

# UNPROTECTED AND UNPERSUADED: THE FCC'S FLAWED MERGER REVIEW PROCEDURES

TREY O'CALLAGHAN<sup>†</sup>

## ABSTRACT

*In CBS Corporation v. FCC, the D.C. Circuit struck down the Federal Communication Commission's rules for protecting confidential information that it collects during certain merger proceedings. In response, the Commission released a new order, pursuant to the Charter, Time Warner, and Bright House merger proceeding, for protecting confidential information. This iBrief analyzes the policy and legal implications of the Order, arguing that the Order is unlawful because it violates the Trade Secrets Act and notice-and-comment rulemaking requirements.*

## INTRODUCTION

The Communications Act of 1934 requires the Federal Communications Commission to review every transfer of one of its licenses.<sup>1</sup> Thus, Commission officials are inevitably interjected into business transactions involving cell phone, landline, broadcast radio, satellite radio, and cable companies—among others.<sup>2</sup>

When determining if it should grant a license transfer, the Commission asks whether “public interest, convenience, and necessity will be served” by the transaction.<sup>3</sup> As Jon Sallet, the Commission's General Counsel, has pointed out, the public interest standard goes “beyond the traditional strictures of antitrust laws (most notably the Clayton Act).”<sup>4</sup> For instance, the Clayton Act instructs the Department of

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<sup>†</sup> Duke University School of Law, J.D. expected 2017; George Washington University, B.A. Economics and Religion, 2014.

<sup>1</sup> 47 U.S.C. § 310(d) (2012).

<sup>2</sup> *See generally, e.g.*, Consent to the Transfer of Control of Licenses XM Satellite Radio Holdings Inc. to Sirius Satellite Radio Inc., 23 FCC Rcd. 12426 (Aug. 5, 2008) (approving the Sirius and XM merger subject to conditions).

<sup>3</sup> 47 U.S.C. § 310(d).

<sup>4</sup> Jon Sallet, Gen. Counsel, Fed. Commc'ns Comm'n, Remarks at the Telecommunications Policy Research Conference: “The Federal Communications Commission and Lessons of Recent Mergers & Acquisitions Reviews” (Sept. 25, 2015), [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2015/db0925/DOC-335494A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db0925/DOC-335494A1.pdf).

Justice to challenge transactions that would “substantially lessen competition.”<sup>5</sup>

In determining if transactions serve the public interest, the Commission forces transacting parties<sup>6</sup> to supply it with confidential information. Often a submitting party’s confidential information necessarily implicates a third party.<sup>7</sup> Parties with an interest in the transaction<sup>8</sup> are allowed to review and comment on the merging parties’ confidential information, which—in theory—assists the Commission with its public interest evaluation.<sup>9</sup> To protect the transacting parties’ confidential information, the Commission only makes certain information available to reviewing parties’ after granting protective orders.<sup>10</sup> But the rules protecting confidential information are far from clear and recent Commission orders and the D.C. Circuit case *CBS Corporation v. FCC* have made the process murkier. Additionally, the Commission sometimes leaks confidential information if it determines that the release is “in the interest of the agency.”<sup>11</sup> Thus, private parties like CBS or ESPN should be unpersuaded that the Commission protects their confidential information.

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<sup>5</sup> 15 U.S.C. § 18 (2012).

<sup>6</sup> Transacting parties are referred to throughout this article as “submitting” or “merging” parties.

<sup>7</sup> A “third party” has a confidential interest in information submitted to the Commission, but they are not a submitting party.

<sup>8</sup> Parties with an interest in the transaction are referred to throughout this article as “reviewing” or “commenting” parties.

<sup>9</sup> See 47 U.S.C. § 309(b) (2012) (“[N]o . . . application . . . shall be granted by the Commission earlier than thirty days following issuance of public notice.”). This review process has been challenged by many for being discriminatory. For example, former senior technology advisor in President Obama’s administration, Phil Weiser, has remarked that the “FCC sometimes uses such proceedings to decide issues that are otherwise pending in industry rulemakings—leading to one set of rules for those who have merged and another set of rules for similarly situated parties who have not.” Phil Weiser, *Institutional Design, FCC Reform, and the Hidden Side of the Administrative State* 36 (Univ. Colo. Law Sch. Legal Studies Research Paper Series), <http://tiny.cc/ksaf5x>.

<sup>10</sup> Charter Commc’ns, Inc., Time Warner Cable, Inc., & Advance/Newhouse P’ship for Consent to Assign or Transfer Control of Licenses & Authorizations, 30 FCC Rcd. 10360, 10365 (Sept. 11, 2015), [https://apps.fcc.gov/edocs\\_public/attachmatch/FCC-15-110A1\\_Rcd.pdf](https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-110A1_Rcd.pdf) [hereinafter *Order*].

<sup>11</sup> See Mario Trujillo, *Inspector General Investigating FCC Leaks*, THE HILL (May 6, 2016, 9:38 AM EDT), <http://thehill.com/policy/technology/278978-inspector-general-investigating-fcc-leaks> (discussing two Commission leaks).

## I. BACKGROUND

### *A. An Ambiguous Beginning: The Commission's First Procedures for Protecting Confidential Information*

The Commission first released a comprehensive framework for protecting confidential information and issuing protective orders in its 1998 *Confidential Information Statement*.<sup>12</sup> The statement makes it clear that under section 0.457(d) of the Commission's rules<sup>13</sup>—a provision implementing part of the Freedom of Information Act—certain trade secrets or “Exemption 4 Materials”<sup>14</sup> are not to be made routinely available for public inspection.<sup>15</sup> The statement requires there to be a “persuasive showing” why confidential information is necessary to the review process before the information is publicly disclosed.<sup>16</sup> To meet the persuasive showing standard, the Commission must identify a “compelling public interest” in favor of disclosure.<sup>17</sup> The Commission also “balanc[es] . . . the interests favoring disclosure and non-disclosure.”<sup>18</sup> The availability of protective orders is one factor the Commission considers when engaging in this balancing.<sup>19</sup>

The Commission used the rules set forth in the *Confidential Information Statement* from 1998 to 2014.<sup>20</sup> However, the statement is unclear about two material issues: First, it is unclear if issuing a protective order qualifies as a public disclosure.<sup>21</sup> Second, the Commission's definition of what constitutes necessary information within the persuasive showing framework is vague and possibly contradictory: In one instance

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<sup>12</sup> Current Policy Concerning Treatment of Confidential Info., 13 FCC Rcd. 24816 (July 28, 1998) [hereinafter *Confidential Information Statement*].

<sup>13</sup> 47 C.F.R. § 0.457 (2016).

<sup>14</sup> 5 U.S.C. § 552(b)(4) (2012) (Exemption 4 of the Freedom of Information Act protects “trade secrets and commercial or financial information obtained [by the government] from a person [that is] privileged or confidential.”).

<sup>15</sup> See *Confidential Information Statement*, supra note 12, at 24818–19.

<sup>16</sup> *Id.* at 24822 (citing 47 C.F.R. § 0.461).

<sup>17</sup> *Id.* at 24822–23.

<sup>18</sup> *Id.* at 24822 (reasoning that the Supreme Court contemplated this in *FCC v. Schreiber*, 381 U.S. 279, 291–92 (1965)).

<sup>19</sup> See *id.* at 24824 (discussing the Commission's reliance on protective orders when determining whether or not to disclose the confidential information).

<sup>20</sup> The Commission's bureaus issued many protective orders between 1998 and 2014 pursuant to the *Confidential Information Statement*. See, e.g., News Corp. & DirecTV Grp., Inc. & Liberty Media Corp. for Authority To Transfer Control, 22 FCC Rcd. 12797, 12797 (July 10, 2007).

<sup>21</sup> See *id.* at 24831 (reasoning that “protective orders can . . . permit[] limited disclosure for a specific *public purpose*” (emphasis added)).

the *Confidential Information Statement* states that the Commission “insists upon a showing that the information is a necessary link in a chain of evidence that will resolve an issue before the Commission” before the information will be released.<sup>22</sup> In another instance, the statement states that information does not need to be “‘vital’ to the conduct of a proceeding, necessary to the ‘fundamental integrity’ of the Commission process at issue, or . . . have a direct impact on the requestor.”<sup>23</sup>

*B. The D.C. Circuit Strikes Down The FCC’s Most Recent Order Protecting Confidential Information*

In 2014, the Commission considered two proposed mergers: AT&T sought to merge with DirecTV—in a transaction ultimately approved—and Comcast sought to merge with Time Warner Cable and Charter Communications—in a transaction that was ultimately withdrawn.<sup>24</sup> In line with past practices and the *Confidential Information Statement*, the Commission in April released a protective order (*April Order*) for the transaction.<sup>25</sup> Third parties like CBS and Viacom, who had their confidential information submitted to the Commission by the merging parties, challenged the *April Order* because they did not want their proprietary information disclosed during the merger-review process.<sup>26</sup>

In response to the third parties’ challenges, a division of the Commission called the Media Bureau sought public comment for new protective order procedures.<sup>27</sup> In response to those comments, the Media Bureau released new rules (*October Order*) governing protective orders.<sup>28</sup> The *October Order* provided content companies more protection than the *April Order*.<sup>29</sup> It “prevented disclosure of confidential information ‘until any objection is resolved by the Commission and, if appropriate by [a] court.’”<sup>30</sup> The order also allowed third parties to object to parties who compete with them reviewing their confidential information, instead of

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<sup>22</sup> *Id.* at 24822–23.

<sup>23</sup> *Id.* at 24829.

<sup>24</sup> *See* CBS Corp. v. FCC, 785 F.3d 699, 700 (D.C. Cir. 2015).

<sup>25</sup> *See id.* at 702.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *See id.* (reasoning that more protection was established by a guarantee of judicial review for all disclosure decisions).

<sup>30</sup> *Id.*

just parties who compete with the merger applicants.<sup>31</sup> Despite these reasonable safeguards, the *October Order* was short lived.<sup>32</sup>

In November, the Media Bureau reconsidered the *October Order*, and released the *Amended Protective Order*.<sup>33</sup> This order truncated protections for third parties.<sup>34</sup> Then the Commission, in a 3-2 vote, denied the content companies' Application for Review of the Media Bureau's *Amended Protective Order*.<sup>35</sup>

The content companies then sued the Commission claiming that the *Amended Protective Order* was unlawful because the Commission does not have the legal authority to disclose their confidential information and because the *Amended Protective Order's* truncated judicial review process was procedurally and substantively unlawful.<sup>36</sup> The D.C. Circuit addressed these issues in *CBS Corporation v. FCC*.<sup>37</sup>

First, the court addresses whether the “persuasive showing standard” applies to information released pursuant to a protective order.<sup>38</sup> The court “assumes” that the standard applies because the *Amended Protective Order* specified that it applies and the Commission's attorney in oral arguments conceded that it applies.<sup>39</sup>

Second, the D.C. Circuit addresses what the persuasive showing standard entails. The court relies on the *Confidential Information Statement*.<sup>40</sup> The statement is clear that disclosure must be in the public interest and it must be a good idea on balance,<sup>41</sup> but it is unclear about how “necessary” information must be for the review process before the

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<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 703.

<sup>33</sup> *Id.*

<sup>34</sup> *See id.* at 702–03 (discussing how the *Amended Protective Order* eliminated judicial review of certain Commission decisions and gave submitting parties less time to object to the release of information).

<sup>35</sup> *Id.* at 703.

<sup>36</sup> *See id.* (explaining that third parties opposed the *Amended Protective Order* because, among other reasons, it was inconsistent with past agency practices).

<sup>37</sup> *Id.* at 699.

<sup>38</sup> *See id.* at 704 (addressing whether the persuasive showing standard applies because 47 C.F.R § 0.457 (2016) states that “a persuasive showing as to the reasons for inspection will be required in requests for inspection,” and in *CBS* there was no requestor—rather, the Commission was attempting to disclose information on its own initiative).

<sup>39</sup> *Id.* at 704.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 705.

Commission may release it.<sup>42</sup> It states—ambiguously—that information must be a “necessary link in a chain of evidence” to be released, but that information does not need to be “‘vital’ to the conduct of a proceeding” to be released.<sup>43</sup> Analyzing the *Confidential Information Statement*, the court held that the Commission’s “necessary-link finding is an unavoidable component of the persuasive showing.”<sup>44</sup> To sum up the court’s holding: to release confidential information “the Commission must explain (1) why disclosure is in the public interest, (2) why it is a good idea on balance, and (3) why the information serves as a ‘necessary link in a chain of evidence.’”<sup>45</sup>

The *Amended Protective Order* satisfied the first two criteria, but did not satisfy the third criterion.<sup>46</sup> The *Confidential Information Statement* gave the Commission authority to release information “central” to the proceeding.<sup>47</sup> But, pursuant to the *Amended Protective Order*, the Commission may only release information if it is “absolutely needed” or “required,” which is a stricter standard.<sup>48</sup>

The court noted that the Commission could clarify or amend its current policy.<sup>49</sup> But the court indicated that the persuasive showing must still apply.<sup>50</sup> In other words, the Commission’s rules must encompass the persuasive showing standard, but the Commission could still clarify what that standard entails.<sup>51</sup>

The court also held that the *Amended Protective Order*’s truncated judicial review process is unlawful because it amounts to a “substantive and important departure from prior Commission precedent.”<sup>52</sup> The order only gives parties five days to challenge the Bureau’s decision, and information is released before the FCC Commissioners or a court may

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<sup>42</sup> See *id.* at 706 (discussing the wide range of definitions of the word “necessary,” including anywhere from “relevant” or “central” to “absolutely needed” or “required”).

<sup>43</sup> See *Confidential Information Statement*, *supra* note 12, at 24829.

<sup>44</sup> *CBS*, 785 F.3d at 705.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 705–06.

<sup>47</sup> *Id.* at 706.

<sup>48</sup> *Id.* (supporting its holding by relying on the Trade Secrets Act, 18 U.S.C. § 1905 (2012), and its decision in *Qwest Commc’ns Int’l Inc. v. FCC*, 229 F.3d 1172, 1180–84 (D.C. Cir. 2000)).

<sup>49</sup> *Id.* at 708.

<sup>50</sup> See *id.* (reasoning that the persuasive showing standard may be amended or clarified—not scrapped).

<sup>51</sup> See *id.*

<sup>52</sup> *Id.*

prevent its release.<sup>53</sup> Previously, parties had more time to object to the release of information, and information would not be released until the full Commission or a court reviewed all timely objections.<sup>54</sup> Since the order does not provide any reasoned analysis for this departure, the court held it to be unlawful.<sup>55</sup>

For the above reasons, the court vacated the *Amended Protective Order*.<sup>56</sup> In response, the full Commission without notice-and-comment rulemaking, in a controversial 3-2 vote, adopted a new order (*Order*) on September 2, 2015 detailing the rules for all protective orders.<sup>57</sup>

## II. THE ORDER

### A. Description of the Order

The *Order* states that the Commission has the authority to release information during licensing proceedings to reviewing parties pursuant to protective orders.<sup>58</sup> It details a new process for parties objecting to the release of information.<sup>59</sup> And it purports to clarify certain rules for the release of information without protective orders.<sup>60</sup> These rules applied to the Time Warner, Charter, and Bright House proceeding, and they will apply to all future proceedings, but the Commission has delegated authority to its various Bureaus to modify the exact scope of future orders.<sup>61</sup>

The Commission believes its authority to release confidential information pursuant to protective orders is well-established.<sup>62</sup> According to the Commission, the Supreme Court in *FCC v. Schreiber*<sup>63</sup> held that

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<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 708–10.

<sup>55</sup> *Id.* The court also indicated that there might be substantive concerns with the five-day rule even if the Commission provided a reasoned analysis for it. *Id.* at 710.

<sup>56</sup> *Id.*

<sup>57</sup> *Order, supra* note 10.

<sup>58</sup> *Id.* at 10365–72.

<sup>59</sup> *Id.* at 10373–77.

<sup>60</sup> *Id.* at 10378–86.

<sup>61</sup> *See id.* at 10378. Any significant change to these rules would presumably need full Commission approval. Moreover, the objection process may not be changed by the bureaus. *Id.* at 10376 n.97.

<sup>62</sup> *Id.* at 10365–66.

<sup>63</sup> *FCC v. Schreiber*, 381 U.S. 279, 289, 291–92 (1965).

section 4(j) of the Communications Act<sup>64</sup> permits the Commission to release confidential information without violating the Trade Secrets Act.<sup>65</sup>

The *Order* states that the “persuasive showing standard” does not apply to information released pursuant to protective orders.<sup>66</sup> The Commission reasons that this standard is only applicable when information is released publicly, and information released pursuant to a protective order does not qualify as a public release.<sup>67</sup> Because it decides that the persuasive showing standard is inapplicable, the information does not have to be “necessary.”<sup>68</sup>

All information in the record may be reviewed pursuant to a protective order, no matter how sensitive it is to a transacting party or a third party.<sup>69</sup> There are no limits on the number of people who may review information under a protective order.<sup>70</sup>

The *Order* does provide some protections: reviewing individuals must not be involved in “competitive decision-making” or be “in a business relationship with the party whose confidential information is at issue.”<sup>71</sup> Reviewing individuals must have an interest in the proceeding or represent a party that has an interest in the proceeding.<sup>72</sup> Reviewing individuals may only use the confidential information for commenting in

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<sup>64</sup> 47 U.S.C. § 154(j) (2012) (“The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice.”).

<sup>65</sup> *Order*, *supra* note 10, at 10365–66, 10366 n.41 (reasoning that the Trade Secrets Act only permits the release of information “authorized by law” and section 4(j) is such authorization); *see also* 18 U.S.C. § 1905 (2012) (“Whoever, being an officer or employee of the United States . . . publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment . . . shall be fined under this title, or imprisoned . . .”).

<sup>66</sup> *Order*, *supra* note 10, at 10384–86.

<sup>67</sup> *Id.* at 10369 & n.65.

<sup>68</sup> *Id.*

<sup>69</sup> *See id.* at 10369, 10371 n.76 (stating that previously the Commission gave extra protections to certain extremely confidential information, but that, because protective orders provide sufficient protection, extra protection is not needed for any information no matter its sensitivity).

<sup>70</sup> *Id.* at 10371. Moreover, the *Order* exempts support personnel of lawyers and consultants from having to sign acknowledgements of a protective order’s rules. The reviewing parties still must sign acknowledgments that they are complying with Commission rules. *Id.* at 10377.

<sup>71</sup> *Id.* at 10371.

<sup>72</sup> *Id.* Presumably, any person or organization could become a party in a proceeding if they claimed to be interested in the result of the transaction.

the current proceeding.<sup>73</sup> Sanctions and criminal penalties may be imposed on certain individuals for violating the terms of a protective order.<sup>74</sup> The *Order* states that these protections “are more than sufficient to protect even highly competitively sensitive information” from being leaked.<sup>75</sup>

The *Order* restores submitting parties and third parties’ previously truncated rights to object to an individual reviewing their confidential information.<sup>76</sup> Although all the information in the record is available to a reviewing party,<sup>77</sup> the *Order* permits submitting parties to object to the release of specific information in the record to all parties,<sup>78</sup> but only in “extraordinary” circumstances will the Commission grant such a request.<sup>79</sup> The *Order* also “allow[s] third parties who have an interest in the confidential information to raise objections to [r]eviewing [p]arties.” Previously, only submitting parties could object to specific individuals reviewing their information.<sup>80</sup>

Also, information is no longer released until the Commission or a court has resolved an objection.<sup>81</sup> The objection process is the same whether or not a party is objecting to a blanket release of information or to the release of information to a specific reviewing individual.<sup>82</sup> The merging party—or the submitting party—has ten business days to object to its release, and a third party must object “as soon as practical.”<sup>83</sup> If the Bureau overrules either objection, the parties have ten days to ask the full Commission to review the Bureau’s decision, and in that time no information will be released.<sup>84</sup> If this application for review is denied, parties have ten days to file a request for a judicial stay of the information’s release.<sup>85</sup>

Finally, the *Order* details the rules for the release of information not pursuant to a protective order (so called “public release”). The

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<sup>73</sup> *Id.* at 10367–68.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 10371.

<sup>76</sup> *Id.* at 10374–77.

<sup>77</sup> *Id.* at 10369.

<sup>78</sup> *Id.* at 10373–74.

<sup>79</sup> *Id.* at 10374–75.

<sup>80</sup> *Id.* Third parties could not object at all and submitting parties could not object to the blanket release of any information. *Id.*

<sup>81</sup> *Id.* at 10375.

<sup>82</sup> *See id.* at 10373–74, 10376 (setting forth that both processes are modeled off Freedom of Information Act regulations).

<sup>83</sup> *Id.* at 10374.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

Commission claims it is clarifying its existing rules and not promulgating a new rule.<sup>86</sup> To access confidential information, a requestor must make a “persuasive showing.”<sup>87</sup> A persuasive showing is made only if, after balancing various interests, the requestor shows that public disclosure serves the public interest.<sup>88</sup> The *Order* states that information does not need to be “absolutely needed” or “required.”<sup>89</sup> Furthermore, it states that Commission rules never required information to be absolutely needed after 1998, but to the extent they did, Commission rules are now changed.<sup>90</sup>

### *B. The Dissenters*

Two Commissioners vigorously dissented to the *Order*.<sup>91</sup> The dissenters have two legal criticisms and some policy concerns. One legal criticism is that, unlike the *Confidential Information Statement*, the *Order* was promulgated without satisfying notice-and-comment requirements.<sup>92</sup> A corollary to this critique is that the *Order* amounts to a substantive rule change.<sup>93</sup> This dissenters have this concern because the Commission has abandoned the persuasive showing standard for protective orders and the necessary link test for the persuasive showing standard.<sup>94</sup>

The other legal concern is that section 4(j) of the Communications Act does not give the Commission the authority to publicly release information.<sup>95</sup> According to Commissioner Pai, after the Supreme Court’s decision in *Chrysler Corp. v. Brown*,<sup>96</sup> the Commission does not have the authority to disclose trade secrets under general housekeeping statutes.<sup>97</sup>

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<sup>86</sup> See *id.* at 10378–79 (clarifying the proper meaning of persuasive showing in light of *CBS Corp. v. FCC*, 785 F.3d 699 (D.C. Cir. 2015)).

<sup>87</sup> *Id.* at 10379.

<sup>88</sup> See *id.* at 10379–80.

<sup>89</sup> *Id.* at 10380–81; *contra CBS*, 785 F.3d at 706.

<sup>90</sup> *Order*, *supra* note 10, at 10380–81.

<sup>91</sup> See *id.* at 10397 (Pai, Comm’r, approving in part and dissenting in part) (dissenting against all parts of the *Order* except for its objection procedures); *id.* at 10404 (O’Reilly, Comm’r, dissenting) (dissenting against all parts of the *Order*).

<sup>92</sup> *Id.* at 10398 (Pai, Comm’r, approving in part and dissenting in part); see also *id.* at 10404 (O’Reilly, Comm’r, dissenting).

<sup>93</sup> See *id.* at 10398 (Pai, Comm’r, approving in part and dissenting in part).

<sup>94</sup> See *id.* at 10399–10401.

<sup>95</sup> *Id.* at 10402–03.

<sup>96</sup> *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979).

<sup>97</sup> *Order*, *supra* note 10, at 10402–03 (Pai, Comm’r, approving in part and dissenting in part).

He reasons that (4)(j) is a general housekeeping statute when read in context, so the Commission has no authority pursuant to it.<sup>98</sup>

Moreover, for policy reasons, the dissenting Commissioners are concerned that too much competitively sensitive information will be released pursuant to protective orders.<sup>99</sup> Commissioner O’Rielly in particular believes protective orders are inadequate to prevent confidential information from being publicly disclosed.<sup>100</sup>

### III. POLICY EVALUATION AND CRITICISMS

The *Order* is a mixed bag from the perspective of third parties. It protects third parties’ confidential information better than the *Amended Protective Order*, but the *Order* should not have dropped the persuasive showing standard.

#### A. An Improved Objection Process

The *Order* benefits third parties and submitting parties because their confidential information is not released until after the full Commission or a court reviews an objection, and because the parties may object to having *certain* confidential information released to *anyone*. They may also object to having *all* confidential information released to a *specific reviewing individual*. Pursuant to the *Amended Protective Order*, a Bureau would release information before the full Commission had a chance to review an objection or before a court at the opportunity to issue a stay order. The *CBS* court invalidated this process for procedural reasons and questioned it for substantive reasons.<sup>101</sup> In response to the *CBS* court’s decision, the Commission promulgated the *Order*, which provides submitting parties and third parties the right to seek a judicial stay and a Commission review of Bureau decisions before the Bureau releases any confidential information.

Moreover, the *Order’s* objection process is certainly fair for submitting parties. They have ten days to challenge confidential information’s release, which is ample time.<sup>102</sup>

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<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *See id.* at 10405 (O’Rielly, Comm’r, dissenting) (railing that there is a “profound misunderstanding of the sensitive nature of some of this material, which will be now be exposed under inconsequential and ineffective protections,” calling the Commission “hopelessly naïve,” and arguing that a reviewer may not “unremember” information).

<sup>101</sup> *CBS Corp. v. FCC*, 785 F.3d 699, 709–10 (D.C. Cir. 2015).

<sup>102</sup> *Order*, *supra* note 10, at 10374.

Third parties, in contrast to submitting parties, must challenge the release of confidential information “as soon as practical.”<sup>103</sup> There is an obvious concern that a Bureau may release information before it is “practical” for a third party to object to that information’s release—for example, if a third party is never made aware that its confidential information is going to be released, it never would have an opportunity to object to such information’s release.

The *Order’s* attached *Protective Order* that governed the submission of information for the Time Warner, Charter, and Bright House transaction provides a solution to this problem: before a submitting party submits its information to the Commission, it “shall notify any known Third-Party Interest Holders who have a confidentiality interest.”<sup>104</sup> Insofar as the Bureau includes this language in all future proceedings, third parties will be protected. However, because this requirement is not contained in the *Order*, third parties should be diligent in safeguarding their interests.

Moreover, according to the *Protective Order*, copies of the reviewer’s Acknowledgement are to be delivered to submitting parties and to known third parties at least five days before the reviewing party accesses any confidential information.<sup>105</sup> Assuming that this protection—which is not contained in the *Order*—is contained in future protective orders,<sup>106</sup> parties should be protected from reviewers with adverse interests to them accessing their highly sensitive information. This is because parties are put on notice by the Acknowledgement.

Another concern is that the *Order*, in practice, will not provide parties with the ability to object to the release of specific information to all reviewers, although the *Order* purports to provide parties this ability. The *Order* states that the Commission expects that only in an “extraordinary” situation would information be precluded from release to all reviewers.<sup>107</sup> The *Order* highlights that a national security situation might qualify as an extraordinary circumstance.<sup>108</sup> Based on this language, it seems like most—if not all—of these objections will be denied by the Bureaus.

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<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 10387 (protective order) [hereinafter *Protective Order*].

<sup>105</sup> *Id.* at 10390–91.

<sup>106</sup> The *Order* does state that all future protective orders must contain the same objection process. One ambiguity is whether third parties are required to be notified pursuant to all future protective orders. See *Order*, *supra* note 10, at 10378 & n.107.

<sup>107</sup> *Id.* at 10373.

<sup>108</sup> *Id.* at 10369 n.63.

As a result, merging parties and third parties are, in effect, limited to objecting to an individual's review of their confidential information. If they object to every individual reviewing their information on a case-by-case basis, they are probably more likely to succeed than if they object to certain information being released to all reviewers.

#### B. The Unfortunate Dropping of the Persuasive Showing Standard for Protective Orders

The Order's biggest disadvantage to third parties is that the persuasive showing standard does not apply to protective orders.<sup>109</sup> This is inconsistent with how the D.C. Circuit previously interpreted Commission precedent and the Commission's attorney's statement at oral arguments in *CBS v. FCC*.<sup>110</sup> As mentioned previously, the Commission reasons that the persuasive showing standard only applies to the public release of confidential information, and it reasons that information released pursuant to a protective order is not to be publicly released. Because the persuasive showing standard is inapplicable, the necessary link component is also inapplicable to protective orders.

Transacting parties must give the Commission all information the Commission deems to be "relevant."<sup>111</sup> "[A]ll of the information submitted to the record" will be available to reviewers pursuant to a protective order. So, as a result of this Order, any and every piece of confidential information that a Bureau staffer deems relevant to a transaction is available to any reviewing party. Thus, for example, Comcast representatives could have easily reviewed Time Warner's secret contract with ESPN without justifying the need for that information. This is a gross intrusion on corporate privacy, and is unnecessary for the Commission's public interest evaluation. The Commission did not need to know what Comcast thinks about Time Warner's ESPN contract to evaluate Time Warner's proposed merger.

To be sure, there are some limitations on who may access this confidential information. But the telecommunications world is very small.<sup>112</sup> The same players represent businesses time and time again during Commission proceedings and there is no way for them to "unremember" confidential secrets.<sup>113</sup> The Commission is naïve in

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<sup>109</sup> *Id.* at 10384.

<sup>110</sup> *See CBS Corp. v. FCC*, 785 F.3d 699, 704 (D.C. Cir. 2015) (stating how the Commission's attorney at oral arguments conceded that the persuasive showing applies to protective orders).

<sup>111</sup> *Order, supra* note 10, at 10369.

<sup>112</sup> *Id.* at 10405 (O'Rielly, Comm'r, dissenting).

<sup>113</sup> *Id.*

thinking that sign-in disclosures, acknowledgement forms, professional sanctions, and a few other light measures will be enough to prevent the disclosure of confidential information outside the bounds of protective orders.

Additionally, “private information from the FCC regularly leaks.”<sup>114</sup> For example, the Senate Commerce Chairman has investigated whether the Commission leaked information about a budget for the Lifeline program to scuttle a bipartisan deal.<sup>115</sup> Even the fact that the Commission Chairman Tom Wheeler had decided to circulate an order to approve the Charter, Time Warner, and Bright House transaction was leaked before Commissioners voted on the deal.<sup>116</sup> Businesses with confidential information being released pursuant to protective orders should be concerned that their information is getting leaked as well.

### *C. Public Release Protections are Eviscerated*

Transacting parties and third parties are damaged by the Commission’s interpretation of the persuasive showing standard for the public release of information. In contrast to confidential information released pursuant to a protective order, the Order states that the requesting party must make a persuasive showing for information to be released publicly.<sup>117</sup> In interpreting the Confidential Information Statement,<sup>118</sup> the Commission now declares that a requesting party does not need to prove that the confidential information it requests is “absolutely needed” or “required.”<sup>119</sup>

The standard for release of information is extremely ambiguous: the Commission balances and weighs various “factors” and public and private “interests” to determine if “disclosing the confidential information serves the public interest.”<sup>120</sup> At least the Order states that “[t]here must be more than a ‘mere chance’ the confidential information will be helpful and it must provide more than ‘factual content.’”<sup>121</sup>

Transacting parties who are forced to submit confidential information to the Commission or third parties implicated in information submitted to the Commission are left with little to no protection. Instead, they rely on Commission staffers using opaque standards to weigh

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<sup>114</sup> Trujillo, *supra* note 11.

<sup>115</sup> *Id.*

<sup>116</sup> *See id.* (discussing the date of the leak).

<sup>117</sup> *Order, supra* note 10, at 10378.

<sup>118</sup> *Confidential Information Statement, supra* note 12, at 24827–28.

<sup>119</sup> *Order, supra* note 10, at 10380–81.

<sup>120</sup> *Id.* at 10383–84.

<sup>121</sup> *Id.*

interests about whether public release is appropriate. And the Chairman of the Commission maintains that “he has broad authority to release nonpublic information unilaterally,” so confidential business information may not be safe.<sup>122</sup>

#### IV. LEGAL CRITICISMS

The *Order* raises two distinct legal issues: First, does the Commission have the authority to release confidential information pursuant to a protective order? Second, did the Commission unlawfully change its rules without notice-and-comment rulemaking by modifying the persuasive showing standard?

##### A. *The Order Likely Violates the Trade Secrets Act*

The Trade Secrets Act prohibits government agencies from disclosing confidential business information unless it is “authorized by law” to do so.<sup>123</sup> The Commission finds its authorization in section (4)(j) of the Communications Act<sup>124</sup> and in the Supreme Court case *FCC v. Schreiber*, where the Court held that (4)(j) “authorize[s] public disclosure of information . . . as the agency may determine to be proper,”<sup>125</sup>—although *Schreiber* never mentions the Trade Secrets Act.<sup>126</sup> Regardless, insofar as *Schreiber* authorizes the Commission to release confidential information without violating the Trade Secrets Act, a later Supreme Court case casts doubts on that authority.

The Court in *Chrysler Corp. v. Brown* held that internal housekeeping statutes do not provide an agency with authorization to release confidential information under the Trade Secrets Act.<sup>127</sup> An internal housekeeping statute deals with matters of “agency organization, procedure, or practice[.]” and such a statute does not authorize an agency to release information publicly.<sup>128</sup> To determine an agency’s authority, the test is whether the text or history of the statute “indicates it is a substantive grant of legislative power to promulgate rules authorizing the release of trade secrets or confidential information.”<sup>129</sup> *Chrysler*—as a later case—

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<sup>122</sup> Trujillo, *supra* note 11.

<sup>123</sup> 18 U.S.C. § 1905 (2012).

<sup>124</sup> *Order*, *supra* note 10, at 10367 (citing 47 U.S.C. § 154(j) (2012)).

<sup>125</sup> *FCC v. Schreiber*, 381 U.S. 279, 291–292 (1965).

<sup>126</sup> *Id. passim*.

<sup>127</sup> *See Chrysler Corp. v. Brown*, 441 U.S. 281, 310–11 (1979) (holding that an internal housekeeping statute does not “authoriz[e] the *release* of trade secrets or confidential business information”; rather, such a statute gives the agency head power over its own “rules of agency organization procedure or practice”).

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 310.

supersedes *Schreiber* if section (4)(j) qualifies as an internal housekeeping statute.

So, is section (4)(j) an internal housekeeping statute? The statute clearly governs the Commission's internal affairs—especially since the statute's language has remained the same since 1934.<sup>130</sup>

The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice . . . Any party may appear before the Commission and be heard in person or by attorney. Every vote and official act of the Commission shall be entered of record, and its proceedings shall be public upon the request of any party interested.<sup>131</sup>

Moreover, section (4)(j) is surrounded by obvious housekeeping statutes. For example, section (4)(h) explains “three members of the Commission constitute a quorum.”<sup>132</sup> And section (4)(k) mandates that the Commission submit annual reports to Congress.<sup>133</sup> It is very unlikely that Congress intended to confer upon the Commission substantive authority to release extremely competitively sensitive information in between mundane, internal affairs provisions.<sup>134</sup>

The Commission's justification for releasing information pursuant to 4(j) is bizarre. It cites *Schreiber* and states: “Section 4(j) does not merely confer power to promulgate rules generally applicable to all Commission proceedings; it also delegates broad discretion to prescribe rules for specific investigations, and to make *ad hoc* procedural rulings in specific instances.”

It then cites *Southwestern Bell Telephone Co.*, 13 FCC Rcd 3602, 3608 ¶ 19 (1997), a Commission order, and states that “[w]e have the authority, when addressing request for confidentiality, to impose or modify protective orders on a case-by-case basis as circumstances dictate.”<sup>135</sup> None of its purported justifications for releasing information discuss why 4(j) is not an internal housekeeping statute.

The closest the Commission gets to addressing the issue is by stating that “section (4)(j) is different from the internal housekeeping

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<sup>130</sup> Communications Act of 1934, Pub. L. No. 73-416, § 4(j), 48 Stat. 1064, 1068 (codified at 47 U.S.C. § 154(j) (2012)).

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* § 154(h).

<sup>133</sup> *Id.* § 154(k).

<sup>134</sup> *Order, supra* note 10, at 10365–66.

<sup>135</sup> *Id.* at 10366 n.41.

statute at issue in *Chrysler*.”<sup>136</sup> To be sure, the two “statutes” are different—this is a truism if there ever was one.<sup>137</sup> But they are both internal statutes.

In sum, because section (4)(j) is an internal statute, the Commission likely lacks the statutory authority to publicly release confidential information pursuant to it.

### *B. The Order Likely Violates the APA’s Notice and Comment Requirements*

Unlike when it adopted the *Confidential Information Statement*, the Commission did not use notice-and-comment rulemaking to promulgate the *Order*. Importantly, the Commission claims that it is “clarifying,” rather than “amending,” its regulations.<sup>138</sup> If the *Order* is irreconcilable with the *Confidential Information Statement*, the *Order* was required to go through notice-and-comment rulemaking.<sup>139</sup> It also must go through notice-and-comment procedures if it “effects a substantive change in existing . . . policy.”<sup>140</sup> In contrast, the *Order* does not need to go through notice-and-comment rulemaking if it qualifies as an “interpretative rule” that merely “describes the [Commission’s] view of the meaning of [its] existing . . . regulation[s].”<sup>141</sup>

Two of the *Order’s* “clarifications” arguably qualify as substantive changes to existing policy. First, it states that the persuasive showing standard does not apply to confidential information released pursuant to a protective order; it only applies when information is released publicly without a protective order. Second, it states that the “necessary link in a chain of evidence” test is not a component of the persuasive showing standard.

It is crucial to this analysis to determine what the Commission’s rules were prior to the *Order*. And as previously mentioned, the *Confidential Information Statement* is somewhat unclear. However, on balance, it appears that the *Confidential Information Statement* stated that

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<sup>136</sup> *Id.*

<sup>137</sup> 5 U.S.C. § 301 (2012) (“The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property.”)..

<sup>138</sup> *Order*, *supra* note 10, at 10361 n.6.

<sup>139</sup> Nat’l Family Planning & Reprod. Health Ass’n v. Sullivan, 979 F.2d 227, 235 (D.C. Cir. 1992).

<sup>140</sup> *Mendoza v. Perez*, 754 F.3d 1002, 1021 (D.C. Cir. 2014).

<sup>141</sup> *Id.*

the persuasive showing standard applies to protective orders and makes the necessary link a component of the persuasive showing standard.<sup>142</sup>

### *1. Persuasive Showing Standard*

The *Confidential Information Statement*, clearly states that a persuasive showing must be made when Exemption 4 material is disclosed.<sup>143</sup> The *Confidential Information Statement* then states that “the rules *also* contemplate [that] the Commission will engage in a balancing of the interests favoring disclosure and non-disclosure.”<sup>144</sup> In the subsequent paragraph, the Commission explains that it relies on “protective orders to balance the interests in disclosure and the interests in preserving the confidentiality of competitively sensitive information.”<sup>145</sup> Quite clearly, the benefits and disadvantages of protective orders are to be considered by the Commission when it balances interests. And the Commission must balance interests in addition to determining whether a persuasive showing has been made. So the obvious conclusion is that the persuasive showing standard applies to protective orders in the *Confidential Information Statement*.

Moreover, this conclusion is supported by the *Amended Protective Order*.<sup>146</sup> The Commission wrote that its “rules permit the disclosure of such information on a ‘persuasive showing’ of the reasons in favor of its release.”<sup>147</sup> In addition to the persuasive showing standard, the Commission also “balances . . . the interests favoring disclosure and nondisclosure.”<sup>148</sup> As a part of this balancing, the Commission has historically “relied on special instruments, such as protective orders, to serve the interests in disclosure while preserving the confidentiality of competitively sensitive materials, rather than excluding relevant documents from the record.”<sup>149</sup> Clearly the persuasive showing standard historically applied to the Commission’s protective orders.

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<sup>142</sup> *Confidential Information Statement*, *supra* note 12, at 24822–24.

<sup>143</sup> *See id.*

<sup>144</sup> *Id.* at 24822.

<sup>145</sup> *Id.* at 24823–24.

<sup>146</sup> Comcast Corp. & Time Warner Cable Inc. for Consent to Assign or Transfer Control of Licenses & Authorizations & AT&T, Inc. and DirecTV for Consent to Assign or Transfer Control of Licenses and Authorizations, 29 FCC Rcd. 13597, 13608 (Nov. 4, 2014) (order on reconsideration).

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

Additionally, in *CBS v. FCC*<sup>150</sup> the D.C. Circuit<sup>151</sup> reasoned that the persuasive showing standard applies to protective orders. To be sure, the court only assumed the standard applies<sup>152</sup> because under Commission regulations “[a] persuasive showing as to the reasons for inspection will be required in requests . . . for inspection of such materials.”<sup>153</sup> Under the *CBS* facts, however, there was no requestor according to the court, because the Commission was releasing information on its own initiative.<sup>154</sup> Thus, the court only assumed that the Commission must make a persuasive showing as if it was the party requesting the information.<sup>155</sup> The court came to this conclusion in light of Commission precedent as well as the Commission’s lawyer acknowledging at oral arguments that the persuasive showing standard applies to information released pursuant to protective orders.<sup>156</sup>

In light of the *Confidential Information Statement*, the *Amended Protective Order*, and the *CBS* holding, it seems clear that the persuasive showing was a Commission requirement prior to the *Order*. Removing this requirement qualifies as a “substantive change in existing policy.”<sup>157</sup> Thus, the *Order* likely required notice-and-comment rulemaking to be lawful, and that never occurred. If the *Order* is challenged, it would likely be struck down for violating notice-and-comment requirements.

## 2. Necessary Link Test

The necessary link test appears to be a part of longstanding Commission policy. No parties dispute that prior to the *Confidential Information Statement* the necessary link test was a part of the Commission’s review process.<sup>158</sup> The question is whether the *Confidentiality Information Statement* scraps this test.

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<sup>150</sup> *CBS Corp. v. FCC*, 785 F.3d 699, 704 (D.C. Cir. 2015).

<sup>151</sup> Commissioner Pai argues that *CBS* is “not the first case where the D.C. Circuit” has reasoned that the persuasive showing standard applies to information released under a protective order. *Order, supra* note 10, at 10400 n.13 (Pai, Comm’r, approving in part and dissenting in part) (citing *Qwest Commc’ns Int’l Inc. v. FCC*, 229 F.3d 1172, 1181–83 (D.C. Cir. 2000)).

<sup>152</sup> *Id.*

<sup>153</sup> *CBS*, 785 F.3d at 704.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *See Mendoza v. Perez*, 754 F.3d 1002, 1021 (D.C. Cir. 2014).

<sup>158</sup> *Order, supra* note 10, at 10400 (Pai, Comm’r, approving in part and dissenting in part).

The *Confidentiality Information Statement* states that—as part of the persuasive showing standard—“the Commission has adhered to a policy of . . . ‘insist[ing] upon a showing that the information is a necessary link in a chain of evidence’ that will resolve an issue before the Commission.”<sup>159</sup> Crucially, this statement is in the past tense. It is unclear if it is simply describing what the Commission has done or if it is articulating the past and future rule. Future passages in the statement clarify this somewhat.

The statement asserts that the persuasive showing standard is retained.<sup>160</sup> Thus, it seems to state that the standard is retained in its current form, which would include the necessary link test. But the *Confidentiality Information Statement’s* subsequent sentences cast doubt on this conclusion. The Commission states that information does not need to be “‘vital’ to the conduct of a proceeding, necessary to the ‘fundamental integrity’ of the Commission process at issue, or . . . have a direct impact on the requestor.”<sup>161</sup>

The *CBS* court held that the “necessary-link finding is an unavoidable component of the persuasive showing the regulations require.”<sup>162</sup> The court held that the Commission treated the language preceding the necessary link test in the *Confidential Information Statement* as binding and not just as a statement of past Commission policy, so the necessary link test must also be binding.<sup>163</sup> This is far from persuasive, but it is the best possible analysis of the *Confidential Information Statement*.

This interpretation is plausible only if there is a difference between information being part of a necessary link in the chain of evidence to resolve issues before the Commission and information being vital to the proceeding. Here, there is a difference.

Not every issue before the Commission is vital. Certain information may be necessary to resolve some issue before the Commission, but the Commission could still approve or deny a merger without resolving the issue. For example, although it might be material to the Commission to seek comment on information about Time Warner and Charter’s contracts with ESPN, surely this is not vital to the Commission’s determination if the transaction serves the public interest. So by not mandating that information be vital, the Commission was simply refusing

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<sup>159</sup> *Confidential Information Statement*, *supra* note 12, at 24823.

<sup>160</sup> *Id.* at 24829.

<sup>161</sup> *Id.*

<sup>162</sup> *See CBS Corp. v. FCC*, 785 F.3d 699, 705 (D.C. Cir. 2015).

<sup>163</sup> *Id.*

to implement a more stringent standard as a part of the necessary link test; they did not remove the test.

In sum, because the Commission removed the necessary link test in the *Order* from its rule governing the release of confidential information without notice-and-comment rulemaking, the *Order* is likely procedurally unlawful.

To be sure, the Commission—insofar as it has the statutory authority to release highly confidential information pursuant to protective orders—probably has the authority to drop the persuasive showing standard from protective orders and alter or remove the necessary link test, but it does not have the authority to do so without a notice-and-comment rulemaking.

#### CONCLUSION

From the perspective of merging parties and third parties, there are some good aspects of the *Order*. Chiefly, they have more rights to object to information release and now a Bureau will not release information until an objection is resolved by the full Commission or a court. Regrettably, too much information is available to reviewing parties and confidential information will likely leak. Moreover, the *Order* likely violates the Trade Secrets Act and the Administrative Procedure Act's notice-and-comment rulemaking requirement. If a party decides to challenge the *Order*, which might not happen because it is not always wise for businesses to litigate with a body that will continue to regulate it, a court will likely strike down the *Order* for one or both of these reasons.