

DC Circ. Shoots Down FCC Merger-Review Disclosure Order

By **Bill Donahue**

Law360, New York (May 8, 2015, 12:36 PM EDT) -- CBS Corp. and other media giants won a ruling Friday tossing out an order from the Federal Communications Commission that would have disclosed their confidential business information during the agency's review of the AT&T Inc.-DirecTV and Comcast Corp.-Time Warner Inc. mergers.

The commission's decision to hastily let direct competitors see the sensitive materials — information on the networks' programming negotiations and contracts with the pay-TV providers — was both “substantively and procedurally flawed,” the court wrote.

The appeals court said the materials — Walt Disney's ESPN contract with Comcast, for instance — would certainly be helpful in weighing whether the mega-mergers would be good for consumers, but that the agency had failed to show that they were sufficiently “necessary” that they could be disclosed to competing companies.



(Credit: Getty)

“It would ... be a simple matter for, say, Fox to peruse those documents, figure out what Disney charges for ESPN, and then price its own sports channel accordingly,” the court wrote. “Not having signed up for that exposure, petitioners think it unfair and, more important for our purposes, unlawful.”

Owing to that kind of the risk, the FCC must “justify” that kind of disclosure by showing the information is “necessary” to the commission’s review process, the court said, not just helpful.

“Nowhere does [the FCC] make the jump from useful or relevant or central to necessary,” the appeals court said.

A spokesman for the FCC didn't immediately return a request for comment on the ruling.

The ruling caps off a major side story to the FCC's high-profile probes into the AT&T-DirecTV deal and the now-dead Comcast-Time Warner deal. CBS, Disney, 21st Century Fox Inc. and many other media

companies said the November 2014 decision was unprecedented, and they quickly won a stay of the disclosures to allow the D.C. Circuit to review it.

Agreeing with that argument, the appeals court said Friday that the FCC not only had failed to justify the need for the materials themselves, but also why it needed them so quickly. The agency's November order gave CBS, Disney and the other challengers five days to protest the disclosures.

"Aggrieved parties like petitioners have only five days to challenge the bureau's decision to disclose their information, and if they fail to convince the commission or a court either to stay or to overturn that decision, they are out of luck," the court wrote. "The order thus amounts to a substantive and important departure from prior commission policy."

The FCC said it implemented the change to prevent the reviews of the high-profile mergers from being delayed, but the appeals court said Friday that the agency failed to explain that change, particularly "why expedited review is so important here given that it has followed the old rule through dozens of merger reviews over the last 15 years."

The appeals court was careful to note that it wasn't weighing in either the validity of the disclosures or time frame, but said the agency would need to offer significantly more evidence to justify either of them.

The television programmers and media companies involved in the challenge also included Scripps Networks Interactive Inc., Time Warner Inc., Univision Communications Inc. and Viacom Inc.

The petitioners are represented by Robert A. Long, Mace Rosenstein, Andrew Soukup, Kevin King and Ashley Anguas Nyquist of Covington & Burling LLP.

The FCC is represented in-house by Jacob M. Lewis and David Morris Gossett.

The case is CBS Corp. v. FCC, case number 14-1242, in the U.S. Court of Appeals for the District of Columbia Circuit.

--Editing by Rebecca Flanagan.