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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:

Pursuant to Section 1.1206(b) of the Commission's Rules, 47 C.F.R. § 1.1206(b), notice is hereby provided of a written *ex parte* presentation in the above-referenced docket. In response to a question from the Transaction Team regarding T-Mobile US, Inc.'s ("T-Mobile") withholding of certain documents identified on its privilege log relating to the engineering models used to analyze the merger of T-Mobile and Sprint Corporation ("Sprint"), and in particular the development of the 5G engineering model, T-Mobile responds as follows:

In the ordinary course of its business, T-Mobile uses an engineering model to inform capacity and quality improvement planning on its LTE network. T-Mobile has not claimed any work product protection over the LTE engineering model used in the ordinary course of its business or of documents relating to the application of that model in the ordinary course of its business.

In preparation for the investigation of (and potential litigation challenging) the merger, as occurs in every major case, in the summer of 2017 counsel for Deutsche Telekom AG ("Deutsche Telekom") and T-Mobile requested that T-Mobile analyze a future LTE network for a combined T-Mobile/Sprint ("New T-Mobile") and prepare comparisons of that New T-Mobile network to future standalone networks for each of T-Mobile and Sprint. Also in 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.

All documents created in connection with this effort are protected by the work product doctrine,[1] including communications relating to the development of the work product.[2] Certain documents

[1] Fed. R. Civ. P. 26(b)(3)(A); *see also* Cobell v. Norton, 212 F.R.D. 24, 31 (D.D.C. 2002) ("[T]he testing question is whether, in light of the nature of the document and the factual situation in the particular case, the

may also be covered by the attorney-client privilege, but the work product doctrine is the primary basis for withholding as privileged the bulk of the documents in this category. We note that some of the documents covered by the work product doctrine include communications between individuals at Sprint and T-Mobile working on the analyses requested by counsel and documents created by Sprint necessary to the analysis and development of the model.[3] As the parties' shared a common interest at the time of such communications (as they still do today), such communications remain protected by the work product doctrine (*i.e.*, no privilege or work product protection was waived).[4]

When negotiations among Deutsche Telekom, Softbank Group Corp., T-Mobile, and Sprint began again in 2018, counsel for Deutsche Telekom and T-Mobile requested that T-Mobile prepare a 5G engineering model to help analyze the competitive impact of the merger and to quantify its benefits, along with an updated version of the work described above in relation to the LTE engineering model. The request for a 5G engineering model was made to further demonstrate the dramatic benefits of the merger generated by the creation of a far superior 5G network for New T-Mobile relative to the standalone companies.

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document can fairly be said to have been prepared or obtained because of the prospect of litigation." (quoting In re Sealed Case, 29 F.3d 715, 718 (D.C. Cir 1994)).

[2] *See* F.T.C. v. Boehringer Ingelheim Pharm., Inc., 778 F.3d 142, 149 (D.C. Cir. 2015) ("The work product protection is broader than the attorney-client privilege in that it is not restricted solely to confidential communications between an attorney and client." (citing In re Sealed Case, 676 F.2d 793, 808-9 (D.C. Cir.1982)).

[3] *See, e.g.*, United States v. Deloitte LLP, 610 F.3d 129, 136 (D.C. Cir. 2010) (holding as work product a memorandum prepared by outside accountants summarizing a meeting between the client, client's outside counsel, and third-party consultants about the possibility of litigation, noting that "the question is not who created the document or how they are related to the party asserting work-product protection, but whether the document contains work product—the thoughts and opinions of counsel developed in anticipation of litigation.").

[4] *See* United States v. AT&T, 642 F.2d 1285, 1299 (D. C. Cir 1980) ("'[C]ommon interests' should not be construed as narrowly limited to co-parties. So long as transferor and transferee anticipate litigation against a common adversary on the same issue or issues, they have strong common interests in sharing the fruit of the trial preparation efforts.").

That Sprint and T-Mobile share a common interest is sufficient to avoid waiver of attorney work product. However, we note that in addition to this common interest, T-Mobile and Sprint entered into a Joint Defense Agreement on August 10, 2017 and prior to that had in place a Non-Disclosure Agreement, entered into on August 3, 2013, and that "[w]hen the transfer [of work product] to a party with such common interests is conducted under a guarantee of confidentiality, the case is even stronger." *Id.* at 1299-1300; *see also* Navajo Nation v. Peabody Holding Co., 209 F. Supp. 2d 269, 286 (D.D.C. 2002) (stating that when evaluating whether sharing information waives work product protection, the D.C. Circuit considers whether there was a "reasonable basis for believing that the disclosed materials would be kept confidential" by the other party), *aff'd*, 64 F. App'x 783 (D.C. Cir. 2003).

Absent the merger, T-Mobile would not have created a 5G engineering model in 2018. Prior to involvement by counsel, T-Mobile did not anticipate developing such a model in the ordinary course of its business in the near future (especially one that covered the period through 2024). In ordinary course, T-Mobile would not have developed a 5G model until the Company moved from planning 5G deployments based on coverage to planning 5G deployments based on capacity. At counsel's request, T-Mobile prepared versions of the 5G engineering model (using ordinary-course engineering principles) for each of T-Mobile standalone, Sprint standalone, and New T-Mobile. The completed 5G engineering models and related output were submitted to the Commission. As in relation to the work to analyze the impact of the merger using the LTE engineering model, materials related to the preparation of the 5G engineering model that were prepared at counsel's request are protected from disclosure by the work product doctrine, including documents and communications by and from Sprint necessary to developing the model.[5] Certain documents may also be covered by the attorney-client privilege.

Please direct any questions regarding the foregoing to the undersigned counsel for Deutsche Telekom and T-Mobile.

Respectfully submitted,

DLA Piper LLP (US)

/s/ Nancy Victory

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Partner

cc: David Lawrence
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[5] Documents do not need to be created "solely or primarily in anticipation of litigation" to be accorded work product protection. Cobell v. Norton, 212 F.R.D. 24, 31 (D.D.C. 2002). The test is "whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation." *See id.* (quotations omitted) (citing In re Sealed Case, 29 F.3d 715 (D.C. Cir 1994)).