

# THE KONKURRENZ GROUP

WASHINGTON, DC

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**REDACTED—FOR PUBLIC INSPECTION**

November 28, 2018

**VIA ECFS**

Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 Twelfth Street, SW  
Washington, D.C. 20554

**RE: Consolidated 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 Protective Order (DA 18-624) in the above-captioned proceeding, the Communications Workers of America (“CWA”) submits the attached public, redacted version of a letter from the undersigned to Nancy J. Victory identifying various deficiencies with T-Mobile’s revised November 15 privilege log. CWA has indicated with the legend “**{{BEGIN HCI END HCI}}**” where Highly Confidential Information has been redacted.

CWA respectfully requests the Commission to require T-Mobile to comply with Instructions 17 and 18 (which apply to claims of privilege) in the “General Information and Document Request for T-Mobile,” dated August 15, 2018.

A Highly Confidential version of this filing is being filed with the Commission on this date and will be made available pursuant to the terms of the Protective Order. Please contact me with any questions.

Sincerely,



Allen P. Grunes  
Counsel to Communications Workers of America

Attachment

# THE KONKURRENZ GROUP

WASHINGTON, DC

**CONTAINS HIGHLY CONFIDENTIAL INFORMATION –  
SUBJECT TO PROTECTIVE ORDER IN WT DOCKET NO. 18-197  
BEFORE THE FEDERAL COMMUNICATIONS COMMISSION**

November 28, 2018

**Via Email**

Nancy J. Victory, Esq.  
DLA Piper LLP  
500 Eighth Street, NW  
Washington, DC 20004

**Re: T-Mobile Privilege Log, Applications of T-Mobile US, Inc. and Sprint Corporation,  
WT Docket No. 18-197**

Dear Nancy:

As you know, we represent the Communications Workers of America (“CWA”) in connection with the proposed transaction. On October 5, 2018, you submitted a DVD containing a privilege log on behalf of T-Mobile to the Commission.<sup>1</sup> I sent you a letter on October 23rd identifying various deficiencies with this log. On October 29, you indicated to me that you were “conducting a thorough review of the log and making a number of revisions.” On November 15th, 2018 you submitted a revised log (the fourth iteration of the log to-date) to the Commission.<sup>2</sup>

A review of T-Mobile’s ostensibly revised November 15 privilege log shows that the issues identified in my previous letter have not been remedied by the revised log.

The revised log has {{BEGIN HCI [REDACTED] END HCI}} entries, a reduction of only {{BEGIN HCI [REDACTED] END HCI}} entries from the October 5 log. The November 15 log still claims privilege over {{BEGIN HCI [REDACTED] END HCI}} pages of documents that are being withheld in their entirety. The defects identified in my October 23 letter remain largely unaddressed. I write to reiterate these issues and request again that T-Mobile promptly correct them.

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<sup>1</sup> Letter from Nancy J. Victory to Marlene H. Dortch, WT Docket No. 18-197 (Oct. 5, 2018).

<sup>2</sup> Letter from Nancy J. Victory to Marlene H. Dortch, WT Docket No. 18-197 (Nov. 15, 2018). T-Mobile had submitted an interim log on November 7 that was in turn superseded by a November 9 log.

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The revised T-Mobile log appears to be over-inclusive in several respects:

1. T-Mobile asserts privilege over communications and documents that were shared with third parties, including other companies and the government;
2. The log contains incomplete and vague entries;
3. T-Mobile appears to assert privilege over documents merely because they were written by, or provided to, an attorney;
4. T-Mobile asserts privilege over widely disseminated communications and other documents that are not likely to be privileged; and
5. In a substantial number of cases, T-Mobile has withheld documents containing allegedly privileged material in their entirety, rather than producing the documents with the privileged material redacted.

As you know, the burden of claiming privilege rests with T-Mobile. In many cases, on the basis of the provided log, CWA and other third party reviewers cannot properly assess the validity of T-Mobile's privilege claims. We therefore request that T-Mobile either provide additional detail to substantiate its privilege claims or produce the withheld materials in a timely manner.

**Communications with Third Parties**

T-Mobile continues to withhold many documents that were shared with third parties. For instance, document PRIV00028231 (changed from PRIV00042905 in the original log) **{{BEGIN HCI [REDACTED] END HCI}}**. The revised log offers no further explanation of why this email is considered **{{BEGIN HCI [REDACTED] END HCI}}**. It remains difficult to see how such entities could share a common legal interest with T-Mobile, much less an attorney-client relationship. Another entry I previously identified, PRIV00088520 (changed from PRIV00103194), had been withheld as an email **{{BEGIN HCI [REDACTED] END HCI}}**. This is the tip of the iceberg.

Emails to **{{BEGIN HCI [REDACTED] END HCI}}** continue to be withheld as privileged. Various government entities are listed on the index of names that accompanies the privilege log, including **{{BEGIN HCI [REDACTED] END HCI}}**

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[REDACTED] END HCI}} still appear on the revised index. T-Mobile still claims privilege over communications such as PRIV00038715 (changed from PRIV00053389), which was sent to {{BEGIN HCI [REDACTED] END HCI}}<sup>3</sup> Similarly, T-Mobile claims privilege over communications such as PRIV00143050 (changed from PRIV00001857) {{BEGIN HCI [REDACTED] END HCI}} and PRIV00053965 (changed from PRIV00068639), which was sent to {{BEGIN HCI [REDACTED] END HCI}} T-Mobile has still made no showing, and there is no basis to conclude, that any of these communications with third parties are shielded by the attorney-client privilege or any other privilege.

**Incomplete or Vague Entries**

A privilege log must be sufficiently detailed so that the claim of privilege can be assessed. The Request for Information to T-Mobile requires that “[t]he description of the subject matter of each document shall describe the nature of the document in a manner that, though not revealing information that is itself privileged, provides sufficiently detailed information to enable the Commission to assess the applicability of the privilege claimed.”<sup>4</sup>

In multiple instances, the revised log fails to provide the requisite detail that would allow CWA, the Commission, or anyone else to evaluate T-Mobile’s claims of privilege. For instance, {{BEGIN HCI [REDACTED] END HCI}} entries still do not include an author/sender of the document. As another example, PRIV00141004 (changed from PRIV00001175) {{BEGIN HCI [REDACTED] END HCI}} In numerous other instances, the author or recipients are identified by vague or meaningless descriptors such as {{BEGIN HCI [REDACTED] END HCI}}

<sup>3</sup> Other previously-identified examples include PRIV00122799 (changed from PRIV00137473), which included {{BEGIN HCI [REDACTED] END HCI}} and PRIV00004080 (changed from PRIV00018754), which included {{BEGIN HCI [REDACTED] END HCI}}

<sup>4</sup> Applications of T-Mobile US, Inc. and Sprint Corporation for Consent to Transfer Control of Licenses and Authorizations, WT Docket No. 18-197, General Information and Document Request for T-Mobile, Instruction 18 (Aug. 15, 2018) (“T-Mobile RFI”).

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[REDACTED]  
**END HCI}}**

Along with its log, T-Mobile provided an updated “Index of Names on the Privilege Log” listing approximately **{{BEGIN HCI [REDACTED] END HCI}}** individuals. The revised index also has serious deficiencies. **{{BEGIN HCI [REDACTED]**

**END HCI}}**

In addition, there remain **{{BEGIN HCI [REDACTED] END HCI}}** documents withheld under a claim of “work product,” but the descriptions still lack the specificity required by the Commission’s instructions. The general assertion that a document was “prepared in anticipation of litigation” is insufficient under the instructions.<sup>5</sup> In many cases, no attorney or law firm is listed anywhere in the description, nor is there any indication of what, if any, litigation is anticipated.

**Documents Provided to an Attorney But not Requesting Legal Advice, or not Involving an Attorney**

T-Mobile appears to assert privilege over documents merely because they were written by, or provided to, an attorney. But that is not the relevant test. The attorney-client privilege only applies to communications that were intended to be confidential and made for the purpose of seeking or providing legal advice.

The problem is compounded as T-Mobile identifies **{{BEGIN HCI [REDACTED] END HCI}}** people on the index with a symbol indicating that the individual is an attorney.<sup>6</sup> But individuals with this notation include those associated with third parties, including, for example, **{{BEGIN HCI [REDACTED] END HCI}}**.

For instance, PRIV00038725 (changed from PRIV00053399) is **{{BEGIN HCI [REDACTED]**

**END HCI}}** It seems more likely that this and similar documents are unprivileged

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<sup>5</sup> See T-Mobile RFI Instruction 18(4) (“For each document withheld under a claim that it constitutes or contains attorney work product, also state whether the Company asserts that the document was prepared in anticipation of litigation or for trial and, if so, specify the anticipated litigation or trial upon which the assertion is based.”).

<sup>6</sup> We assume that the notation “^” after a person’s name indicates that person is an attorney “acting in a legal capacity with respect to the withheld document or communication” per Instruction 18 of the T-Mobile RFI.

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business documents. Simply because an attorney is copied does not convert an unprivileged business document into a privileged document.

**Widely Disseminated Communications and Documents**

There are still thousands of entries on the privilege log that were shared with or distributed to large numbers of people. Several hundred were sent to more than {{BEGIN HCI [REDACTED] END HCI}} recipients. Many were sent to recipients that T-Mobile describes on the index as {{BEGIN HCI [REDACTED] END HCI}}. In numerous cases, T-Mobile asserts the attorney-client privilege as a basis to withhold these documents. But wide distribution of a communication is an indication that it is unlikely to be protected by the attorney-client privilege.

As we noted previously, given the extensive circulation of many of the withheld communications, it is difficult to see how those communications were attorney-client privileged. If the large sets of recipients or the distribution lists included even one individual outside of T-Mobile who was not outside counsel, T-Mobile likely would have waived the applicable privilege.

**Withholding Entire Documents Instead of Redacting**

With a relative handful of exceptions, T-Mobile has continued to withhold documents in their entirety rather than redacting the privileged portions and producing the unredacted portions. It has produced in redacted form only 4% of the documents listed on the log.

To the extent that any of the {{BEGIN HCI [REDACTED] END HCI}} withheld in their entirety contain both privileged and non-privileged content, T-Mobile must produce such documents in redacted form if it is able to do so. Along these lines, we note that {{BEGIN HCI [REDACTED] END HCI}} documents withheld in full are more than 20 pages long, and more than {{BEGIN HCI [REDACTED] END HCI}} are more than 100 pages long.<sup>7</sup> We are highly skeptical that all or most of these documents were properly withheld in their entirety.

**Conclusion**

The revised privilege log still has numerous deficiencies, and T-Mobile's continued failure to correct them impedes our ability to review the merits of the claimed privileges. CWA requests that T-Mobile provide the Commission with a revised privilege log and produce any

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<sup>7</sup> Document PRIV00132968, withheld in its entirety, is listed as being {{BEGIN HCI [REDACTED] END HCI}} pages long.

Nancy J. Victory, Esq.  
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documents for which it no longer asserts a claim of privilege. CWA also requests that, for any document which has only a portion that is privileged, the remainder of the document be produced in a redacted form.

CWA requests that the new privilege log be provided as expeditiously as possible. We are filing this letter with the Commission pursuant the procedures in the protective order.

Please contact me with any questions.

Sincerely,



Allen P. Grunes

## CERTIFICATE OF SERVICE

I, Allen P. Grunes, hereby certify that on November 28, 2018, I caused true and correct copies of the foregoing to be served by electronic mail upon the following:

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Sincerely,

\_\_\_\_\_/s/\_\_\_\_\_  
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