UNITED STATES GOVERNMENT

memorandum

DATE: September 23, 2014

TO: Jonathan Sallet, General Counsel, Federal Communications Commission
William Lake, Chief, Media Bureau, Federal Communications Commission

FROM: Hillary Burchuk, Office of the General Counsel, Federal Communications Commission

SUBJECT: Applications of Comcast Corporation, Time Warner Cable Inc., Charter Communications Inc., and SpinCo for Consent to Assign Licenses or Transfer Control of Licenses, MB Docket No. 14-57

Applications of AT&T Inc. and DIRECTV for Consent to Assign Licenses or Transfer Control of Licenses, MB Docket No. 14-90

The Federal Communications Commission Staff files this notice of an ex parte presentation that took place on Thursday, September 16, 2014, attended by Jonathan Sallet, James Bird, Hillary Burchuk, Jamillia Ferris, of the FCC's Office of General Counsel and Mace Rosenstein of Covington and Burling LLP on behalf of CBS Corporation, Discovery Communications, The Walt Disney Company, Twenty First Century Fox, Inc., Scripps Networks Interactive, Inc., Time Warner Inc., Viacom Inc. and Univision Communications Inc. This notice is being filed by staff pursuant to 47 CFR Section 1.1206(b)(1)(note).

Counsel raised the following concerns relating his clients' programming contracts, drafts thereof and materials relating to the negotiation of those agreements ("Protected Materials") which have been requested by the Commission in MB Docket Nos. 14-57 and 14-90 (the "Proceedings"). He claimed that the Protected Materials should receive protection beyond that afforded Highly Confidential information pursuant to the Commission's Joint Protective Orders in the Proceedings, for the following reasons:

1. The contracts at issue are the programmers' most closely-guarded and competitively sensitive documents.
2. Certain individuals who have already signed the Protective Order for Highly Confidential Information are known to participate in contract negotiations.
3. An outside counsel or expert who views the programming contracts will have comprehensive contracting information for the entire industry.
4. In the future, such outside counsel or expert could market that expertise, even if they have not before been involved in contract negotiations or related advice.
5. Any violation will difficult to police.
6. There has been at least one alleged serious violation of a Commission protective order governing a prior proceeding.
7. Since the documents are being sought from other parties to the contracts, the programmers, whose information is being placed at risk, do not have an effective way to protect their interests.

Counsel for the programmers proposed the following options to protect particularly sensitive materials.

I. Overall Protections

The Protected Materials would be removed from the applicants' production obligations. The objecting programmers would execute waivers authorizing the Department to allow FCC staff to review the Protected Materials in the Department's custody.

II. Other Protections

The Protected Materials will be placed in the record of the Proceedings only for the limited purpose, and to the extent necessary, to enable the Commission to refer to such Protected Materials in its decision. Placement of any Protected Materials in the Proceedings shall be subject to a "third level" protective protocol, as follows:

(1) The FCC shall notify any nonparty to the Proceeding immediately upon designating any Record Materials pertaining to that party for inclusion in the public record;
(2) The nonparty will be given the opportunity to redact The Protected Materials prior to being placed in the public record and/or discussed in the FCC decision, so that the name, any other identifying information or features relating to the nonparty will be redacted from any discussion of or reference to any of the Record Materials in the FCC's decision;
(3) The Protected Materials will be placed in the public record as near-contemporaneously as possible with the release of the FCC's decision; and
(4) The Protected Materials will be accessible only to FCC staff and will not be available for review by any party to the proceeding in either redacted or unredacted format, including individuals who have executed the "second level" protective order.

III. Additional Options

A. The Protected Materials will be accessible in unredacted format only to FCC staff. The Protected Materials will be available for review only in redacted format to any party to the Proceeding, including persons who have executed the "second level" protective order.

B. The Protected Materials will be accessible in unredacted format to the FCC staff, and to parties to the Proceedings subject to the following additional procedures:
   (1) A requesting party will be subject to the "second-level" protective order (*i.e.*, outside counsel/consultants only with no involvement in competitive decision-making) and will be required to subscribe to the following "third-level" protective provisions:
      a) A party seeking access will be required to certify that he/she and his/her respective organization or firm has not and currently is not representing any individual in content distribution negotiations (including in any agreement set to expire and be considered for renewal within the next 12 months), or in regulatory proceedings relating to program carriage, access or affiliation matters; and

b) A party seeking access will have the burden of demonstrating that it has a reasonable, good faith need to review the requested Protected Materials.

(2) The FCC will notify the affected nonparty as soon as possible following receipt of a request for inspection.

(3) The affected nonparty will have the right to object to inspection by the requesting party within 2 business days.

(4) If, after consideration of the request for inspection and the affected nonparty's objections, the FCC authorizes a qualified requesting party to review any unredacted Protected Materials, such review will be subject to procedures including:

(i) The Protected Materials will be anonymized if otherwise unredacted;

(ii) The Protected Materials will be made available for review on FCC premises; and

(iii) The Protected Materials will be subject to contemporaneous review only, *i.e.*, the reviewing party will not be permitted to make manual or electronic copies or to take notes.