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**REDACTED—FOR PUBLIC INSPECTION**

January 29, 2019

***By ECFS***

Marlene Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

Re: **Applications of T-Mobile US, Inc. and Sprint Corporation for Consent to Transfer Control of Licenses and Authorizations, WT Docket No. 18-197**

Dear Ms. Dortch:

In accordance with the *Protective Order* in the above-captioned proceeding, DISH Network Corporation (“DISH”) submits the public, redacted version of the enclosed motion.<sup>1</sup> DISH has denoted with **{{BEGIN HCI END HCI}}** where Highly Confidential Information has been redacted. A Highly Confidential version of this filing is being simultaneously filed with the Commission and will be made available pursuant to the terms of the *Protective Order*.

Please contact me with any questions.

Respectfully submitted,

\_\_\_\_\_  
/s  
Pantelis Michalopoulos  
Andrew Golodny  
*Counsel to DISH Network Corporation*

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<sup>1</sup> Applications of T-Mobile US, Inc. and Sprint Corporation for Consent to Transfer Control of Licenses and Authorizations, *Protective Order*, WT Docket No. 18-197, DA 18-624 (June 15, 2018).

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

In the Matter of )  
)  
Applications of T-Mobile US, Inc. ) WT Docket No. 18-197  
)  
and )  
)  
Sprint Corporation )  
)  
Consolidated Applications for Consent to )  
Transfer Control of Licenses and )  
Authorizations )  
)

**CHALLENGE TO CONFIDENTIALITY DESIGNATIONS**

DISH Network Corporation (“DISH”) hereby challenges certain confidentiality designations made by the Applicants in the above-referenced proceeding. The Applicants have made improper and overly broad use of the “Highly Confidential” designation under the Protective Order.<sup>1</sup> This over-classification has placed fundamental issues about the proposed merger outside the realm of public discussion, depriving the American people and relevant decision-makers of key facts about this merger.

The Protective Order explains that the Commission’s confidentiality framework is bounded by “the general right of the public, and our desire for the public, to participate in this proceeding in a meaningful way.”<sup>2</sup> The Applicants are denying the public this right by applying the Highly Confidential designation to information that does not fall into any of the categories of

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<sup>1</sup> See Applications of T-Mobile US, Inc. and Sprint Corporation for Consent to Transfer Control of Licenses and Authorizations, *Protective Order*, WT Docket No. 18-197, DA 18-624 (June 15, 2018) (“Protective Order”).

<sup>2</sup> *Id.* ¶ 1.

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information permitted to be withheld from public view, with the apparent objective of concealing information that is unfavorable to them rather than information that is genuinely confidential.<sup>3</sup>

The Applicants have:

- Selectively disclosed excerpts from their internal documents that support their arguments, even as other excerpts of the same document refute them. For example, the Applicants have quoted in public from a highly confidential document that discusses limitations of porting data, while the same document also includes **{{BEGIN HCI  
END HCI}}**
- Designated as Highly Confidential all of their own economists' estimates of price increases, marginal cost savings, quality improvements, and consumer willingness to pay for such improvements. None of these estimates, and the estimates made by DISH's and other parties' economists in rebuttal can be reverse engineered to reveal any Highly Confidential current or projected information about the Applicants' business.
- Designated their Cornerstone Report as Highly Confidential, when all but nine of its 87 exhibits were created using third-party commercial sources.
- Designated material as Highly Confidential in their Compass Lexecon Declaration that had been previously submitted in the public record by DISH, because it was derived exclusively from public sources in the Brattle Declaration.

On January 9, DISH wrote a letter to the Applicants in an attempt to resolve these issues without involving the Commission. DISH explained its concern with the Applicants' abuse of the Highly Confidential designation, and requested that the Applicants take steps to cure this over-classification. DISH has not received a response to its letter.

When objecting to another party's request for confidential treatment, the Applicants wrote that the Commission's confidentiality rules "are not intended to serve [as] a cloak to screen Applicants from general statements concerning the effects of their merger" or "to prevent

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<sup>3</sup> See *id.*, Appendix A.

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facts or events in the public domain from being disclosed.”<sup>4</sup> These statements should be applied to the Applicants themselves. DISH therefore moves under paragraph four of the Protective Order<sup>5</sup> that the Commission order the Applicants to designate as public all information improperly withheld by the Applicants, including without limitation:

- Information from the public record in the Compass Lexecon Declaration;
- Estimates of outside economic experts describing price effects expected from the merger;
- Almost the entirety of the Cornerstone Report; and
- Any other information designated as highly confidential that is not specifically covered by Appendix A of the Protective Order.

**I. The Applicants Should Remedy Their Overuse of the Highly Confidential Designation**

The Protective Order is clear. A submitting party “may designate as Highly Confidential only those types of information described in Appendix A.”<sup>6</sup> Appendix A lists ten categories of information that may be designated as “Highly Confidential.”

The Applicants have regularly designated information as “Highly Confidential” that does not fall into any of these categories. If the Applicants wished to expand the scope of Appendix A to include additional categories of information that they believe should be classified as Highly Confidential, they could have filed such a request with the Commission.<sup>7</sup> DISH is not aware of any such request.

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<sup>4</sup> Letter from Nancy J. Victory and Regina M. Keeney to Marlene H. Dortch, WT Docket No. 18-197, Objection to Confidentiality Designations by Comcast Corporation at 2 (Dec. 12, 2018).

<sup>5</sup> Protective Order ¶ 4 (Challenge to Designation).

<sup>6</sup> *Id.* ¶ 3.

<sup>7</sup> *See id.* ¶ 3 (“If a submitting Party believes that the descriptions contained in Appendix A should be revised, the Submitting Party shall submit a request to amend Appendix A.”).

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For example, the study performed by Cornerstone Research contains 87 exhibits, *all* of which were withheld from public view as “Highly Confidential.” However, all but nine of these exhibits were created using third-party data from commercial sources such as {{BEGIN HCI

**END HCI}}**<sup>8</sup> Exhibits relying on or derived from these third-party sources should, at most, be designated as Confidential, not Highly Confidential.<sup>9</sup> The Applicants agree that third-party copyrighted materials should be Confidential.<sup>10</sup> However, to the extent that the Cornerstone economists have manipulated the third-party data so that it is now their work product, the exhibits and associated explanatory text should be public.

For example, Cornerstone Exhibit 36 is a high-level summary of Cornerstone’s merger simulation. These aggregated figures do not reflect either the third-party data source or the Applicants’ own internal analysis. The exhibit is therefore outside the purview of a “Highly Confidential” designation. The Protective Order covers only “*disaggregated* quantification of merger integration benefits or efficiencies (including costs, benefits, timeline, and risks of the

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<sup>8</sup> See *e.g.*, Cornerstone Exhibits 1, 2, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 77, 78, 79, 80, 81, 85. That even the source names for each exhibit are designated highly confidential shows the extent of the over-classification. See John Asker, Timothy F. Bresnahan, and Kostis Hatzitaskos, *Economic Analysis of the Proposed Sprint/T-Mobile Merger* (Nov. 6, 2018), Attachment A to Letter from Nancy Victory, Counsel for T-Mobile, to Marlene Dortch, FCC, WT Docket No. 18-197 (“Cornerstone Report”).

<sup>9</sup> See Protective Order ¶ 2, defining “Confidential Information.”

<sup>10</sup> See Letter from Nancy J. Victory, Counsel to T-Mobile, to Marlene Dortch, FCC, WT Docket No. 18-197, at n.4 (Dec. 18, 2018) (“Applicants are not asserting Highly Confidential status for any documents that have been publicly released (which would be Public) or for third party materials that are copyrighted (which would be considered Confidential).”).

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integration).”<sup>11</sup> Post-announcement analysis by outside economists, created outside the ordinary course of business solely for the purpose of having a transaction approved by regulators, should not be considered “most sensitive business data” as contemplated by the Protective Order. The public should be allowed to review and scrutinize the Applicants’ claims about the aggregate effects of the proposed merger.

As the Applicants explained in objecting to certain Comcast designations in this proceeding:

There are important reasons for the Commission to have and enforce these restraints on the public’s and Participants’ access to facts and data that meet defined standards for competitively sensitive information. However, those important considerations are not intended to serve [as] a cloak to screen Applicants from general statements concerning the effects of their merger or from characterizations of the facts and events in which the Applicants are participants. Nor are the confidentiality rules intended to prevent facts or events in the public domain from being disclosed.<sup>12</sup>

DISH agrees.

The effect of the Applicants’ over-designation has been to prevent outside counsel for the participants in this proceeding from telling their clients about the conclusions reached by the Applicants’ outside economists regarding the merger. The Applicants also share this concern; as they explained to Comcast in December:

The issue and its importance are heightened here because, under a Highly Confidential classification, outside counsel for the Applicants may not even disclose to their clients the nature of the general advocacy or the descriptions of past and alleged future conduct by the Applicants . . . To be clear, counsel for the Applicants are not seeking to share any competitively sensitive information with their clients, but rather to enable

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<sup>11</sup> Protective Order, Appendix A, Category No. 2 (emphasis added).

<sup>12</sup> Letter from Nancy J. Victory and Regina M. Keeney to Marlene H. Dortch, WT 18-197, Objection to Confidentiality Designations by Comcast Corporation at 2 (Dec. 12, 2018).

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responses to claims that have been made about the effects of the merger and the conduct of their clients.<sup>13</sup>

Again, DISH agrees.

The over-designations are not limited to the Cornerstone Report. The Applicants’ designations have even had the effect of *removing* information from the public domain. For example, the report of the Brattle Group (submitted with DISH’s Petition to Deny) contained two Highly Confidential tables, out of 36 tables and 15 figures.<sup>14</sup> Brattle used information from publicly available sources such as Commission reports, the ULS database, and securities filings in compiling these tables. When Compass Lexecon cited those *same* Brattle tables in its own declaration, however, it designated the information as Highly Confidential. For example, Table 1 of the Compass Lexecon Declaration is entitled “Critical Efficiencies Based on HBVZ Models”—and is based on information submitted publicly on pages 47-53 of the Brattle Declaration—but was subsequently designated as Highly Confidential by the Applicants.<sup>15</sup>

As another example, there is no reason for confidential treatment of most estimates made by the Applicants’ or DISH’s economic experts, including without limitation estimates of price increases, marginal cost savings, quality improvements, and consumer willingness to pay for such improvements.<sup>16</sup> None of these estimates can be “reverse engineered” to uncover any

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<sup>13</sup> *Id.*

<sup>14</sup> See Declaration of Joseph Harrington, Coleman Bazelon, Jeremy Verlinda, and William Zarakas, Exhibit B to Petition to Deny of DISH Network Corp., WT Docket No. 18-197 (Aug. 27, 2018).

<sup>15</sup> See Declaration of Compass Lexecon, Appendix F to Joint Opposition of T-Mobile and Sprint, WT Docket No. 18-197 (Sept. 17, 2018). See also Tables 13 and 14.

<sup>16</sup> See e.g., *id.*, Tables 1, 12, 13, 14, and 15; Reply Declaration of the Brattle Group, Exhibit 1 to Reply of DISH Network Corp., WT Docket No. 18-197, at Tables 1, 3, 4, 5, 6, 7, and 8 (Oct. 31, 2018).

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internal sensitive business data of the Applicants. For that reason, price increases and cost reductions or quality improvements estimated to result from the merger according to each side's experts should be in the public record.

The foregoing are merely examples. Over-classification pervades the Applicants' submissions in this proceeding. The Commission should require the Applicants to review their submissions in this proceeding and de-designate any materials that fall outside the categories listed in Appendix A of the Protective Order.

**II. The Applicants Have Waived Confidential Protection for Documents About the Use of Porting Data**

T-Mobile's December 14 *ex parte* letter publicly cites to 27 internal Sprint and T-Mobile documents that were produced as "stamped highly confidential documents."<sup>17</sup> Despite the public disclosure of key portions of these documents, the Applicants have taken the position that these documents (except for the portions quoted in the *ex parte*) continue to be "Highly Confidential" and remain out of public view. At a minimum, the documents referenced in the December 14 *ex parte* should now be considered public.

Because the Applicants have allowed quoted excerpts or summaries of the documents to become public, it is difficult to understand how the remainder of the documents can still come under the umbrella of the Protective Order. Publicizing some parts of a document while obfuscating other contrary information in the same document is not justified. As an example, Applicants cite to supposed limitations of porting data described in TMUS-FCC-01909049.<sup>18</sup>

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<sup>17</sup> See Mark Israel, Michael Katz, and Bryan Keating, *Additional Information Regarding the Estimation of Diversion Ratios* at 1, attached to letter from Nancy Victory to Marlene Dortch, WT Docket No. 18-197 (Dec. 14, 2018).

<sup>18</sup> See *id.* at 6 n.25.

But the letter fails to point out that document also includes **{{BEGIN HCI**

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**III. CONCLUSION**

DISH requests that the Commission act to cure these unduly broad classifications by requiring the Applicants to designate as public information initially classified as Highly Confidential, including without limitation: information from the public record in the Compass Lexecon Declaration; estimates of outside economic experts in connection with the price effects expected from the merger; almost the entirety of the Cornerstone Report; and any information that is not specifically covered by Appendix A of the Protective Order.

Respectfully submitted,

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<sup>19</sup> TMUS-FCC-01909049 at 01909051.

<sup>20</sup> *S.E.C. v. Lavin*, 111 F.3d 921, 933 (D.C. Cir. 1997).

