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By ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

Re: Confidentiality Designations, 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:

DISH Network Corporation (“DISH”) hereby responds to the February 5, 2019 ex parte letter filed by T-Mobile U.S., Inc. (“T-Mobile”) and Sprint Corporation (“Sprint”) (together, the “Applicants”) replying to DISH’s January 29, 2019 motion seeking to challenge certain confidentiality designations made by the Applicants. In their letter, the Applicants reject in its entirety DISH’s challenge to the Applicants’ over-designations of information as Highly Confidential.¹ According to the Applicants, their experts’ view that prices would “only” rise by \$X and DISH’s experts’ view that prices would rise by \$Y should continue to be shielded from public view.² But, the Applicants fail to provide a reasonable justification for protecting this information and instead attempt to distort DISH’s argument in an effort to excuse their over-designations. It is true that “analysis or output based on underlying data that is Public or Confidential” can in appropriate cases be deemed Highly Confidential.³ And it is also true that “information developed by a third party at the expense and direction of the Submitting Party” can be deemed Highly Confidential.⁴

¹ See Letter from Pantelis Michalopoulos, Counsel to DISH, to Marlene Dortch, FCC, WT Docket No. 18-197 (Jan. 29, 2019).

² See Letter from Nancy Victory, Counsel to T-Mobile, and Regina Keeney, Counsel to Sprint, to Marlene Dortch, FCC, WT Docket No. 18-197 (Feb. 5, 2019). Applicants state that DISH filed its challenge “months after the pleading cycle in this proceeding has closed,” but it was the Applicants who filed the Cornerstone Report after the initial pleading cycled ended, necessitating the Commission to issue a second public notice. DISH filed its challenge the day after the Commission reopened after the 35-day government shutdown.

³ *Id.* at 2.

⁴ *Id.*

DISH's motion does not argue that such information *never* qualifies as Highly Confidential, as the Applicants suggest. The Applicants never answer DISH's actual arguments. There is no reason why conclusions of outside economists based off of Public or Confidential sources *and prepared solely for the purpose of having the merger approved by regulators* should be deemed Highly Confidential. Neither DISH, nor any other party, could use such information to get an "unfair advantage" over the Applicants. Indeed, the Applicants have expressly admitted that these reports are *not* created in the ordinary course of business.⁵ As discussed below, this data falls outside of the FCC's Protective Order in this proceeding.

The examples of the over-designations DISH cited include outside economists' aggregate calculations of alleged merger efficiencies or price effects, not the "disaggregated" figures that would fall within category 2 of the protective order or the "granular" information about the Applicants' business covered by category 5. Nor do these calculations reflect "information that discusses in detail current or future plans to compete for a customer," as required by category 3, since they pertain to the impact of the proposed merger, and were made post-announcement. The Applicants do not explain why examples like Cornerstone Exhibits 15 or 36, showing high-level summaries of Cornerstone's merger simulation (both sourced from commercially available sources, not the Applicants' internal documents) or Table 1 of the Compass Lexecon Declaration (entitled "Critical Efficiencies Based on HBVZ models"), derived from the *public* portion of the Brattle declaration, should remain hidden from public view. Nor do the Applicants explain how they distinguish their own confidentiality challenge in this proceeding.⁶

DISH is not challenging the status of the vast bulk of the millions of documents produced in this proceeding. Instead, DISH's challenge is narrow: DISH only contends that high-level summaries and aggregate conclusions about the expected effects of the merger should not be designated Highly Confidential. Below we list representative samples of such information:

Compass Lexecon Declaration: Tables 1, 2, 12, 13, 14, 15, 16, 17, 20, 21, 22, 23 and Figures 2, 17, 18, and 19.⁷

Brattle Reply Declaration: Tables 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 24(b), 26, 29, 30, and Figures 1 and 2.⁸

⁵ Letter from Nancy Victory, Counsel to T-Mobile, to Marlene Dortch, FCC, WT Docket No. 18-197, at 1 (Dec. 12, 2018) ("[I]n anticipation of potential litigation, T-Mobile's counsel retained economic consultants to assist in the assessment of the competitive effects of a potential merger and the quantification of efficiencies from the merger. This work would not have been conducted by T-Mobile in the ordinary course of its business.").

⁶ See Letter from Nancy Victory, Counsel to T-Mobile, and Regina Keeney, Counsel to Sprint, to Marlene Dortch, FCC, *Objection to Confidentiality Designations by Comcast Corporation*, WT Docket No. 18-197, at 2 (Dec. 12, 2018) (Commission's confidentiality rules "are not intended to serve [as] a cloak to screen Applicants from general statements concerning the effects of their merger.").

⁷ Declaration of Compass Lexecon, Appendix F to Joint Opposition of T-Mobile US, Inc. and Sprint Corp., WT Docket No. 18-197 (Sept. 17, 2018).

Cornerstone Report: Exhibits 5, 6, 7, 12, 13, 14, 15, 16, 17, 18, 21, 22, 23, 29, 30, 36, and 37.⁹

Brattle Reply to Cornerstone: Tables 1, 2, 3, 4, 5, 6, 7, 8, and 9.¹⁰

DISH therefore requests, consistent with its January 29, 2019 motion, that the Commission require the Applicants to designate as public the information which has been improperly designated as Highly Confidential.

Respectfully submitted,

/s
Pantelis Michalopoulos
Counsel to DISH Network Corporation

⁸ Reply Declaration of Joseph Harrington and The Brattle Group, Exhibit 1 to Reply of DISH Network Corp., WT Docket No. 18-197 (Oct. 31, 2018).

⁹ John Asker, Timothy F. Bresnahan, and Kostis Hatzitaskos, *Economic Analysis of the Proposed Sprint/T-Mobile Merger*, Attachment A to Letter from Nancy Victory, Counsel for T-Mobile, to Marlene Dortch, FCC, WT Docket No. 18-197 (Nov. 6, 2018).

¹⁰ Further Reply Declaration of the Brattle Group, WT Docket No. 18-197 (Dec. 4, 2018).