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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
)
Applications of)
)
Charter Communications Inc.,)
Time Warner Cable Inc.,)
Advance/Newhouse Partnership)
For Consent to Assign or Transfer Control of)
Licenses and Authorizations)

MB Docket No. 15-149

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Federal Communications Commission
Office of the Secretary

PETITION FOR RECONSIDERATION

**CBS CORPORATION, CHAMBER OF COMMERCE OF THE UNITED STATES,
MOTION PICTURE ASSOCIATION OF AMERICA,
SCRIPPS NETWORKS INTERACTIVE, INC., THE WALT DISNEY COMPANY,
TIME WARNER INC., TWENTY FIRST CENTURY FOX, INC.,
UNIVISION COMMUNICATIONS INC., AND VIACOM INC.**

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Dated: October 13, 2015

SUMMARY

Five months ago, the D.C. Circuit rejected the Commission's decision to give third parties access to highly sensitive proprietary business information in merger review proceedings. *CBS Corp. v. FCC*, 785 F.3d 699 (D.C. Cir. 2015). *CBS* held that, under the Trade Secrets Act and the FCC's rules, in order for the Commission "to justify disclosure" of sensitive information and to adequately protect the confidentiality interests of third parties, "the information must be 'necessary' to the Commission's review process." *Id.* at 707. Because the Commission had not met this standard, it lacked authority to release such information even under a protective order.

Now the Commission has announced a sweeping modification of its confidential information policies. The new approach guts the fundamental protection the Commission long afforded sensitive information, which its rules provide shall not be made "routinely available for public inspection." 47 C.F.R. § 0.457(d). The Commission's September 11, 2015 Order promulgated a new policy under which such information will be made available to the public in licensing proceedings and in response to other requests submitted under Section 0.461 based merely upon an assertion of "relevance," directly contravening the D.C. Circuit's command that a showing of "necessity" must be made before sensitive information may be disclosed. The Commission compounded its error by adopting this policy *sua sponte*, without providing any advance notice of its decision or opportunity for public comment.

The Commission should grant this Petition and vacate the Order to cure its violations of the Trade Secrets Act and the Administrative Procedure Act. As a threshold matter, the Commission lacks authority to disclose broadly sensitive information in licensing proceedings because it has not adopted, through notice-and-comment proceedings, procedures for permitting such disclosure. The Supreme Court held in *Chrysler Corp. v. Brown*, 441 U.S. 281, 315-16 (1979), that the Trade Secrets Act prohibits agencies from releasing confidential information

except pursuant to a regulation that is the product of notice-and-comment rulemaking.

Moreover, the Commission may not circumvent this requirement by announcing new rules in the guise of an interpretive regulation or general statement of agency policy, as the Order purports to do. *Id.*

The Order also violates the Trade Secrets Act by authorizing the disclosure of highly sensitive information based on a showing of mere relevance. The D.C. Circuit has rejected the Commission's position that relevance is sufficient to justify disclosure of material protected by the Trade Secrets Act, holding instead that a "necessary" standard must be satisfied before sensitive information may be disclosed even under a protective order. *CBS*, 785 F.3d at 706-07; *see also Qwest Commc 'ns Int'l Inc. v. FCC*, 229 F.3d 1172, 1183-84 (D.C. Cir. 2000).

Even if the Commission could adopt a "relevance" standard for releasing confidential information without notice-and-comment procedures—and it cannot—the Order violates the Administrative Procedure Act because it fails to acknowledge the change in the Commission's policies, justify the Commission's change in the application of its "persuasive showing" standard, or explain the Commission's substitution of a new "relevance" standard for the longstanding "necessary" standard. The Commission's contention that it previously has authorized disclosure of sensitive information based on a showing of mere "relevance" is incorrect: the Commission's own decisions demonstrate that the FCC has not endorsed, much less adopted, such a low bar. The Order also fails to consider the risk that inadvertent violations of its protective orders will occur or explain how the benefits of disclosure outweigh those harms. Finally, the Order fails to distinguish between sensitive information placed in the record by parties and sensitive information belonging to non-parties, who have not placed their confidential information at issue nor asked for it to be shared with third parties.

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To: The Commission

PETITION FOR RECONSIDERATION

Under 47 C.F.R. § 1.106, CBS Corporation, Scripps Networks Interactive, Inc., The Walt Disney Company, Time Warner Inc., Twenty First Century Fox, Inc., Univision Communications Inc., and Viacom Inc. (collectively, “Content Companies”), with the Chamber of Commerce of the United States and the Motion Picture Association of America, request that the Commission reconsider its September 11, 2015 order, which announces new policies for the treatment of sensitive and proprietary business information disclosed under a protective order or in response to requests for third-party access submitted under 47 C.F.R. § 0.461 (the “Order”).

I. BACKGROUND

A. The FCC’s Longstanding Refusal To Make Sensitive Material “Routinely Available For Public Inspection.”

The Commission’s rules provide that several categories of “trade secrets and commercial or financial information” should not be “routinely available for public inspection.”¹ Although the Commission has discretion to consider these sensitive materials in its proceedings, such

¹ 47 C.F.R. § 0.457(d)(1).

materials may be made available for review by third parties only if “[a] persuasive showing as to the reasons for inspection” has been made.²

In its *Confidential Information Policy*, the Commission explained that this “persuasive showing” standard ensures that the Commission’s “fulfillment of its regulatory responsibilities does not result in the unnecessary disclosure” of sensitive information to the public.³ Thus, before disclosure is permitted, a “compelling public interest” in favor of disclosure must be identified, a showing must be made “that the information is a necessary link in a chain of evidence that will resolve an issue before the Commission,” and the Commission must “engage in a balancing of the interests favoring disclosure and non-disclosure.”⁴ As the Commission has clarified, this showing is required before disclosure may occur even under a protective order.⁵

B. The Commission’s Attempt To Depart From The *Confidential Information Policy* Was Rejected By The D.C. Circuit.

In connection with its review of the proposed Comcast/Time Warner Cable and AT&T/DirectTV mergers, the Commission departed from the *Confidential Information Policy* and its historical practice by proposing to make “hundreds of thousands of pages” of programming agreements and related materials available to third parties under a protective order.⁶ The Commission did so even though these programming agreements are among the categories of information that may not be made “routinely available” to third parties.⁷

² 47 C.F.R. §§ 0.457(d), 0.461.

³ *Examination of Current Policy Concerning the Treatment of Confidential Info. Submitted to the Comm’n*, 13 FCC Rcd. 24816, 24822 (1998) (“*Confidential Information Policy*”).

⁴ *Confidential Information Policy*, 13 FCC Rcd. at 24822-23.

⁵ *Examination of Current Policy Concerning the Treatment of Confidential Info. Submitted to the Comm’n*, 14 FCC Rcd. 20128, 20130 (1999) (“*Confidential Information Policy Reconsideration*”).

⁶ *Applications of Comcast Corp. and Time Warner Cable, Inc.*, 29 FCC Rcd. 13597, 13613 (Media Bur. 2014).

⁷ *Confidential Information Policy*, 13 FCC Rcd. at 24852.

The Content Companies opposed the Commission’s proposal, and the D.C. Circuit agreed that the Commission lacked authority to release sensitive programming agreements and related negotiation materials.⁸ According to the Court, federal law does not authorize the release of sensitive information simply because that information is “relevant,” “highly relevant,” or even “central” to an issue before the Commission.⁹ Instead, “to justify disclosure, the information must be ‘necessary’ to the Commission’s review process.”¹⁰ Because the Commission did not explain why disclosing programming agreements was “absolutely necessary,” it lacked authority under the Trade Secrets Act and its own rules to make programming agreements available to third parties in a merger review proceeding, even under a protective order.¹¹

On remand, the Commission declined to make programming agreements available for inspection by third parties. In the Comcast/Time Warner Cable proceeding, the FCC’s staff notified the transaction parties that it planned to designate the transaction for hearing without making those agreements available.¹² Weeks later, the Commission approved the AT&T/DirecTV merger even though the programming agreements that it once claimed were “highly relevant” and “central” to its review of that transaction were not made available to third parties.¹³ No party challenged the outcome of either merger proceeding on the basis that programming agreements were not made available for review by third parties.

⁸ *CBS Corp. v. FCC*, 785 F.3d 699, 706-07 (D.C. Cir. 2015).

⁹ *Id.* at 706.

¹⁰ *Id.* at 707.

¹¹ *Id.*

¹² See Order, Statement of Commissioner Pai, at 38.

¹³ See *Applications of AT&T Inc. and DirecTV*, No. 15-94, 2015 WL 4556648, at *45 n.524 (2015); *id.* at *160 (Commissioner Pai observing that approval “bel[ies] any assertion that third-party inspection of these materials was necessary to the Commission’s consideration of this transaction”).

C. The Commission's Latest Change To Its Confidential Information Policy.

On September 11, 2015, the Commission responded to the D.C. Circuit's decision by announcing sweeping changes to its policies for making sensitive material available to third parties. The Commission implemented these changes without notice or providing an opportunity for comment. This procedure departed from the practice the Commission followed in 1998, when it promulgated the *Confidential Information Policy*—now rewritten by the Order—through a notice-and-comment proceeding that took into account comments from two dozen parties.¹⁴

The Order establishes new procedures for the FCC's treatment of sensitive information released under a protective order, including information released to third parties in a licensing proceeding. Departing from the standard the Commission embraced less than one year ago, the Order declares that no entity, not even the Commission, needs to make a "persuasive showing" to justify disclosure of sensitive information.¹⁵ Instead, that information will presumptively be made available to third parties. The Commission makes clear that this rule "applies to *all* of the information submitted in the record,"¹⁶ and thus draws no distinction between run-of-the-mill confidential information and information that the Commission's rules state shall "not routinely [be made] available for public inspection."¹⁷

The Order also changes the Commission's Section 0.461 procedures by diluting the "persuasive showing" that must be made before information may be released in response to a Section 0.461 request to access confidential information. There is no longer any requirement

¹⁴ See, e.g., *Confidential Information Policy*, 13 FCC Rcd. at 24827-28; see also *Applications of Comcast Corp. and Time Warner Cable Inc.*, 29 FCC Rcd. 11864, at *1 (Media Bur. 2014).

¹⁵ Order at ¶ 44.

¹⁶ Order at ¶ 18.

¹⁷ 47 C.F.R. § 0.457(d).

that third-party disclosure cannot occur unless disclosure is “necessary.”¹⁸ Instead, sensitive material will be made broadly available—not even under a protective order—simply when “the information sought to be released is relevant to a public interest issue before the Commission.”¹⁹

D. Petitioners Are “Adversely Affected By” The New Policy.

There is “good reason why it was not possible to participate in the earlier stages of the proceeding”: neither Petitioners—nor anyone else—have had any chance to do so because the FCC provided no notice or opportunity to comment before issuing the Order.²⁰

Petitioners are “adversely affected by” the Order.²¹ The Order creates a framework under which third parties can access proprietary business information—both those previously submitted and those subsequently requested—in the Charter/Time Warner Cable merger proceeding and in future proceedings.²² As the Commission has recognized, disclosing programming agreements to third parties “can result in substantial competitive harm to the information provider.”²³ The Media Bureau likewise has recognized that the “key terms” of these agreements—which contain competitively sensitive information such as pricing and business terms that are central to the Content Companies’ business strategies—“have historically been treated as especially sensitive from a competitive standpoint.”²⁴

¹⁸ Order at ¶ 43.

¹⁹ Order at ¶ 36.

²⁰ 47 C.F.R. § 1.106(b)(1). After the Charter application was filed, the Content Companies met with Commissioners and/or their staff to explain their concerns about the importance of protecting their programming materials. *See Notice of Ex Parte Communication*, MB Docket No. 15-149 (July 31, 2015).

²¹ 47 C.F.R. § 1.106(b)(1).

²² *See* Order, Statement of Commissioner Pai, at 38 (“This *Order* is obviously the first step in the Commission’s misguided effort to” “give outside parties a sneak peek at confidential programming agreements.”).

²³ *Confidential Information Policy*, 13 FCC Rcd. at 24852.

²⁴ *Comcast*, 29 FCC Rcd. 11864, at *1.

The Order's relaxed standards for the treatment of confidential information trigger potential competitive harms by making it easier for third parties to access programming agreements previously submitted to the Commission or any agreements and related materials that may be submitted in to the Commission.²⁵ Moreover, the threat that this competitively sensitive information will be released to third parties under the Commission's new standards imposes an ongoing chilling effect on the Content Companies' efforts to negotiate programming agreements.

II. THE COMMISSION SHOULD RECONSIDER AND VACATE THE ORDER BECAUSE IT VIOLATES THE TRADE SECRETS ACT AND THE ADMINISTRATIVE PROCEDURE ACT.

A. The Order Violates The Trade Secrets Act.

The Trade Secrets Act requires the Commission to engage in notice-and-comment rulemaking before it can promulgate new or modified procedures governing the release of sensitive information, which the Commission has not done. The Trade Secrets Act also prohibits the Commission from making sensitive information available "based on mere relevance,"²⁶ as the Order purports to do.

1. The Trade Secrets Act Requires Notice-And-Comment Rulemaking To Change How The Commission Will Release Sensitive Information.

Information protected by the Trade Secrets Act may not be disclosed unless "authorized by law."²⁷ For disclosure to be "authorized by law" under the Trade Secrets Act, three requirements must be satisfied.²⁸ First, disclosure must be "permitted by a regulation."²⁹

²⁵ See Order at ¶ 16 n.56.

²⁶ *CBS*, 785 F.3d at 706.

²⁷ 18 U.S.C. § 1905.

²⁸ *Bartholdi Cable Co. v. FCC*, 114 F.3d 274, 281 (D.C. Cir. 1997) (quoting *Chrysler Corp. v. Brown*, 441 U.S. 281, 302-03 (1979)).

²⁹ *Id.* (quoting *Brown*, 441 U.S. at 302-03).

Second, that regulation must be “‘substantive,’ rather than interpretive or procedural,” and it must be promulgated “consistent ‘with any procedural requirements imposed by Congress’ such as the APA.”³⁰ Third, the regulation must be “‘rooted in a grant of power by the Congress’ to limit the scope of the Trade Secrets Act.”³¹ The Order satisfies none of these requirements.

First, no regulation authorizes the Commission to disclose sensitive material in a proceeding to all participants in that proceeding, even under a protective order. As the D.C. Circuit observed earlier this year, the Commission’s “regulations say nothing about what should happen when, as here, the Commission decides to disclose confidential documents on its own.”³² The only “regulation[s]” addressing how sensitive material may be disclosed, 47 C.F.R. §§ 0.457(d) and 0.461, authorize the release of sensitive material only when a third party “file[s] a request for inspection” under Section 0.461.³³ These regulations also prohibit the release of this information unless a “persuasive showing as to the reasons for inspection has been made.”³⁴ In other words, the *only* way sensitive information may be released under the Commission’s rules—including if disclosure is contemplated in a licensing proceeding—is in response to a Section 0.461 request that makes a “persuasive showing” why disclosure is warranted.

Second, expanding the circumstances in which sensitive information may be released, as the Order purports to do, can only be done through notice-and-comment rulemaking. In *Chrysler Corp. v. Brown*, the Supreme Court held that an agency cannot announce a new procedure for releasing sensitive information unless it promulgates a “substantive rule” that is the product of

³⁰ *Id.* (quoting *Brown*, 441 U.S. at 302-03).

³¹ *Id.* (quoting *Brown*, 441 U.S. at 302-03).

³² *CBS*, 785 F.3d at 704.

³³ 47 C.F.R. § 0.461.

³⁴ 47 C.F.R. § 0.457(d)(1), (d)(2).

notice-and-comment rulemaking.³⁵ *Brown* also makes clear that an agency cannot circumvent this requirement by describing its rule as an “interpretive rule,” because “[a]n interpretive regulation or general statement of agency policy cannot be the ‘authoriz[ation] by law’ required by” the Trade Secrets Act.³⁶ Here, because the Order is neither a substantive rule nor the product of notice-and-comment rulemaking, it cannot provide the “authoriz[ation] by law” necessary to release sensitive information.

Third, the Order was not promulgated under “a grant of . . . power by the Congress” that was intended to limit the scope of the Trade Secrets Act.³⁷ In prior proceedings, the Commission has repeatedly asserted that only “Section[] 0.457(d) . . . of the Commission’s rules constitute[s] the requisite legal authorization for disclosure of competitively sensitive information under the Trade Secrets Act.”³⁸ But, as explained above, that rule does not authorize disclosure in the circumstances contemplated by the Order.³⁹

Apparently recognizing this problem, the Commission claims for the first time that Section 4(j) of the Communications Act provides the necessary “authori[zation] by law” to allow the Commission to expand the circumstances when sensitive information can be released.⁴⁰ But

³⁵ *Brown*, 441 U.S. at 315 (“[I]mportant interests are in conflict: the public’s access to information in the Government’s files and concerns about personal privacy and business confidentiality. . . . In enacting the APA, Congress made a judgment that notions of fairness and informed administrative decisionmaking require that agency decisions be made only after affording interested persons notice and an opportunity to comment. With the consideration that is the necessary and intended consequence of such procedures, [the agency] might have decided that a different accommodation was more appropriate.”).

³⁶ *Id.* at 315-16.

³⁷ *Id.* at 302; accord *Bartholdi Cable*, 114 F.3d at 281.

³⁸ *Confidential Information Policy*, 13 FCC Rcd. at 24820; see also *Comcast*, 29 FCC Rcd. at 13608 (Section 0.457(d) “constitute[s] the legal authority for the disclosure of . . . competitively sensitive information under the Trade Secrets Act”), *aff’d* 29 FCC Rcd. 14267, at *1 (2014).

³⁹ See *supra* at 7.

⁴⁰ See Order at ¶ 13 (citing 47 U.S.C. § 154(j)).

Section 4(j) does no such thing. Section 4(j) simply recites that 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.”⁴¹ As the Supreme Court held in *Brown*, this kind of “housekeeping statute” does not authorize an agency to release sensitive information protected by the Trade Secrets Act.⁴² The D.C. Circuit reached the same conclusion in *Qwest*, where it reversed the Commission’s decision to release sensitive information covered by the Trade Secrets Act, observing that “[a] mere housekeeping statute . . . whose history indicated that it was ‘simply a grant of authority to the agency to regulate its own affairs,’ would not suffice to authorize disclosure of confidential business information because it was not intended to provide authority for limiting the scope of the Trade Secrets Act.”⁴³

FCC v. Schreiber is not to the contrary. Although *Schreiber* suggested that Section 4(j) could authorize the Commission to release confidential information in some instances,⁴⁴ that decision did not consider the separate prohibition against disclosing sensitive information that is imposed by the Trade Secrets Act. Indeed, 14 years after *Schreiber* was handed down, the Supreme Court declared in *Brown* that *Schreiber* had no applicability in cases like this one, where questions are raised “regarding the applicability of” the Trade Secrets Act.⁴⁵ Furthermore, the Commission itself long ago abandoned the “presumption in favor of public procedures” at

⁴¹ 47 U.S.C. § 154(f).

⁴² *Brown*, 441 U.S. at 310-12.

⁴³ *Qwest Comm'ns Int'l, Inc. v. FCC*, 229 F.3d 1172, 1177 (D.C. Cir. 2000) (quoting *Brown*, 441 U.S. at 309).

⁴⁴ *FCC v. Schreiber*, 381 U.S. 279, 291-92 (1965).

⁴⁵ *Brown*, 441 U.S. at 315 n.45.

issue in *Schreiber* in favor of a rule that sensitive information shall not be made “routinely available” unless a “persuasive showing” has been made that disclosure is warranted.⁴⁶

2. The New “Relevance” Standard Violates The Trade Secrets Act.

In addition to these procedural requirements, the Trade Secrets Act embraces a substantive “presumption against disclosure of confidential information” that reflects Congress’s judgment that “confidential business information should [remain] private unless there’s *good cause* to disclose it.”⁴⁷ As the D.C. Circuit has held, this standard can be satisfied only by a “necessity” showing.⁴⁸ “Relevance”—the new standard embraced in the Order—is not enough.⁴⁹

For example, in *CBS*, the D.C. Circuit explained in detail why a showing of “relevance” was insufficient under the Trade Secrets Act to justify the release of the Content Companies’ programming agreements even under a protective order:

Because corporate business documents will almost always be relevant to a merger between two industry participants, allowing the Commission to disclose confidential information based on mere relevance would mean that such information *would*, subject to the governing protective orders, be routinely available for inspection. We must read the statute and the Commission’s precedents to avoid that construction if we are to be faithful to Congress’s plan and to the Commission’s own historical approach.⁵⁰

The D.C. Circuit rejected the Commission’s arguments that sensitive information may be disclosed if the information is “relevant,” “highly relevant,” “central,” or “important” to an issue

⁴⁶ 47 C.F.R. § 0.457(d).

⁴⁷ *CBS*, 785 F.3d at 706 (emphasis added), 707.

⁴⁸ *See id.* at 706-07; *see also Qwest*, 229 F.3d at 1183-84.

⁴⁹ *See CBS*, 785 F.3d at 706; *see also Qwest*, 229 F.3d at 1183-84.

⁵⁰ *CBS*, 785 F.3d at 706. This concern is well-founded, as “it is hard to imagine any document or information within any communications-related company that could ever be excluded under [the Commission’s new relevance] standard, confirming its boundlessness.” Order, Statement of Commissioner O’Rielly, at 46. In practice, a “relevance” standard imposes no meaningful limit on routine public access to sensitive business information and offers “little to no recourse for third parties that have their information submitted against their will to the Commission.” *Id.*

before the Commission, or if “commenter analysis of [the information] would be helpful to the Commission’s evaluation” of an issue.⁵¹ Instead, the court held, “to justify disclosure” of sensitive information like programming agreements, “the information must be ‘necessary’ to the Commission’s review process.”⁵² “Otherwise, Congress and the Commission have decided, the risk to the affected businesses will not be worth it.”⁵³

CBS tracks the D.C. Circuit’s earlier decision in *Qwest v. FCC*, which likewise “affirmed the relevant/necessary dichotomy.”⁵⁴ *Qwest* held that the FCC could not release sensitive raw audit data,⁵⁵ which—like programming agreements—are not routinely available for public inspection.⁵⁶ This was true even though the Commission argued that third-party disclosure of sensitive information under a protective order was justified on the ground that “broader comment [would] greatly assist the Commission in resolving the issues.”⁵⁷ The court rejected this argument because the Commission had not explained why disclosure was “required,” or why it could not rely on alternative measures that would better protect confidential information.⁵⁸

Here, by contrast, the Order authorizes the release of sensitive information in licensing proceedings and in response to Section 0.461 requests simply upon a showing of relevance. Indeed, the Order makes clear that even sensitive information that is *irrelevant* will presumptively be made available to third parties in licensing proceedings, unless the

⁵¹ *CBS*, 785 F.3d at 706-07.

⁵² *Id.* at 707; *see also id.* at 706 (“[D]isclosure is proper only if the information disclosed is absolutely necessary to the process.”).

⁵³ *Id.* at 707.

⁵⁴ *Id.* at 706.

⁵⁵ *Qwest*, 229 F.3d at 1180-84.

⁵⁶ 47 C.F.R. § 0.457(d)(1)(iii).

⁵⁷ *Qwest*, 229 F.3d at 1183.

⁵⁸ *Id.* at 1183.

Commission decides to exercise its discretion to withhold that information from the record.⁵⁹ While the Order claims that “[p]ublic participation in [the Commission’s] proceedings . . . is important,”⁶⁰ “‘assistance’ is not enough” to justify disclosure under the Trade Secrets Act.⁶¹ Instead, to “vindicate the goals of the Trade Secrets Act,” the Commission may only disclose sensitive information that is strictly “necessary to the review process.”⁶² Because the Order authorizes the disclosure of sensitive information based upon a showing of mere relevance, it violates the Trade Secrets Act and should be set aside.

B. The Order Violates the Administrative Procedure Act By Arbitrarily Abandoning The Commission’s Application Of Its “Persuasive Showing” Standard.

Even if the Commission had authority to issue the Order or to release sensitive information upon a showing of mere relevance—and it does not—the Order still fails to adequately acknowledge or explain the Commission’s two major changes to the FCC’s “persuasive showing” standard. The Order first departs from the FCC’s longstanding refusal to make sensitive information available at all—whether in a licensing proceeding or in response to a Section 0.461 request—unless a heightened “necessity” showing was satisfied. The Order also departs from the FCC’s practice of refusing to make sensitive information available to the public, even under a protective order, unless the “persuasive showing” standard had been satisfied. Yet the Order fails to offer an adequate explanation for either change.

⁵⁹ Order at ¶ 20.

⁶⁰ Order at ¶ 16.

⁶¹ *CBS*, 785 F.3d at 706.

⁶² *Id.* at 707.

1. The Order Arbitrarily Replaces The Commission’s “Necessity” Showing With A “Relevance” Showing.

Under the FCC’s longstanding application of the Commission’s “persuasive showing” standard, the FCC refused to release sensitive information unless, among other things, “a showing” was made “‘that the information is a necessary link in a chain of evidence’ that will resolve an issue before the Commission.”⁶³ This “necessity” standard meant that sensitive information would be released to third parties “only in very limited circumstances”—if it would be released at all.⁶⁴ Indeed, the D.C. Circuit vacated the Commission’s most recent attempt to make sensitive material available to third parties after the Commission failed to make the “necessary link” showing required by its own rules.⁶⁵

To be sure, the D.C. Circuit called the Commission’s implementation of its “necessity” standard “confusing and often contradictory.”⁶⁶ The Court believed that the “necessary link” requirement was susceptible of “two interpretations”—one in which the requested *information* is the “necessary link” and another in which the *third-party comments* regarding that information serve as the “necessary link.”⁶⁷ The Court therefore gave the Commission only two options to clarify its rules: it could conclude either that the “confidential information itself” must be

⁶³ *Confidential Information Policy*, 13 FCC Rcd. at 24823 (quoting *Classical Radio for Connecticut, Inc.*, 69 FCC 2d 1517, 1520 n.4 (1978)).

⁶⁴ *Id.* at 24822 (observing that the Commission has exercised its discretion to release trade secrets “only in very limited circumstances”).

⁶⁵ *CBS*, 785 F.3d at 706-07.

⁶⁶ *Id.* at 708.

⁶⁷ *Id.* at 707.

necessary to the Commission’s review process or that the “third-party comments on it” must be necessary to that process.⁶⁸

The Commission chose neither option. Instead, it rewrote its persuasive-showing standard to eliminate the “necessary link” requirement altogether.⁶⁹ Under its new standard, sensitive information will be made available on an unrestricted basis to Section 0.461 requestors whenever the information is “relevant to resolving an issue before the Commission.”⁷⁰ Similarly, in a licensing proceeding “all of the information submitted in the record”—including sensitive material—will presumptively be made available for third-party review on the theory that such material is “relevant and material to the issues before the Commission.”⁷¹

However, the Order violates the Administrative Procedure Act because it fails to justify its rejection of the D.C. Circuit’s directive or to “show that there are good reasons for [the Commission’s] new policy.”⁷² For example, before an agency can justify a change in its policy, the agency must first acknowledge that its policies are changing. This requirement ensures that an agency’s “prior policies and standards are being deliberately changed, not casually ignored.”⁷³

Here, however, the Commission’s only justification for changing its policies rests on a revisionist assertion that the policies are not actually changing. According to the Order, the

⁶⁸ *Id.* at 708. To be sure, the D.C. Circuit mentioned in passing that the Commission could “explain . . . whether ‘necessity’ is the standard at all.” *Id.* But the *CBS* court also unequivocally stated that it “*must read the*” Trade Secrets Act to require more than relevance before sensitive information could be disclosed under a protective order, and that “to justify disclosure, the information must be ‘necessary’ to the Commission’s review process.” *Id.* at 706-07 (emphasis added). Moreover, as explained below, the Order does not “explain” why “relevance” is a better standard than “necessity,” nor could it. *See infra* at 17.

⁶⁹ *See* Order at ¶ 43 (The Commission no longer “require[s] a showing that the information is ‘necessary’” before it will be released to third parties.).

⁷⁰ *Id.*

⁷¹ *Id.* at ¶ 18.

⁷² *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

⁷³ *Ramaprakash v. FAA*, 346 F.3d 1121, 1124 (D.C. Cir. 2003) (quotation marks omitted).

Confidential Information Policy never included a “necessity” standard.⁷⁴ Rather, according to the Order, “the Commission will engage in a balancing of the public and private interests” when deciding to release confidential information,⁷⁵ and it has always been “sufficient that the information was relevant” for sensitive material to be disclosed.⁷⁶

The *Confidential Information Policy* flatly contradicts this characterization. That *Policy* establishes three separate components of the “persuasive showing” standard: a “compelling public interest” requirement, a “necessary link” showing, and “a balancing of the interests favoring disclosure and non-disclosure.”⁷⁷ As the D.C. Circuit observed, the *Policy* makes clear that “even if the Commission finds that the public interest and the balance of equities favor disclosure, it will ‘not automatically authorize . . . release of such information’” unless the Commission’s “necessary link” standard also is satisfied.⁷⁸

Similarly, the Order’s characterization of the FCC’s past practices cannot be squared with the actual decisions themselves. A careful examination of the decisions cited in footnote 133 of the Order confirms that relevance alone has not been “sufficient” to satisfy the Commission’s “persuasive showing” standard. *See generally*, Appendix. For example:

- Although the Order says that *Alianza* applied a “relevancy” standard, *Alianza* actually focused on “the reasonable *necessity* for petitioner’s having the information.”⁷⁹
- Although the Order notes that *Sioux Empire* used the word “relevant,” *Sioux Empire* actually considered “the reasonable *necessity* for petitioner’s having the information,” concluded that there was “no *necessity* of destroying the [records’] confidentiality,” and

⁷⁴ Order at ¶¶ 39-43.

⁷⁵ *Id.* at ¶ 41.

⁷⁶ *Id.* at ¶ 40 n.133.

⁷⁷ *Confidential Information Policy*, 13 FCC Rcd. at 24822-23.

⁷⁸ *CBS*, 785 F.3d at 704 (quoting *Confidential Information Policy*, 13 FCC Rcd. at 24823).

⁷⁹ *Alianza Federal de Pueblos Libres*, 31 FCC 2d 557, 558- (1971) (emphasis added; quotation marks omitted).

determined the petition was “deficient in establishing *necessity* for obtaining the information.”⁸⁰ The Order also does not address *Sioux Empire*’s observation that confidential information could not be disclosed unless it is “relevant and material . . . and is a necessary link in a chain of evidence relating to the . . . issue.”⁸¹

- Although the Order states that the information under consideration in *Robert J. Butler* was “unrelated” to the issues in the case, the Commission actually refused to make confidential information available to third parties because the petitioner had not “made a persuasive showing that the information at issue [wa]s *necessary* to the resolution of any [contested] issues.”⁸²

Tellingly, the Order ignores numerous other FCC decisions that confirm that the “necessary link” requirement demands much more than mere relevance. For instance, the Commission has declined to release information when it was not “necessary” to do so even though the information “could conceivably bear on” a contested question.⁸³

Thus, the only justification the Order offers for the change in policy rests on the inaccurate assertion that the Order does not change any policies at all. But the Commission cannot satisfy its obligations under the Administrative Procedure Act to acknowledge a change if it steadfastly refuses to admit a change has occurred.⁸⁴ Because the Order does not “display an

⁸⁰ *Sioux Empire Broad. Co.*, 10 FCC Rcd. 132, 134-35 (1967) (emphases added).

⁸¹ *Id.* at 135 (emphasis added).

⁸² *Robert J. Butler*, 6 FCC Rcd. 5414, 5418 (1991) (emphasis added).

⁸³ *Application of Mobile Commc’ns Holdings Inc.*, 10 FCC Rcd. 1547, 1548 (Int’l Bur. 1994). In addition, the Order ignores additional decisions cited in the *Confidential Information Policy* that characterize the “necessary link” requirement as demanding a showing that the requested material is of “critical significance” to the proceedings. See *Confidential Information Policy*, 13 FCC Rcd. at 24823 n.37 (quoting *Am. Tel. & Tel. Co.*, 5 FCC Rcd. 2464, 2464 (1990)). Other decisions similarly paraphrase the “necessary link” requirement as concerned with whether the “information is critical,” suggesting that “necessary link” and “critical” are interchangeable concepts. See, e.g., *Gregory F. Intoccia*, 10 FCC Rcd. 13462, 13463 (Com. Car. Bur. 1995), *Cincinnati Bell Tel. Co. Tariff FCC No. 45*, 10 FCC Rcd. 10574, at *5 (Com. Car. Bur. 1995), *John L. McGrew*, 10 FCC Rcd. 10574, at *3 (1995), *Jonathan E. Canis*, 9 FCC Rcd. 6495, at *2 (Com. Car. Bur. 1994).

⁸⁴ *Fox Television Stations*, 556 U.S. at 515.

awareness that” the Commission “is changing position,” it by definition cannot provide a reasoned justification for the Commission’s decision.⁸⁵

Beyond this fatal flaw, the Order does not explain why a showing of mere relevance is sufficient to authorize widespread disclosure of confidential material. This omission is particularly glaring given the D.C. Circuit’s observation in *CBS* that the “necessary-link finding is an *unavoidable* component of the persuasive showing the regulations require.”⁸⁶

The Order also fails to explain why the same standard governing disclosure of a *party’s* confidential information should apply to records and materials belonging to *non-parties*. Although disclosure of a party’s finances or other confidential records may become relevant when the party puts its costs, infrastructure, or financial condition at issue,⁸⁷ none of the decisions cited in the Order provides a similar rationale for releasing a non-party’s records. Heightened protection is warranted for sensitive information belonging to non-parties, who have not placed their business transactions at issue and who have not authorized third-party access to their confidential information. Accordingly, the Order should be revisited because it “entirely failed to consider an important aspect of the problem.”⁸⁸

Finally, the Order provides no explanation for eviscerating the second half of the Commission’s “necessity” standard. Under that standard, disclosure should not occur unless the information “is a necessary link *in a chain of evidence that will resolve* an issue before the

⁸⁵ *Id.*

⁸⁶ *CBS*, 785 F.3d at 705 (emphasis added).

⁸⁷ See *Confidential Information Policy*, 13 FCC Rcd. at 24822; *Liberty Cable Co., Inc.*, 11 FCC Rcd. 2475, 2476 (1996).

⁸⁸ *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

Commission.”⁸⁹ The Order effectively strips out the emphasized language, rewriting the sentence as authorizing disclosure if information “is [relevant to] an issue before the Commission.” The Commission provides no explanation for dropping the “chain of evidence” and “resolution” requirements, even though the Administrative Procedure Act requires the Commission to “provide a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored.”⁹⁰

2. The Order Arbitrarily Abandons The “Persuasive Showing” Requirement When Disclosure Occurs Under Protective Orders.

The Order also fails to explain adequately why the Commission no longer requires a “persuasive showing” before sensitive material will be released under protective orders.

FCC regulations list several categories of information, including programming agreements, that generally are not “available for public inspection” unless “[a] persuasive showing as to the reasons for inspection” has been made.⁹¹ The Commission’s rules do not distinguish between unrestricted disclosures to the public and disclosures to some members of the public under a protective order. Accordingly, if the Commission can make sensitive information available to third parties, it can do so only after a “persuasive showing” has been made.

The Commission recognized as much less than one year ago. When it ordered the release of the Content Companies’ programming agreements to third parties, the Commission affirmed a Media Bureau order recognizing that disclosure in a merger review proceeding required “a

⁸⁹ *Confidential Information Policy*, 13 FCC Rcd. at 24823 (emphasis added; quotation marks omitted).

⁹⁰ *Ramaprakash*, 346 F.3d at 1124 (quotation marks omitted).

⁹¹ See 47 C.F.R. §§ 0.457(d)(1), 0.461.

‘persuasive showing’ of the reasons in favor of its release.”⁹² The Commission’s counsel reiterated this point before the D.C. Circuit, explaining that “we’re in a world where the persuasive-showing standard applies.”⁹³

The Order casually dismisses its ruling as a misguided “implication,”⁹⁴ but it cannot dodge the Commission’s own precedent so easily. Although the Order claims that “not one” of the protective orders issued since its *Confidential Information Policy* was promulgated “even mentioned a requirement of a persuasive showing,”⁹⁵ this misses the point entirely. The Commission has applied the “persuasive showing” standard in materially identical merger review proceedings, and the Order does not identify a single instance in which the Commission has held that its persuasive-showing standard does *not* apply. Consequently, the Administrative Procedure Act requires the Commission to justify its decision to abandon its practice of requiring a “persuasive showing” when disclosure occurs under a protective order. The Order does not do so.

First, the Order offers no reasoned explanation why the “persuasive showing” standard applies when sensitive information is disclosed in response to a Section 0.461 request but not when disclosure is made under a protective order.⁹⁶ The Order attempts to justify the use of different standards by saying that materials disclosed in response to a Section 0.461 request are “released to the general public” on an unrestricted basis, but disclosures under a protective order

⁹² *Comcast*, 29 FCC Rcd. at 13608-09, *aff’d* 29 FCC Rcd. 14267, at *1 .

⁹³ *CBS*, 785 F.3d at 704.

⁹⁴ Order at ¶ 44 n.139.

⁹⁵ *Id.* (emphasis omitted).

⁹⁶ *Id.* ¶ 45.

involve “only a very limited release . . . for only limited purposes.”⁹⁷ This reasoning overlooks that sensitive material set forth in Section 0.457(d) is *exempt* from unrestricted public disclosure,⁹⁸ cannot be produced until the Commission’s “persuasive showing” requirement has been satisfied,⁹⁹ and has in practice *only* been produced under protective orders.¹⁰⁰ Given that the persuasive-showing standard applies to disclosures of sensitive information under a protective order in response to a Section 0.461 request, the Order offers no explanation why the persuasive-showing standard should not apply to disclosures of sensitive information under a protective order in other Commission proceedings as well.

Second, the Order claims that no persuasive-showing standard should apply in licensing proceedings because “the relevant case law indicates that petitioners to deny generally must be afforded access to all information submitted by licensees.”¹⁰¹ Yet the Order cites just one case to support its understanding of the “relevant case law,”¹⁰² and that 35-year old decision held that the

⁹⁷ *Id.*

⁹⁸ *See, e.g., Confidential Information Policy*, 13 FCC Rcd. at 24822 (Commission releases “information falling within FOIA Exemption 4” only in “very limited circumstances”).

⁹⁹ *See, e.g., id.* at 24822-23.

¹⁰⁰ *Id.* at 24824 (observing that “even when information is critical to resolution of a public interest issue . . . disclosure under a protective order or agreement may serve the dual purpose of protecting competitively valuable information while still permitting limited disclosure for a specific public purpose”) (quotations marks omitted). Accordingly, to the extent the Order argues that a protective order may not be used “to limit the release of information” requested in a Section 0.461 request, even if that material is covered by Section 0.457(d), Order at ¶ 36, the Order misstates the governing law. Whereas material *not* exempt from FOIA must be made available unconditionally and cannot be limited by “a protective order,” *Nat’l Archives and Records Admin. v. Favish*, 541 U.S. 157, 174 (2004), material *exempt* from FOIA may be made available “conditionally,” 47 C.F.R. § 0.461(f)(4), and is usually made available pursuant to a protective order. *See, e.g., Cincinnati Bell*, 10 FCC Rcd. at *6; *Petition of the State of California*, 10 FCC Rcd. 2881, 2887-88 (Wireless Tel. Bur. 1995).

¹⁰¹ Order at ¶ 14.

¹⁰² Order at ¶ 7 n.13.

FCC could resolve a challenge to a license renewal application by conducting its own investigation instead of allowing the petitioner to obtain discovery from the licensee.¹⁰³

More recent decisions confirm that the Commission has broad discretion to shield confidential information from third-party review.¹⁰⁴ The Commission can and has issued orders based on review of documents not available to the parties.¹⁰⁵ Instead, the Commission must place only the “most critical factual material that is used to support the agency’s position on review” into the record—not every document submitted by a party.¹⁰⁶ The *Confidential Information Policy* itself declares that denying routine access to sensitive materials “is compatible with the public interest.”¹⁰⁷ Indeed, FCC decisions to release sensitive information, even under a protective order, have twice been reversed by courts.¹⁰⁸

To the extent the Commission has changed its mind and now believes that interested parties cannot participate effectively without access to “all of the information filed in the record,”¹⁰⁹ the Order fails to explain why that is true now when it was not true as recently as five months ago. Agencies must “provide a more detailed justification” when they change their application of their regulations if that change “rests upon factual findings that contradict those

¹⁰³ *Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC*, 595 F.2d 621, 634 (D.C. Cir. 1978) (en banc).

¹⁰⁴ See *Consumer Fed’n of America v. FCC*, 348 F.3d 1009, 1012-14 (D.C. Cir. 2003) (FCC may withhold confidential information from third parties when it is not “needed” to challenge a merger proposal); *SBC Commc’ns Inc. v. FCC*, 56 F.3d 1484, 1492 (D.C. Cir. 1995) (FCC may present confidential material in summary form in its final order).

¹⁰⁵ *Applications of Nynex Corp.*, 12 FCC Rcd. 19985, 20000 (1997).

¹⁰⁶ *Ass’n of Data Processing Serv. Orgs. v. Bd. of Governors*, 745 F.2d 677, 684 (D.C. Cir. 1984).

¹⁰⁷ 13 FCC Rcd. at 24852.

¹⁰⁸ *CBS*, 785 F.3d at 706-07; *Qwest*, 229 F.3d at 1175, 1181, 1184 (citing 47 C.F.R. § 0.457(d)).

¹⁰⁹ Order at ¶ 46.

which underlay its prior policy.”¹¹⁰ The Commission previously has approved merger transactions, including the Comcast/NBCUniversal and AT&T/DirecTV mergers, even though it expressly recognized that “commenters did not have access to all of the record.”¹¹¹ These decisions demonstrated that third-party commenters need not have access to *all* relevant materials to participate effectively in a licensing proceeding. If the Commission now believes that commenters must have access to the entire record, that finding “contradict[s] those which underlay” the Commission’s “prior policy” and demands a particularly detailed justification for the change in course.¹¹² The Order does not acknowledge, much less satisfy, this burden.

Third, the Order suggests that it is aligned with past FCC practice because the Commission supposedly has “never granted a request to withhold information in the record entirely from review.”¹¹³ This assertion is incorrect. The FCC “has processed transaction after transaction in the video market . . . without supplying” programming agreements to third parties, even under a protective order.¹¹⁴ Indeed, FCC officials have reviewed sensitive material *in camera* at the FCC or the Department of Justice in connection with that agency’s parallel review.¹¹⁵ The FCC used this approach in its review of the 2011 Comcast/NBCUniversal merger,¹¹⁶ and it approved the AT&T/DirecTV merger just months ago even though commenters

¹¹⁰ *Fox Television Stations*, 556 U.S. at 515; *see also Perez v. Mortgage Bankers Ass’n*, 135 S. Ct. 1199, 1209 (2015).

¹¹¹ *See AT&T*, 2015 WL 4556648, at *45 n.524.

¹¹² *Fox Television Stations*, 556 U.S. at 515.

¹¹³ Order at ¶ 5; *see also id.* ¶ 23.

¹¹⁴ *Comcast*, 29 FCC Rcd. 14267, at *3 (Dissenting Statement of Commissioner Pai) (emphasis omitted).

¹¹⁵ *See, e.g., Applications of Comcast Corp. and AT&T Corp.*, 17 FCC Rcd. 22633, 22636 (2002); *Applications of Tele-Comm’n, Inc. and AT&T Corp.*, 14 FCC Rcd. 3160, 3233-34 (1999).

¹¹⁶ *Comcast*, 29 FCC Rcd. 14,267, at *3 (Dissenting Statement of Commissioner Pai).

did not have access to sensitive information that the Commission once said was “highly relevant and indeed central” to its review of that transaction.¹¹⁷

Fourth, the Order wrongly assumes that disclosure under a protective order protects third-party confidentiality interests as effectively as the persuasive showing standard. As a threshold matter, the FCC has long protected confidentiality interests by using *both* a persuasive showing standard and a protective order, not by selecting one or the other.¹¹⁸ But the more fundamental problem with this assumption is that the Order fails to balance any benefit from disclosure against the harm from misuse. The Order instead assumes that a protective order will prevent misuse of sensitive information.

But, as the FCC recently acknowledged, experience provides ample reason to conclude that inadvertent disclosures of sensitive information can and do occur—especially when “an individual possessing information regarding [competitively sensitive information] of more than one . . . party . . . provide[s] advice to another . . . party that is influenced by the information he or she possesses”¹¹⁹— and that this risk increases as more individuals access the information. Indeed, just a few weeks ago, a representative of the Alabama Public Service Commission inadvertently violated a protective order issued by the Wireline Competition Bureau, resulting in public dissemination of sensitive material and a “serious breach of the Protective Order.”¹²⁰

¹¹⁷ See *Comcast*, 29 FCC Rcd. at 13602, *aff'd* 29 FCC Rcd. 14,267, at *1.

¹¹⁸ See *supra* at 19.

¹¹⁹ *Guidance Regarding The Prohibition of Certain Communications During The Incentive Auction*, Public Notice, DA 15-1129, ¶ 15 (Oct. 6, 2015).

¹²⁰ See Order, *Rates for Interstate Inmate Calling Services*, No. DA 15-1052, 2015 WL 5592707, at *2-3 (Wireline Comp. Bur. Sept. 21, 2015).

Similar violations of protective orders abound.¹²¹ Whether a violation is intentional or inadvertent, the resulting harm is the same and cannot be undone.¹²²

The Order suggests that the threat of sanctions is sufficient to prevent intentional misuse of sensitive information, but it does not explain how the Commission proposes to detect, investigate, and sanction violations of its orders. Instead, the Order places the onus on an individual who violates a protective order to self-report that violation, even though the Order does not cite even one example where sanctions were imposed following a self-reported violation. The protective orders in the Comcast/Time Warner and AT&T/DirecTV proceedings confirm that violations occur and go unpunished: although those protective orders required third parties to certify that they had destroyed all confidential information they obtained in those proceedings,¹²³ numerous individuals appear not to have done so, even as these same individuals request access to confidential information as part of the Charter/Time Warner Cable proceeding.¹²⁴

Fifth, the Order fails to explain why the new Model Protective Order provides less protection for sensitive information than the protective orders the Commission issued less than one year ago. The protective orders adopted by the Commission in the Comcast/Time Warner Cable and AT&T/DirecTV merger transactions restricted how sensitive information covered by

¹²¹ See, e.g., Letter from Richard L. Rosen to FCC, *Applications of AT&T Inc. and Deutsche Telekom AG for Consent to Assign or Transfer Control of Licenses and Authorizations*, WT Docket 11-65 (Aug. 8, 2011), available at <http://tinyurl.com/pjwbkqy>.

¹²² See *In re Papandreou*, 139 F.3d 247, 251 (D.C. Cir. 1998).

¹²³ See *Applications of Comcast & Time Warner Cable Inc.*, Second Amended Modified Joint Protective Order, 29 FCC Rcd. 13799, at *9, ¶ 22 (Media Bur. 2014).

¹²⁴ According to the Commission's website, at least eight individuals requested access to confidential material in the Comcast/Time Warner Cable or AT&T/DirecTV proceedings, did not provide the certification required by Paragraph 22 of the *Second Amended Modified Joint Protective Orders* entered in those proceedings, and now have requested access to confidential material in the Charter/Time Warner Cable proceeding.

Section 0.457(d) may be accessed and copied.¹²⁵ The Model Protective Order omits these protections, but the Order gives no explanation for doing so.

Finally, the Order presumptively authorizes third-party access to sensitive information without explaining why the Commission will not first consider whether alternatives are available that would better protect third-party confidentiality interests. The D.C. Circuit repeatedly has held that before the FCC may release sensitive information, it *must* consider alternatives other than giving third parties access under a protective order.¹²⁶ The *Confidential Information Policy* likewise states that “the Commission [will] not automatically authorize public release of [confidential] information” even when a “compelling public interest” supports disclosure,¹²⁷ but will first consider “special remedies such as redaction” and “aggregated data or summaries.”¹²⁸

III. CONCLUSION

For the foregoing reasons, the Commission should vacate the Order, which was adopted in violation of the Trade Secrets Act and the Administrative Procedure Act.

¹²⁵ See, e.g., *Applications of AT&T, Inc. and DirecTV*, Second Amended Modified Joint Protective Order, 29 FCC Rcd. 13810, at *5, ¶¶ 6-7 (Media Bur. 2014).

¹²⁶ *CBS*, 785 F.3d at 707; *Qwest*, 229 F.3d at 1183; see also, e.g., *Pennzoil Co. v. Fed. Power Comm’n*, 534 F.2d 627, 632 (5th Cir. 1976) (agency must consider “whether there are alternatives to full disclosure that will provide consumers with adequate knowledge to fully participate in the [agency]’s proceedings but at the same time protect the interests of the producers”).


¹²⁷ 13 FCC Rcd. 24822-23.

¹²⁸ *Id.* at 24823.

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APPENDIX

The Order’s Inaccurate Characterization of Prior FCC Decisions

The Order characterizes the “necessary link” component of the Commission’s “persuasive showing” standard as requiring only a showing that the requested information is “relevant to resolving an issue before the Commission.” Order ¶ 43. The Order bases that conclusion principally on footnote 133, which contends that prior FCC decisions indicate “that the standard used to decide whether to release information publicly was always a balancing of interests” and “that it was sufficient that the information was relevant (although other factors might tip the balance against public release).” Order ¶ 43 n.133. However, footnote 133 does not accurately describe those decisions. The following summary addresses the FCC decisions in the order in which they are discussed in footnote 133.

Decision	How Footnote 133 Characterizes the Decision	Relevant Text	Reason Footnote 133’s Characterization is Inaccurate
<p><i>Confidential Information Policy Notice</i>, 11 FCC Rcd 12406 (1996)</p>	<p>“[T]he <i>Confidential Information Policy Notice</i> explained the mere chance/necessary link phrase as follows: ‘In other words, the Commission requires that specific and concrete public benefits be reasonably anticipated before properly exempt information will be released on a discretionary basis.’”</p>	<p>“Even where a party has placed its financial condition at issue or a compelling public interest exists to disclose confidential information, however, the Commission does not automatically authorize release of such information. In determining whether a public interest in the privacy of proprietary business data exists, the Commission has adhered to a policy whereby it ‘will not authorize the disclosure of confidential financial information on the mere chance that it might be helpful, but insists upon a showing that the information is a necessary link in a chain of evidence that will resolve a public interest issue.’ In other words, the Commission requires that ‘specific and concrete public benefits be reasonably anticipated before properly exempt information will be released on a discretionary basis.’” 11 FCC Rcd at 12419-20 (footnotes omitted).</p> <p>“The Commission’s policies implementing its rules governing confidentiality affect both the competitive nature of the telecommunications industry and performance of the Commission’s public</p>	<p><i>First</i>, the Order fails to account for additional language in the <i>Confidential Information Policy Notice</i> indicating that “the Commission has long been sensitive to the concern that fulfillment of its regulatory responsibilities does not result in unnecessary disclosure of confidential information that places Commission regulatees at an unfair competitive disadvantage,” and that “the Commission’s policy has been to avoid disclosures of confidential information <i>except where necessary</i> to the effective performance of its regulatory duties.” 11 FCC Rcd at 12422 (emphases added).</p> <p><i>Second</i>, the document is a Notice of Proposed Rulemaking that expressed only the Commission’s tentative views. The final rule—embodied in the <i>Confidential Information Policy</i>—provides a fuller and more accurate explanation of how the “necessary link” requirement works in practice. Nothing in the <i>Confidential Information Policy</i> purports to give the Commission unlimited discretion to release confidential information; rather, the</p>

Decision	How Footnote 133 Characterizes the Decision	Relevant Text	Reason Footnote 133's Characterization is Inaccurate
<p><i>Kannapolis Television Co. WCCB-TV, Inc.</i>, 80 F.C.C.2d 307 (1980)</p>	<p>"[W]hile first quoting the mere chance/necessary link phrase as the Commission's general policy, the Commission stated that in determining whether to release the confidential information, 'the Commission considers the relevancy and materiality of the information sought and the inability to obtain the requested information from other sources. Application of these criteria to individual requests will produce results which vary in accordance with the particular facts of each case.'"</p> <p>In <i>Kannapolis</i>, "[t]he Commission went on to determine whether the information sought was 'relevant and material' and decided, 'on balance,' to release some of the information."</p>	<p>responsibilities. As indicated in the preceding discussion, the Commission has long been sensitive to the concern that fulfillment of its regulatory responsibilities does not result in unnecessary disclosure of confidential information that places Commission regulatees at an unfair competitive disadvantage. . . . For these reasons, the Commission's policy has been to avoid disclosures of confidential information except where necessary to the effective performance of its regulatory duties and to employ protective orders where appropriate." <i>Id.</i> at 12422.</p> <p>"The Commission will not authorize the disclosure of confidential financial information on the mere chance that it might be helpful but insists upon a showing that the information is a necessary link in a chain of evidence that will resolve a public interest issue. <i>Classical Radio for Connecticut, Inc.</i>, 69 F.C.C.2d 1517, 1520 n.4 (1978). See <i>Sioux Empire Broadcasting Co.</i>, 10 F.C.C.2d 132 (1967). In determining whether to release these reports, the Commission considers the relevancy and materiality of the information sought and the inability to obtain the requested information from other sources. <i>Alaskans for Better Media</i>, 46 R.R.2d 991, 994 (1979)." 80 F.C.C.2d at 310.</p> <p>"On the other hand, applying the 'relevant and material' criteria, we find that a persuasive showing has not been made for release of all WCCB-TV's forms dating back to 1970." <i>Id.</i> at 311.</p> <p>"As stated above, our rules require a 'persuasive showing' before we will release</p>	<p>Commission imposed a "necessary link" standard before information may be disclosed. See 13 FCC Rcd at 248322-23 & n.37.</p>
<p><i>Kannapolis</i></p>	<p>The Commission expressly abrogated <i>Kannapolis</i> in <i>WETM-TV, Inc.</i>, 88 F.C.C.2d 1399, 1403 (1982) (the "policy of requiring disclosure" outlined in <i>Kannapolis</i> "no longer should be followed").</p> <p>Moreover, <i>Kannapolis</i> states that confidential information must be "relevant and material." 80 F.C.C.2d at 311 (emphasis added). The Order's mere relevance standard fails to account for the additional requirement.</p> <p>Finally, <i>Kannapolis</i> did not state that confidential material provides a "necessary link" whenever it is "relevant and material." Instead, it treated "relevant and material" as a lower threshold, not met by the petitioner, thus eliminating any need to reach the "necessary link" question.</p>	<p>The Commission expressly abrogated <i>Kannapolis</i> in <i>WETM-TV, Inc.</i>, 88 F.C.C.2d 1399, 1403 (1982) (the "policy of requiring disclosure" outlined in <i>Kannapolis</i> "no longer should be followed").</p> <p>Moreover, <i>Kannapolis</i> states that confidential information must be "relevant and material." 80 F.C.C.2d at 311 (emphasis added). The Order's mere relevance standard fails to account for the additional requirement.</p> <p>Finally, <i>Kannapolis</i> did not state that confidential material provides a "necessary link" whenever it is "relevant and material." Instead, it treated "relevant and material" as a lower threshold, not met by the petitioner, thus eliminating any need to reach the "necessary link" question.</p>	<p>Commission imposed a "necessary link" standard before information may be disclosed. See 13 FCC Rcd at 248322-23 & n.37.</p>

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<p><i>Alianza Fed. De Pueblos Libres' Request for Inspection of Annual Fin. Reports</i>, 31 F.C.C.2d 557 (1971)</p>	<p>"The opinion" in <i>Alianza</i> "recites the mere chance/necessary link phrase and then states that before the Commission will release confidential information, it requires a 'persuasive showing' which depends on the various balancing criteria described in <i>Kannapolis Television Co.</i>, and later in the <i>Confidential Information Policy Notice</i>, including the relevancy and materiality of the information sought."</p>	<p>otherwise exempt confidential information. 47 C.F.R. § 0.457(d)(1). See <i>Alaskans for Better Media</i>, 46 R.R.2d 991 (1979). In this case we do not believe a persuasive showing has been made for disclosure of the other Bahakel stations' financial reports. . . . Since there is virtually no likelihood that the financial reports would reveal significant information on the issue of inter-corporate borrowing, we find that the requisite 'persuasive showing' has not been made." <i>Id.</i> at 313.</p>	<p>The Order neglects other aspects of the <i>Alianza</i> decision that contradict the Order's interpretation of the "necessary link" requirement. For example, <i>Alianza</i> identifies "reasonable necessity" as one aspect of a "persuasive showing." 31 F.C.C.2d at 558. Footnote 3 in <i>Alianza</i>, which immediately follows the recitation of the "persuasive showing" standard, cites <i>KWOL Inc.</i>, 24 F.C.C.2d 305, 306 (1970), in which the Commission explained that it "must be circumspect in releasing" confidential materials and that "reasonable necessity for petitioner's having the information" is an "elemen[t]" of the "persuasive showing" inquiry.</p>
		<p>"The Commission is not disposed to authorize disclosure of information submitted in confidence on the chance that it might be helpful to a petitioner in proving his case, but insists upon a showing that the information is a necessary link in a chain of evidence that will resolve a public interest issue. <i>Sioux Empire Broadcasting Co.</i>, 10 F.C.C.2d 132, 134 (1967). While we have recognized that there can be circumstances where disclosure of the financial reports of broadcast licensees is appropriate as being relevant to the issues in the matter, care must be taken to avoid a widespread breach of the historically confidential treatment accorded such information. To release annual financial reports, we require a 'persuasive showing,' whose adequacy depends on such elements as 'the reasonable necessity for petitioner's having the information, the position of the station in the proceeding involved, the inability to obtain the requested information from other sources, and the relevancy and materiality of the information sought.'" 31 F.C.C.2d at 558-59.</p>	

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<p><i>Confidential Information Policy</i>, 13 FCC Rcd 24816 (1998)</p>	<p>The <i>Confidential Information Policy</i> “cites <i>Kannapolis</i> and two other cases, <i>Thomas N. Locke</i> and <i>Robert J. Butler</i> . . . for examples of the application of the ‘persuasive showing’ standard. The discussions in those three decisions are evidence that the balancing factors described in the text provided the basis of the Commission’s decisions, and that a showing of a ‘necessary link in a chain of evidence’ was not an additional requirement on top of those factors.”</p>	<p>“As discussed, the Commission’s rules provide for the disclosure of Exemption 4 material if a ‘persuasive showing’ is made. Consistent with the Supreme Court’s decision in <i>FCC v. Schreiber</i>, the rules also contemplate that the Commission will engage in a balancing of the interests favoring disclosure and non-disclosure. In balancing these interests, the Commission has been sensitive to ensuring that the fulfillment of its regulatory responsibilities does not result in the unnecessary disclosure of information that might put its regulatees at a competitive disadvantage. Accordingly, the Commission generally has exercised its discretion to release publicly information falling within FOIA Exemption 4 only in very limited circumstances, such as where a party placed its financial condition at issue in a Commission proceeding, or where the Commission has identified a compelling public interest in disclosure. Even in such circumstances, the Commission does not automatically authorize public release of such information. Rather, the Commission has adhered to a policy of not authorizing the disclosure of confidential financial information ‘on the mere chance that it might be helpful, but insists upon a showing that the information is a necessary link in a chain of evidence’ that will resolve an issue before the Commission.” 13 FCC Rcd at 24822-23.</p> <p>Footnote 37, immediately following the paragraph quoted above, states: “<i>Classical Radio for Connecticut, Inc.</i>, 69 F.C.C.2d 1517, 1520 n.4 (1978) (<i>Classical Radio</i>) (citing <i>Sioux Empire Broadcasting</i></p>	<p>The Order’s analysis of the <i>Confidential Information Policy</i> omits any discussion of paragraph 8 of the <i>Confidential Information Policy</i>, which provides a detailed explanation of the “persuasive showing” standard and several illustrations of the “necessary link” requirement embedded in it. For example, the Order fails to mention that even when “the Commission has identified a compelling public interest in disclosure,” it “does not automatically authorize public release of [confidential] information” but rather applies the “necessary link” test. 13 FCC Rcd at 28822-23.</p> <p>The Order also does not mention or assess several of the decisions cited in footnote 37 of the <i>Confidential Information Policy</i> that illustrate how the “necessary link” requirement works in practice. For example, the Order does not mention <i>John L. McGrew</i>, 10 FCC Rcd 10574, (1995), in which the Commission explained that “even when information is critical to resolution of a public interest issue, the competitive threat posed by widespread disclosure under the FOIA may outweigh the public benefit in disclosure.” Nor does the Order acknowledge the Wireless Bureau’s decision in <i>Petition of Public Utility Commission, State of Hawaii</i>, 10 FCC Rcd 2881, 2887 (1995), which ordered disclosure not to the public, but under a protective order, and did so only after finding that the materials in question were “directly relevant” and “of ‘critical significance” to the proceedings. The <i>Confidential Information Policy</i> quoted this “critical significance” passage, which</p>

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		<p>Company, 10 F.C.C.2d 132 (1967)); accord, <i>Letter from Kathleen M. H. Wallman to John L. McGrew</i>, 10 FCC Rcd 10574, 10575 (Com. Car. Bur. 1995) (<i>McGrew Letter</i>) (citing <i>Classical Radio</i>), app. for rev. pending; see also <i>Petition of Public Utility Commission, State of Hawaii</i>, 10 FCC Rcd 2881, 2888 (Wireless Bur. 1995) (<i>Hawaii II</i>) (information must be directly relevant to a required determination), modified on other grounds 10 FCC Rcd 3984 (Wireless Bur. 1995) (<i>Hawaii III</i>); <i>Robert J. Butler</i>, 6 FCC Rcd 5414, 5418 (1991) (<i>Butler</i>); <i>American Telephone and Telegraph Co.</i>, 5 FCC Rcd 2464 (1990) (quoting AT&T, FOIA Control No. 88-190 (CCB Nov. 23, 1988) distinguishing between material of 'critical significance' and data providing a 'factual context' for the consideration of broad policy issues and concluding with respect to the latter the prospect of competitive harm likely to flow from release outweighs value of making information available)."</p> <p>"We believe, however, that the determinations of whether the persuasive showing standard has been met should continue to be made on a case-by-case basis. A case-by-case determination is appropriate because it requires a balancing of, inter alia, the type of proceeding, the relevance of the information, and the nature of the information. The Commission's current rules contemplate that the Commission will engage in a balancing of the public and private interests when determining whether the 'persuasive showing' standard has been met. That balancing may well take into account the</p>	<p>originally appeared in <i>American Telephone and Telegraph Co.</i>, 5 FCC Rcd 2464 (1990), another decision not discussed in the Order's analysis of the "necessary link" requirement.</p> <p>The Order likewise omits any discussion of decisions cited in footnote 62 of the <i>Confidential Information Policy</i> as examples of the Commission's case-by-case application of the "persuasive showing" standard. For example, the Order does not mention <i>Atianza Fed. de Mercedes v. FCC</i>, which states that a "persuasive showing "must include 'the reasonable necessity for petitioner's having the information, the position of the station in the proceeding involved, the inability to obtain the requested information from other sources, and the relevancy and materiality of the information sought.'" 539 F.2d 732, 738 (D.C. Cir. 1976) (quoting <i>Sioux Empire</i>, 10 F.C.C.2d at 134) (emphases added).</p> <p>Finally, the Order overlooks aspects of the <i>Butler</i> and <i>Locke</i> decisions which show that a "necessary link" requires more than mere relevance.</p>

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<p><i>Thomas N. Locke</i>, 8 FCC Rcd 8746 (1993)</p>	<p>The Order initially characterizes <i>Locke</i> as “evidence that the balancing factors described in the text provided the basis of the Commission’s decisions, and that a showing of a ‘necessary link in a chain of evidence’ was not an additional requirement on top of those factors.”</p> <p>A subsequent passage describes <i>Locke</i> as “concluding that ‘overall public interest would not be served’ by releasing audit information where requestor made only general allegations that information was of</p>	<p>type of proceeding involved, whether the requestor is a party to the proceeding, and may also be affected by other factors, such as whether it is feasible to use a protective order.” 13 FCC Rcd at 24828.</p> <p>Footnotes 62 and 63, which follow the first and second sentences of the passage immediately above, state as follows:</p> <p>“62. See, e.g., <i>Butler</i>, 6 FCC Rcd at 5418, citing <i>Western Union Telegraph Co.</i>, 2 FCC Rcd 4485, 4487 (1987); <i>Knoxville Broadcasting Corp.</i>, 87 F.C.C.2d 1099, 1105 (1981); and <i>Classical Radio</i>, 69 F.C.C.2d at 1520 n.4; see also <i>Alianza Federal de Mercedes v. FCC</i>, 539 F.2d 732, 737-38 & n.15 (D.C. Cir. 1976); <i>RCA Global Communications, Inc. v. FCC</i>, 524 F. Supp. 579, 584 & n.8 (D. Del. 1981); <i>NTV Enterprises, Inc.</i>, 62 F.C.C.2d 722, 723 (1976); and <i>Amaturo Group, Inc.</i>, 69 F.C.C.2d 1, 2 (1976).”</p> <p>“63. See, e.g., <i>Thomas N. Locke</i>, 8 FCC Rcd 8746 (1993); <i>Butler</i>, 6 FCC Rcd at 5418; and <i>Kannapolis</i>, 80 F.C.C.2d at 308, for examples of the application of the ‘persuasive showing’ standard.”</p>	
		<p>“Locke has not made a persuasive showing that the documents should be released despite their confidentiality. . . . Our general policy . . . is to maintain the confidentiality of audit records except in unusual circumstances. [citations omitted] One purpose of this policy is to ensure that carriers continue to voluntarily assist the Commission in the audit process not only by permitting the examination of existing records, but also by allowing employee interviews and preparing new documents</p>	<p><i>Locke</i> does not suggest, much less conclude, that the “necessary link” requirement is not “an additional requirement on top of” the balancing factors. Rather, it describes the audits at issue as “necessary materials,” and recites a “general policy” against releasing confidential materials “except in unusual circumstances.” 8 FCC Rcd at 8746-47 & n.3. <i>Locke</i> also cites <i>Martha H. Platt</i>, 5 FCC Rcd 5742 (1990), discussed below. <i>Locke</i> did not replace the “necessary link”</p>

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<p><i>Robert J. Butler</i>, 6 FCC Rcd 5414 (1991)</p>	<p>great importance in devising a national policy for the telephone companies.”</p> <p>The Order discusses <i>Butler</i> twice. The first discussion characterizes <i>Butler</i> as standing for the proposition “that the balancing factors described in the text provided the basis of the Commission’s decisions, and that a showing of a ‘necessary link in a chain of evidence’ was not an additional requirement on top of those factors.”</p> <p>The second discussion summarizes <i>Butler</i> as “holding that, even if the requested information were relevant, the proceeding in which it would be used might never occur; that the information did not bear on and was unrelated to a legitimate issue in that proceeding; and that as a practical matter it was difficult to see how the information could be at issue; also holding that disclosure would harm international negotiations.”</p>	<p>which otherwise would not be created. [citation omitted] Given these strong policy considerations, as well as the potential competitive harm that would occur from disclosure, we conclude that the overall public interest would not be served by allowing public inspection of these documents.” 8 FCC Rcd. at 8746-47.</p> <p>Footnote 6, which follows the final sentence in the passage above, states: “<i>Compare New York Telephone Co.</i>, 5 FCC Rcd 874 (1990); <i>National Exchange Carrier Association</i>, 5 FCC Rcd 7184 (1990) (Commission released summary audit information contained in FCC audit reports that served as the basis for enforcement proceedings in which the ratepayers had a vital interest).”</p>	<p>requirement with an “overall public interest” test. Rather, it held that the petitioner had not shown the “unusual circumstances” necessary to disclose confidential audit records and contrasted the petitioner’s request with a prior case in which “ratepayers had a <i>vital</i> interest” in such records. 8 FCC Rcd at 8746 & n.6 (citing <i>National Exchange Carrier Association</i>, 5 FCC Rcd 7184 (1990)).</p>
<p><i>Robert J. Butler</i>, 6 FCC Rcd 5414 (1991)</p>	<p>The Order discusses <i>Butler</i> twice. The first discussion characterizes <i>Butler</i> as standing for the proposition “that the balancing factors described in the text provided the basis of the Commission’s decisions, and that a showing of a ‘necessary link in a chain of evidence’ was not an additional requirement on top of those factors.”</p> <p>The second discussion summarizes <i>Butler</i> as “holding that, even if the requested information were relevant, the proceeding in which it would be used might never occur; that the information did not bear on and was unrelated to a legitimate issue in that proceeding; and that as a practical matter it was difficult to see how the information could be at issue; also holding that disclosure would harm international negotiations.”</p>	<p>“As a final matter, we address ARINC’s related claim that the documents should be disclosed as a matter of fundamental fairness and due process, because the information concerns ‘critical issues’ in the MSS licensing proceeding. The Commission, pursuant to section 0.457(d)(2)(i) of the rules, may disclose material that is within Exemption 4 upon a ‘persuasive showing.’ Pursuant to this rule, the Commission’s long standing policy is that Exemption 4 materials will not be made available on the mere chance that the information might be interesting or helpful in an FCC proceeding. Rather, the Commission insists on a showing that the information is a necessary link in a chain of evidence that will resolve a public interest issue. <i>Western Union Telegraph Co.</i>, 2 FCC Rcd 4485, 4487 (1987); <i>Knoxville</i></p>	<p>Nowhere does <i>Butler</i> say that the “necessary link” requirement is supplanted by a free-form balancing test. To the contrary, <i>Butler</i> recited the “necessary link” test and denied a disclosure request because the materials in question were not “necessary to the resolution of any issues . . . in any currently pending licensing proceeding.” 6 FCC Rcd at 5418 (emphasis added).</p> <p>The Order’s summary does not acknowledge the basis for the Commission’s decision: that the requested materials were not “necessary to the resolution of any issues . . . in any currently pending licensing proceeding.” 6 FCC Rcd at 5148 (emphasis added).</p>

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<p><i>Classical Radio for Connecticut, Inc.</i>, 69 F.C.C.2d 1517 (1978)</p>	<p>The Order states that “in <i>Classical Radio Connecticut</i> . . . the Commission found that some of the information sought would not have more than ‘marginal evidentiary value,’ while also holding that under ‘Commission policy and precedent,’ the licensee’s “interest in retaining the confidentiality of this financial information is outweighed by having its having placed these matters in issue in this proceeding.””</p>	<p><i>Broadcasting Corporation</i>, 87 F.C.C.2d 1099, 1105 (1981); <i>Classical Radio for Connecticut, Inc.</i>, 69 F.C.C.2d 1517, 1520 n.4 (1978). . . .</p> <p>“Indeed, as a practical matter, it is difficult to envision how the detailed technical decisions pertaining to an actual coordination could be at issue in an initial licensing proceeding. Decisions concerning coordination necessarily are dependent on the proposed plans of other countries and concessions that may be made by them in the actual negotiating process. Thus, as the Commission recognized when it issued AMSC’s original authorization, its MSS licensing decision could not be based on matters that might transpire during the ‘dynamic’ process of actual negotiations. We conclude, therefore, that ARINC has not made a persuasive showing that the information at issue is necessary to the resolution of any issues of ‘technical superiority,’ or any other issues, that might be addressed in any currently pending licensing proceeding.” 6 FCC Rcd at 5418.</p> <p>“Therefore, without reference to the appraisal, we do not think the requested data would have more than marginal evidentiary value for CRC. The stations’ appraisal, however, is not contained in the Commission’s records, and we have no authority to require its disclosure at this stage of the proceeding. Consequently, we do not at this time see the reasonable necessity of disclosing confidential records pertaining to the AM station.” 69 F.C.C.2d at 1519-20.</p> <p>Footnote 4, which immediately follows that</p>	<p>The Order’s discussion of <i>Classical Radio for Connecticut</i> is incomplete because it does not mention the Commission’s conclusion that the petitioner was not entitled to disclosure of “confidential records pertaining to the AM station” because there was no “reasonable necessity of disclosing” them. 69 F.C.C.2d at 1520. As to the records that were ordered to be disclosed, the Order does not mention that the party that owned those records, Ten Eighty, “[d]id not object” to their disclosure. <i>Id.</i> at 1521. Finally, <i>Classical</i></p>

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<p><i>Applications of Eider C. Stangland & Wallace L. Stangland, D.B.A. Sioux Empire Broad. Co.,</i> 10 F.C.C.2d 132 (1967)</p>	<p>In <i>Sioux Empire</i>, “the Commission held that it doubted that some of the information sought was relevant or material and why, if so, it could not be obtained from public Commission information, and that other information sought was not ‘necessary, relevant, or material.’”</p>	<p>paragraph, states: “The Commission will not authorize the disclosure of confidential financial information on the mere chance that it might be helpful but insists upon a showing that the information is a necessary link in a chain of evidence that will resolve a public interest issue. <i>Sioux Empire Broadcasting Co.</i>, 10 F.C.C.2d 132 (1967).”</p> <p>“It would appear that any danger of competitive harm resulting from disclosure of this information would be solely to Ten Eighty, present licensee of the station. . . . Under Commission policy and precedent, however, Ten Eighty’s interest in retaining the confidentiality of this financial information is outweighed by its having placed these matters in issue in this proceeding. It is noteworthy in this regard that Ten Eighty does not object to the release of its more recent financial records, which are presumably at least of equal interest to a competitor. Consequently, we will permit inspection of financial records pertaining to WTIC-FM for the period 1971-1974.” 69 F.C.C.2d at 1521.</p> <p>“The Commission’s recently adopted rules implementing the Public Information Act of 1966, and, specifically, section 0.457(d)(1)(i) thereof, preserve the requirement for holding such material in confidence unless ‘a persuasive showing as to the reasons for inspection’ is made. <i>Multivision Northwest, Inc.</i>, 8 F.C.C.2d 892 (1967). In the <i>Multivision</i> case the Commission also indicated some of the criteria it would evaluate in determining whether a ‘persuasive showing’ had been made; e.g., the reasonable necessity for</p>	<p><i>Radio</i> cited and relied upon the <i>Sioux Empire</i> formulation of the “persuasive showing” standard, <i>see id.</i> at 1520 n.4, which requires more than mere relevance.</p>
			<p>The Order’s summary of <i>Sioux Empire</i> omits <i>Sioux Empire</i>’s (i) consideration of “the reasonable necessity for petitioner’s having the information,” (ii) conclusion that there was “necessity of destroying the [records’] confidentiality,” and (iii) determination that the petition was “deficient in establishing necessity for obtaining the information.” 10 F.C.C.2d at 134-35.</p> <p>The Order does not mention <i>Sioux Empire</i>’s delegation to a hearing officer to decide future disclosure requests. <i>Sioux Empire</i></p>

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		<p>petitioner's having the information, the position of the station in the proceeding involved, the inability to obtain the requested information from other sources, and the relevancy and materiality of the information sought. . . .</p> <p>"[W]e are not disposed to authorize disclosure of information submitted in confidence on the chance that it might be helpful to a petitioner in proving his case, but will insist upon a showing that the information is a necessary link in a chain of evidence that will resolve the public-interest issue. KISD's petition does not meet that test.</p> <p>"With respect to the request for disclosure of the annual financial reports for the years 1947-60 for station KIHQ, . . . the deficiencies are readily apparent. First, we have doubts, which KISD's showing has in no way dissipated, that financial information from 7 to 17 years old would be relevant or material in determining whether Sioux Falls can presently support more than three standard broadcast stations. Further, if such financial information is relevant and material, we see no reason why the composite figures for the Sioux Falls stations published by the Commission for the years involved would not serve KISD's purpose. <i>Multivision Northwest, Inc.</i>, 8 F.C.C.2d 892 (1967). . . . In any event, there appears to be no necessity of destroying the confidentiality of the financial reports to establish that KIHQ was operated at a loss. . . .</p> <p>"With respect to its request for the disclosure of the revenues of KELO-FM for</p>	<p>directed the officer to determine whether "the information is relevant and material . . . and is a necessary link in a chain of evidence relating to the [pending] issue." 10 F.C.C.2d at 135 (emphasis added). This conjunctive formulation shows that it is not enough for a confidential record to be "relevant," or even "relevant and material." Rather, disclosure is warranted only if the record is "relevant and material" <i>and</i> meets the "necessary link" requirement.</p>

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<p><i>The Western Union Tel. Co.</i>, 2 FCC Rcd 4485 (1987)</p>	<p>The requestor in <i>Western Union</i> “argued only that the confidential audit information sought would ‘shed light.’”</p>	<p>1965 and 1966, we find that KISD’s showing in its petition is deficient in establishing necessity for obtaining the information and in its efforts to obtain the information from other sources. . . . On this showing we cannot conclude that the information sought would be necessary, relevant, or material in the hearing, especially since the issue relates to the adequacy of revenues to support standard broadcast stations. . . .</p> <p>“We will delegate to the hearing examiner the authority to permit disclosure of the requested financial information to the extent that he finds, on the basis of the hearing record, that the information is relevant and material, cannot otherwise be obtained, and is a necessary link in a chain of evidence relating to the Carroll issue.” 10 F.C.C.2d 132, 134-35.</p>	
		<p>“The Commission has previously disclosed information which qualifies for exemption 4 protection in certain limited circumstances where a party has placed its financial condition at issue in a Commission proceeding or where the Commission has identified a compelling public interest in disclosure. <i>Kannapolis Television Co.</i>, 80 F.C.C.2d 307 (1980); <i>MCI Telecommunications Corp.</i>, FCC 85-266 (released May 17, 1985). In such cases, however, we adhere to a policy whereby: [t]he Commission will not authorize the disclosure of confidential financial information on the mere chance that it might be helpful but insists upon a showing that the information is a necessary link in a chain of evidence that will resolve a public</p>	<p>The quoted language has no bearing on the Order’s conclusions that a “necessary link” demands no more than mere relevance, or that the “necessary link” requirement is somehow supplanted by a balancing test. <i>Western Union</i> cites and applies the “necessary link” requirement. See 2 FCC Rcd at 4487. In doing so, the Commission also pointed out that the confidential records “[d]id not necessarily relate” to the question at hand. While <i>Western Union</i> concluded that disclosure would not provide “specific and concrete public benefits,” this language does not imply that the “necessary link” element is unnecessary. Rather, it suggests that since the lower bar of anticipating “specific and concrete public benefits” by the release of the information</p>

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		<p>interest issue. <i>Classical Radio for Connecticut, Inc.</i>, 69 F.C.C.2d 1517, 1520 n.4 (1978).</p> <p>“WU claims only that the requested information would shed light on the effect of SFAS-87 on pension costs and is relevant to the evaluation of the local exchange carriers’ revenue requirements claimed in connection with their annual 1987 access tariff filings now pending before the Commission as well as the issue of the need for further action by the Commission. Although we appreciate the requestor’s interest in reviewing the local exchange carriers’ information in connection with the annual 1987 access tariff filings and other related proceedings, we do not believe that the information at issue provides a necessary link for the specific resolution of a public interest issue. SFAS-87 is an accounting and reporting standard that does not necessarily relate to pension plan funding levels which have been traditionally recognized for ratemaking purposes. In light of Exemption 4’s recognition of the legitimate business concerns of parties providing internal company records to federal agencies, we must insist that specific and concrete public benefits be reasonably anticipated before properly exempt information will be released on a discretionary basis.” 2 FCC Red at 4487 (paragraph break added).</p>	<p>was not met, there was no need for the Commission to reach the question whether a “necessary link” existed.</p>
<p><i>TS Infosystems, Inc.</i>, 6 FCC Rcd 8 (1991)</p>	<p>The Order quotes the Commission’s statement in <i>TS Infosystems</i> that “Infosystems merely seeks to enhance its own competitive posture in future procurement activities.”</p>	<p>“The Commission has authorized public disclosure of information that is otherwise exempt from disclosure under the FOIA only where there is a sufficient showing that the information is a necessary link in a</p>	<p>The quoted language is irrelevant to the question whether the “persuasive showing” and “necessary link” requirements are satisfied by a showing of mere relevance, or supplanted by a free-form balancing test.</p>

Decision	How Footnote 133 Characterizes the Decision	Relevant Text	Reason Footnote 133's Characterization is Inaccurate
		<p>chain of evidence that will resolve a public interest issue. See <i>Western Union Telegraph Co.</i>, 2 FCC Rcd 4485, 4487 (1987); <i>Classical Radio of Connecticut, Inc.</i>, 69 F.C.C.2d 1517, 1520 n.4 (1978). Infosystems has not presented a compelling interest sufficient to justify public disclosure. Rather, Infosystems merely seeks to enhance its own competitive posture in future procurement activities.” 6 FCC Rcd 8 n.5.</p>	<p><i>TS Infosystems</i> cited and applied the “necessary link” requirement without so much as <i>mentioning</i> a balancing test or relevance standard. Moreover, the Order does not acknowledge the Commission’s observation in <i>TS Infosystems</i> that the requestor had not “presented a compelling interest sufficient to justify public disclosure.” 6 FCC Rcd 8 n.5.</p>
<p><i>Martha H. Platt</i>, 5 FCC Rcd 5742 (1990)</p>	<p>The Order characterizes <i>Platt</i> as “finding no compelling public interest to justify release under FOIA for confidential audit reports on ground that the information would ‘shed light.’”</p>	<p>“Finally, we concur with the Bureau that there is no compelling public interest sufficient to justify release of the audit reports. Platt claims that the requested information would “shed light” on both the extent to which BOCs are currently abiding by requirements to separate the costs of their regulated and unregulated activities and the extent to which the Commission is willing and able to monitor the BOCs activities. The Commission, however, will not authorize the public disclosure of information that is otherwise exempt from disclosure under FOIA on the mere chance that it might be interesting or helpful; rather, it insists on a showing that the information is a necessary link in a chain of evidence that will resolve a public interest issue. <i>Classical Radio for Connecticut, Inc.</i>, 69 F.C.C.2d 1517, 1520 n.4 (1978); <i>Western Union Telegraph Co.</i>, 2 FCC Rcd at 4487. To do otherwise would undermine the purpose of FOIA’s exemptions.” 5 FCC Rcd at 5743.</p>	<p><i>Platt</i> undermines the Order’s mere relevance standard. Evidence is “relevant” if it “sheds light” on an issue. See, e.g., Oxford English Dictionary Online, http://www.oed.com/view/Entry/161893 (accessed Sept. 24, 2015) (defining relevant as “[b]earing on or connected with the matter in hand”). Yet, in <i>Platt</i>, an allegation that the requested records “shed light” on pending issues was insufficient; as the Commission pointed out, disclosing confidential materials on such a relaxed basis “would undermine the purpose of FOIA’s exemptions.” 5 FCC Rcd at 5743.</p>

CERTIFICATE OF SERVICE

I, Mace Rosenstein, hereby certify that on this 13th day of October, 2015, I caused true and correct copies of the foregoing Petition for Reconsideration to be served by Federal Express and electronic mail to the following:

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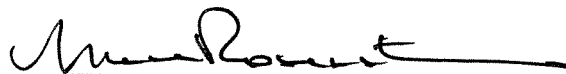
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