”); see also *Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, 11 FCC Rcd 12406, 12413 (1996) (the “1996 Policy Statement NPRM”) (citing *Chrysler*, 441 U.S. at 301-303).

power by Congress,” nor “promulgated in accordance” with the APA, the disclosure required by the Order is not “authorized by law.”

IV. THE COMMISSION SHOULD REVERSE THE ORDER.

The Commission established clear procedures for implementing the Benchmark Condition in the Merger Decision. Now it needs to reinstate those procedures by reversing the changes imposed by the Order. Additionally, because the Order exceeds lawful authority, is the product of arbitrary and capricious decision-making, abrogates contracts without statutory authority, creates a regulatory taking under the Fifth Amendment, and violates federal statutes, a reversal is necessary to serve the public interest.

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January 3, 2013

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of January, 2013, a true and correct copy of the foregoing Application for Review of Media Bureau Order DA-12-190 has been served, in the delivery manner specified, on the following persons at the addresses shown below:

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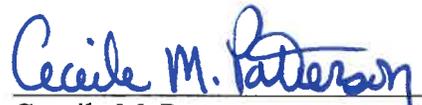
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