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

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

MOTION FOR LEAVE TO INTERVENE AND RESPONSE IN OPPOSITION TO EMERGENCY MOTION FOR STAY OF THE AMERICAN CABLE ASSOCIATION

MOTION TO INTERVENE

Pursuant to 47 U.S.C. § 402(e), 28 U.S.C. § 2348, Federal Rule of Appellate Procedure ("FRAP") 15(d), and D.C. Circuit Local Rule 15(b), the American Cable Association ("ACA")[1] hereby moves for leave to intervene as of right in the

[1] See the first section of the Response to Motion and the Corporate Disclosure Statement below, for an overview of the ACA's membership and further details of its interests in this proceeding.

above-captioned proceeding. Pursuant to FRAP 26.1 and Local Rule 26.1, this motion is accompanied by ACA's corporate disclosure statement, found below.

Under Section 402(e) of the Communications Act any, "person who would be aggrieved or whose interest would be adversely affected by a reversal or modification of the order of the Commission complained of" may be allowed intervention. 47 U.S.C. § 402(e). Likewise, 28 U.S.C. § 2348 provides that, "any party in interest in the proceeding before the agency whose interests will be affected if an order of the agency is or is not enjoined, set aside, or suspended, may appear as parties thereto of their own motion and as of right." This Court will grant intervention to parties "directly affected by" the order at issue, under Fed. R. App. P. 15(d). *See, e.g., Yakima Valley Cablevision, Inc. v. FCC,* 794 F.2d 737, 744-45 (D.C. Cir. 1986).

ACA is a party to the proceedings below,[2] seeking access to the documents at issue here. As discussed in more detail in the Response below, the interests of ACA's members will be directly affected by the outcome of this proceeding. Accordingly, ACA respectfully moves for leave to intervene as of right.

[2] *See, e.g.*, Appendix to Petitioners' Emergency Motion for Stay Pending Judicial Review ("Appendix"), A-34.

RESPONSE IN OPPOSITION OF ACA TO EMERGENCY MOTION FOR STAY

I. Interests of ACA in this Proceeding.

As a party participating in the Comcast/Time Warner Cable/Charter and AT&T/DirecTV license transfer proceedings, ACA has a substantial interest in the very issue before this Court concerning access by third parties to the subset of "Highly Confidential Information" ("HCI") that the FCC has identified as "Video Programming Confidential Information" ("VPCI"). ACA, which represents approximately 840 small and medium-sized members,[3] all of whom are multichannel video programming distributors ("MVPDs"), is concerned about the competitive effects of the pending transfers in two industries – the MVPD industry, which distributes video programming to consumers, and the video programming industry, which provides this programming to these MVPDs.

These potential effects cannot be fully examined, understood, or addressed by parties, including ACA, without access to VPCI, nor can they be fully addressed by the FCC unless placed in the record and made available to parties to the proceedings. For these reasons, ACA has actively participated in the FCC's proceeding that resulted in the challenged order, including filing comments in

[3] ACA's membership includes a diverse mix of cable operators, rural telecommunications companies and municipalities. Many ACA members are small privately held companies. No ACA member has more than one million subscribers.

opposition to the Petitioners.[4] ACA (and by extension, its members) is harmed when it cannot access purportedly highly confidential information needed to develop and support its arguments on the harms of each merger and appropriate remedies. ACA's interests would be directly and negatively affected if this Court reverses or delays the order of the FCC permitting access to VPCI.

II. ACA Opposes the Motion Based on No Likelihood of Success on the Merits, No Irreparable Harm, and Overbroad Statements in the Motion.

Petitioners have failed to show a substantial likelihood of success on the merits. The FCC has amply considered the Petitioners' concerns regarding access to VPCI.[5] In response to Petitioners' repeated filings in objection, the FCC has adopted extraordinary protections for the review and use of VPCI by parties such as the ACA.[6] Such protections go above and beyond those the FCC has previously adopted in its review of transactions where similar documents were requested by the FCC, produced by applicants, and made available for review by parties to the proceeding.[7] If anything, the latest constraints on reviewing VPCI are too protective and could be fairly be characterized as prejudicing parties participating in the proceeding.[8] Nonetheless, given the fact that requiring programming

[4] *E.g.*, Appendix, A-34.
[5] ACA defers to the FCC to defend the procedural challenges to its orders.
[6] *See* Appendix, A-1 – A-109.
[7] *See, e.g.*, Appendix, A-40.
[8] The FCC's latest Order on this matter requires ACA's representatives to review the VPCI only in Petitioners' offices. *See id*. at A-11.

contracts entered into by applicants to license reviews be made available to parties is relatively common, there is no basis for this Court to find that the FCC should have further restricted access to the Petitioners' VPCI by parties to the proceeding. The Petitioners' likelihood of succeeded on the merits is doubtful.

Petitioners' claim that they are likely to suffer irreparable harm is also suspect. The Petitioners argue as though the FCC has permitted video distributors participating in the proceedings and their purchasing agents to have direct and unfettered access to the video programming distribution agreements (*i.e.*, VPCI) with merger participants. In fact, the Second Amended Modified Joint Protective order is highly restrictive in terms of who may access the information and the conditions of such access.

First, it limits access to only individuals who are representatives of parties to the transaction proceeding – such as "outside counsel" and "outside consultants" (as these terms are defined by the FCC).[9] Second, these representatives must not be involved in "competitive decision-making" activities, such as programming contract negotiations. *Id.* Third, it requires these representatives to declare that they will not utilize the VPCI for purposes other than participating in the proceeding. *Id.* Finally, it prohibits those who qualify to review the VPCI, from

[9] Appendix, A-6 – A-14.

accessing such information on their own and from photocopying or printing such information.

To support their claim of "irreparable harm," the Petitioners rest their case on the axiom that once information is reviewed it cannot be "unreviewed." However, the Petitioners fail to demonstrate a substantial risk of harm due to "outside counsel" and "outside consultants" reviewing the VPCI. Given the extraordinary restrictions on who is eligible to review VPCI, the restrictive purposes for which it may be used, and the inability to make copies, any harm is actually quite unlikely.

To credit Petitioners' claim of likely harm, one would have to presume that the parties signing the Acknowledgements of Confidentiality are likely to violate their oath by using VPCI in future programming negotiations with Petitioners, or improperly disclosing VPCI to others engaged in such negotiations. In fact, the FCC has a long history of successful reliance on protective orders and the integrity of the parties who sign them.[10] Petitioners have presented not a shred of evidence that any signatory is likely to violate commitments required by the protective orders.

[10] *See, e.g.*, Appendix at A-37.

III. It is Essential for Parties, Not Just the DOJ and FCC, to Have Reasonable Access to VPCI.

The public's right to participate in a license transfer or assignment proceeding is an integral part of any FCC review, embodied in the Communications Act and the Administrative Procedure Act.[11] Interested parties, including industry members and public interest groups, assist the Commission in determining whether granting an application would serve the public interest by evaluating the applicants' claims and bringing to the Commission's attention facts and arguments known only to industry participants.

If the Court were to allow Petitioners to make categories of important data and information off-limits to interested parties, it would significantly curtail the utility of public participation in the FCC's current proceedings and set a bad precedent for future proceedings. It would undermine the public trust that the FCC is conducting through, fair, and open proceedings. Not allowing access to the VPCI would create harms that exceed the harms identified by the Petitioners and would not serve the public interest.

ACA's comments below address why it must have access to VPCI.[12] Without access, ACA will be unable to effectively make its case related to the harms of the transactions and appropriate remedies, and the public would be

[11] *See, e.g.*, 47 U.S.C. §309; 5 U.S.C. §554.
[12] *See* Appendix at A-82.

harmed without a full review of these issues. *See id.* And, upon inspection of the VPCI, ACA may discover additional reasons why the proposed transactions would be harmful to competition and consumers.

ACA's position before the FCC is that the merged firms would be able to obtain better programming rates for their MVPD business than they would be able to obtain separately, and that by obtaining better programming prices they would become more profitable MVPDs.[13] As such, the merged firm would have an increased incentive and ability to charge higher prices for their affiliated programming to their MVPD rivals. If the buyers in the license transfer proceedings have the option of opting into the existing programming deals of the MVPDs of the sellers, when those deals are better, the programming rates paid by the buyer can be lower after the transaction closes. Similarly, if the buyer has the option of bringing the MVPDs of the sellers under its existing programming deals, when its deals are better, a similar benefit will be created.

The ACA's representatives seek access to the terms of the Petitioners programming deals to evaluate to what extent the harms ACA identified will occur, and to what extent the merged firms will be able to lower their programming prices immediately following the transactions' closure, improve their profitability, and

[13] *See* Appendix, A-34.

therefore have the incentive to charge their MVPD rivals higher prices for their affiliated programming. Without such access, ACA's arguments might be dismissed by the FCC (or a reviewing court) as speculative or not adequately supported by the record. Even if the FCC believed the argument, it may be unable to address the argument in its Order due to the fact that the information supporting the claim had not been placed in the record and made available to parties to the proceedings.

With transactions as large and far-reaching as those proposed below, and with many different types of harms affecting many industry sectors, the FCC and DOJ need the benefit of a full record and expert analysis from interested parties and industry participants—such as ACA—if they are to adequately protect the public interest.

IV. Petitioners Misstate the Antitrust Laws, Which are Not Implicated by Normal Document Disclosure Procedures.

Apart from lacking a case for likelihood of success on the merits and irreparable harm, the Petitioners have made statements in support of their Motion that could lead the Court to misstate, in *dicta*, important legal concepts. At least twice in the Motion, Petitioners invoke the antitrust laws as grounds to permit them to avoid normal FCC document disclosure procedures. They incorrectly assert, for example, that "[t]he antitrust laws prohibit parties from sharing pricing

information." Motion at 13. They cite *United States v. Container Corp. of Am.*, 393 U.S. 333 (1969) and Section 1 of the Sherman Act. *Id.* at 13, 17.

In fact, the antitrust laws do not prohibit "parties" to administrative or court litigation from sharing information. Rather, antitrust laws might prohibit "competitors" from sharing pricing information, but even then only if such sharing is part of other marketplace activity that is anti-competitive and unlawful, such as price-fixing agreements.

As Justice Fortas noted—quite correctly—in his concurring opinion in *Container Corp.*:

> I join in the judgment and opinion of the Court. I do not understand the Court's opinion to hold that the exchange of specific information among sellers as to prices charged to individual customers, pursuant to mutual arrangement, is a *per se* violation of the Sherman Act.
>
> Absent *per se* violation, proof is essential that the practice resulted in an unreasonable restraint of trade. There is no single test to determine when the record adequately shows an "unreasonable restraint of trade"; but a practice such as that here involved, which is adopted for the purpose of arriving at a determination of prices to be quoted to individual customers, inevitably suggests the probability that it so materially interfered with the operation of the price mechanism of the marketplace as to bring it within the condemnation of this Court's decisions. *Cf. Sugar Institute v. United States*, 297 U. S. 553 (1936); *American Column & Lumber Co. v. United States*, 257 U. S. 377 (1921).

393 U.S. at 338-39. In *Container Corp.*, the court found there was an agreement among defendants to reciprocate in sharing prices, the intent and effect of which "was to stabilize prices…." *Id*. at 336. And thus, based on the unique facts of the

case, there was "concerted action" in violation of Section 1 of the Sherman Act. *Id.* at 335.

The danger of Petitioners' overbroad and misleading statements about the law concerning access to pricing information is that their conclusions might be adopted by the Court without the kind of fact intensive and fact specific review that is necessary to determine if price sharing has anti-competitive or ***pro-competitive*** effects in the given situation. Consistent with Justice Fortas's concurrence, the Supreme Court has never held that the mere sharing of pricing information by competitors, without more, is an unlawful restraint of trade. And to ACA's knowledge, nor has any other federal court.

The information sharing that Petitioners challenge is twice removed from the scenario in *Container Corp*. The sharing would not take place in the marketplace, but instead in an administrative litigation proceeding, conducted by a federal agency, and subject to significant restrictions on who may gain access to VPCI and how it may be utilized. And the sharing in no way can reasonably be considered to be among competitors, as the issue has been considered in cases such as *Container Corp*. In this case, only representatives of parties, such as "outside counsel" and "outside experts," who are not involved in competitive decision-making, are permitted access to the VPCI. [14] These individuals are strictly barred from sharing

[14] Appendix, A-9, A-74 – A-79.

the VPCI with their clients, and thus actual competitors to Petitioners in the marketplace would not be gaining access to information. *Id.* at A-9, A-11.

Regardless of how the Court rules on the Motion, it should reject antitrust law as a basis for its decision.

CONCLUSION

For the foregoing reasons, the Petitioners' Motion should be denied.

Respectfully submitted this 17th day of November, 2014

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Local Rule 26.1, the American Cable Association ("ACA") hereby submits the following corporate disclosure statement.

ACA is incorporated in Pennsylvania as a 501(c)(6) nonprofit trade association. ACA is principally engaged in representing the interests of its members before Congress and regulatory agencies, such as the FCC. Its membership consists of about 840 small and mid-sized multichannel video program distributors collectively serving about seven million households primarily in small markets and rural areas. ACA does not issue stock and is not publicly traded. The ACA has no parent company, and no publicly held corporation pays more than 10% of its dues or possesses or exercises more than 10% of the voting control of the ACA.

Respectfully submitted the 17th day of November, 2014

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of November, 2014, I caused true and correct copies of the foregoing Motion For Leave to Intervene and Response in Opposition to Emergency Motion for Stay of the American Cable Association to be filed electronically with the Clerk of the Court using the CM/ECF system (paper copies also to be filed by noon per the Court's order). Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. In addition, counsel listed below, who are not registered with the CM/ECF system, will be served by electronic mail:

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