

February 5, 2019

VIA ECFS

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 Twelfth Street, S.W.  
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:

T-Mobile US, Inc. (“T-Mobile”) and Sprint Corporation (“Sprint” and, collectively with T-Mobile, “Applicants”) hereby respond to the challenge by DISH Network Corporation (“DISH”) to certain confidentiality designations made by the Applicants.<sup>1</sup> DISH asserts that the Applicants have made overly broad use of the “Highly Confidential” designation under the terms of the Protective Order adopted in this proceeding.<sup>2</sup> Without much analysis or specificity, DISH requests that the Commission designate as public: “[i]nformation from the public record in the Compass Lexecon Declaration; [e]stimates of outside economic experts describing price effects expected from the merger; [a]lmost 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.”<sup>3</sup> DISH also argues that the Applicants have waived confidential protection for the entirety of information in a document if some information in the document has been made public. As explained below, DISH’s claims are flatly wrong. The Applicants’ Highly Confidential Information designations are consistent with both the plain language of the Protective Order and with past precedent.<sup>4</sup>

DISH’s stated basis for standing to be a petitioner in this proceeding is as a competitor to T-Mobile and Sprint, and in the future to New T-Mobile.<sup>5</sup> The Applicants’ Public Interest Statement also recognizes DISH as having a formidable cache of spectrum and as having

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<sup>1</sup> See Letter from Pantelis Michalopoulos, Counsel to DISH Network Corporation, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 18-197 (Jan. 29, 2019) (“DISH Motion”).

<sup>2</sup> *Applications of T-Mobile US, Inc. and Sprint Corporation, Consolidated Applications for Consent to Transfer Control of Licenses and Authorizations*, Protective Order, WT Docket No. 18-197, 33 FCC Rcd. 6036 (June 15, 2018) (“Protective Order”).

<sup>3</sup> DISH Motion at 3.

<sup>4</sup> Interestingly, DISH has chosen to wait until now to challenge the Applicants’ confidentiality designations – months after the subject information was filed with the FCC, months after DISH filed pleadings responding to it, and months after the pleading cycle in this proceeding has closed.

<sup>5</sup> Petition to Deny of DISH Network Corporation, WT Docket No. 18-197, n.1 (August 27, 2018).

announced plans to introduce a competitive wireless service offering.<sup>6</sup> Notwithstanding DISH's assertion that its motion is motivated by concern about public discussion and "depriving the American people" of key facts about this merger,<sup>7</sup> by its motion DISH is seeking FCC approval for its business decision-makers to access and use commercially sensitive, confidential business information of the Applicants. This is exactly what the Protective Order is designed to prevent – a competitor getting an unfair advantage as a result of the Commission gathering the information it needs for reasoned decision-making.

Putting aside the intent of the filing, DISH's challenge seems to be based on several generalized misconceptions. First, DISH argues that any analysis or output based on underlying data that is public or Confidential cannot be deemed Highly Confidential.<sup>8</sup> This assertion is both unsupported and unsupportable. Nowhere does the Protective Order state or even suggest that information is disqualified from being classified as Highly Confidential or Confidential if its source data is public.<sup>9</sup> To the contrary, many of the types of information listed in Appendix A may be mostly or wholly derived from public information (*e.g.*, a company's analysis of its competitors or strategy for pursuing new customers), yet their inclusion in Appendix A indicates that the Commission recognizes them as likely to be Highly Confidential. The Protective Order appropriately recognizes that analysis and outputs have distinct value, and may have competitive sensitivity even if the inputs to the analysis are public.<sup>10</sup>

Moreover, contrary to DISH's assertion, information developed by a third party at the expense and direction of the Submitting Party is not somehow disqualified from being deemed Confidential or Highly Confidential.<sup>11</sup> Nowhere does the Protective Order reference that information must be developed by the Submitting Party itself in the ordinary course of business in order to qualify for Confidential or Highly Confidential treatment. Further, DISH is wrong that information pertaining to forecasts or projections is disqualified from Highly Confidential classification. Appendix A of the Protective Order specifically recognizes that granular

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<sup>6</sup> *Applications of T-Mobile US, Inc. and Sprint Corporation for Consent to Transfer Control of the Licenses and Authorizations*, WT Docket No. 18-197, Description of Transaction, Public Interest Statement and Related Demonstrations, 112-14 (June 18, 2018).

<sup>7</sup> DISH Motion at 1.

<sup>8</sup> DISH concedes that third party copyrighted materials – such as underlies Applicants' IKK and Cornerstone economic studies – should be Confidential. DISH Motion at 4.

<sup>9</sup> Contrary to DISH's assertions, Tables 13 and 15 of the IKK Declaration rely on estimates of marginal costs that are not part of the Brattle Declaration. *See* DISH Motion at 6.

<sup>10</sup> *See* Protective Order at Appendix A. Categories 3-7 list the type of output and analysis contained in the filings the Applicants designated as Highly Confidential at issue here today.

<sup>11</sup> DISH inconsistently argues that an expert analysis conducted by the Applicants' outside consultants must be classified as public, while third-party expert materials made available to multiple customers for a fee is Confidential. DISH Motion at 4.

projections of “future” financial data falls within recognized categories of Highly Confidential Information.<sup>12</sup> Indeed, expert projections of the Applicants’ future financial characteristics and incentives as standalone players and as a merged entity have significant competitive sensitivity. Detailed forecasts of quality improvements and how they will be received by customers do as well. Not only could disclosure of this information enable other industry participants to compete more effectively against the Applicants, but it would also likely affect the Applicants’ – and potentially other industry players’ – stock prices and business opportunities.<sup>13</sup> As such, DISH is wrong that the analyses and calculations in the IKK Declaration<sup>14</sup> and Cornerstone Report<sup>15</sup> are inherently disqualified from being classified as Highly Confidential.

To be deemed Highly Confidential Information, the particular information must simply meet the definition in the Protective Order, specifically:

information that is not otherwise available from publicly available sources; that the Submitting Party has kept strictly confidential; that is subject to protection under FOIA and the Commission’s implementing rules; that the Submitting Party or a Third-Party Interest Holder claims constitutes some of its most sensitive business data which, if released to competitors or those with whom the Submitting Party or Third-Party Interest Holder does business, would allow those persons to gain a significant advantage in the marketplace or in negotiations; and that is described in Appendix A to this Protective Order, as the same may be amended from time to time.

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<sup>12</sup> Protective Order at App. A (category 5).

<sup>13</sup> For this reason, granular analysis and outputs of economic experts in FCC merger dockets are typically heavily redacted. *See, e.g., Applications of AT&T Inc. and DIRECTV for Consent to Transfer Control of Licenses and Authorizations*, MB Docket No. 14-90, Description of Transaction, Public Interest Statement, and Related Demonstrations (filed June 11, 2014), Declaration of Michael Katz, *An Economic Assessment of AT&T’s Proposed Acquisition of DirecTV* (June 11, 2014); *Applications of AT&T Inc. and T-Mobile for Consent to Transfer Control of Licenses and Authorizations*, WT Docket No. 11-65, Description of Transaction, Public Interest Statement, and Related Demonstrations, Declaration of Dennis W. Carlton, Allan Shampine and Hal Sider (filed April 21, 2011).

<sup>14</sup> Declaration of Mark Israel, Michael Katz and Bryan Keating, App. F to Joint Opposition of T-Mobile and Sprint, WT Docket No. 18-197 (Sept. 17, 2018) (“IKK Declaration”). In its filing, DISH refers to the IKK Declaration as the “Compass Lexecon Declaration.”

<sup>15</sup> 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 H. Dortch, Secretary, Federal Communications Commission, WT Docket No. 19-197 (“Cornerstone Report”).

The exhibits, tables and figures in the IKK Declaration and Cornerstone Report to which DISH refers plainly meet this definition. The information:

- *Is not otherwise available from public sources* – The Highly Confidential portions of the IKK Declaration and Cornerstone Report were derived/calculated by the authors and are not available from public sources.
- *Has been kept strictly confidential* – The Applicants have not publicly released the Highly Confidential portions of the IKK Declaration and Cornerstone Report. These materials have been made available only to a limited number of third parties pursuant to the FCC’s protective order or under nondisclosure agreements.
- *Is subject to protection under FOIA and the Commission’s implementing rules* – The Highly Confidential portions of the IKK Declaration and Cornerstone Report contain commercially sensitive information dealing with projected marginal costs, critical efficiency values, and market share that clearly fall within the commercial exemption to FOIA and 47 C.F.R. 0.457.
- *Constitutes some of its most sensitive business data which, if released to competitors or those with whom the Submitting Party or Third-Party Interest Holder does business, would allow those persons to gain a significant advantage in the marketplace or in negotiations* – The bulk of the information that DISH seems to be targeting pertains to granular and detailed projections of various aspects of T-Mobile’s, Sprint’s and New T-Mobile’s financial performance, costs, efficiencies, financial incentives, etc. Other targeted information involves a detailed discussion of quality improvements and consumer willingness to pay for such improvements. If publicly released, such information would plainly afford competitors an advantage in competing against the companies and is also likely to affect the Applicants’ – and potentially other industry participants’ – stock prices and business opportunities.
- *Is described in Appendix A to this Protective Order* – Categories 2 (“discussions of specific detail or disaggregated quantification of merger integration benefits or efficiencies”), 5 (“granular information about a Submitting Party’s current or future costs, revenues, marginal revenues, market share, or customers”), 6 (“[d]etailed information describing or illustrating how a Submitting Party analyzes its competitors, including sources and methods used in these analyses, any limits on use of these analyses or data, and how such analyses or data are used”), and/or 8 (“Information that discusses in detail the number or anticipated changes in the number of customers or amount of traffic, including churn rate data, broken down by zip code or market, and detailed information about why customers discontinue service”) describe the information contained in the Highly Confidential portions of the IKK Declaration and Cornerstone Report.

For these reasons, it is clear that the information in the IKK Declaration and Cornerstone report have been properly designated as Highly Confidential.

Finally, it is important that, under the plain language of the Protective Order, the confidentiality designation runs to information. The Protective Order specifically notes that a document may contain both public information, which is not redacted, and Confidential and/or Highly Confidential Information, which may be redacted from public view.<sup>16</sup> As such, DISH's assertion that the Applicants have somehow waived confidentiality and must make all of a document public because it contains some public information is unavailing.<sup>17</sup>

For the foregoing reasons, the Commission should deny DISH's motion.

Respectfully submitted,

**T-Mobile US, Inc.**

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<sup>16</sup> Protective Order at 2 (definitions of Redacted Confidential Document and Redacted Highly Confidential Document).

<sup>17</sup> DISH's citation of *S.E.C. v. Lavin* as supporting its waiver argument is inapposite. DISH Motion at 8. That case deals with the wholly unrelated concept of marital privilege and the withholding of transcripts of recorded calls from the decision-maker. Significantly, the court in that case found there was no waiver of privilege due to partial disclosure of the conversations.