

December 12, 2018

*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  
Objection to Confidentiality Designations by Comcast Corporation**

Dear Ms. Dortch:

T-Mobile US, Inc. (“T-Mobile”) and Sprint Corporation (“Sprint” and, collectively with T-Mobile, “Applicants”), pursuant to paragraph 4 of the Protective Order in this proceeding,<sup>1</sup> hereby challenge the confidentiality designations of Comcast Corporation (“Comcast”) in its October 22, 2018 response, as partially modified on November 19, 2018, to Requests 2 and 3 of the Commission’s October 3, 2018 Information and Document Request.<sup>2</sup> Despite marking almost the entirety of these submissions as “Highly Confidential,” Comcast’s filings do not appear to contain *any* Highly Confidential Information. Indeed, Applicants are hard pressed to find information in the filings that meets the definition of Confidential Information.

Under its merger review processes, the Commission often requests information from companies to gather facts that will help inform its evaluation of the competitive and public interest effects of a transaction. When the information provided is competitively sensitive (Confidential Information), the Commission limits access to this information to outside counsel/consultants and in-house counsel not engaged in competitive decision-making. Where the information is particularly detailed, sensitive and proprietary (Highly Confidential Information), the Commission limits access only to outside

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<sup>1</sup> *In the Matter of 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, DA 18-624 at ¶4 (Jun. 15, 2018) (“Protective Order”).

<sup>2</sup> Letter from Michael D. Hurwitz, Counsel for Comcast Corporation, to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket No. 18-97 (Nov. 19, 2018) (“November 19 Response”); Letter from Michael D. Hurwitz, Counsel for Comcast Corporation, to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket No. 18-97 (Oct. 22, 2018) (“October 22 Response”).

counsel/consultants so that Participants<sup>3</sup> in the proceeding are screened entirely from knowing such information.

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 to 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.

Here, the issue is that the information Comcast characterizes as Highly Confidential falls into the categories of being general advocacy unrelated to the granular details of Comcast's own business operations; portrayals of the Applicants' conduct or intent in past or future business dealings; and/or facts that are indisputably in the public domain. Comcast's Highly Confidential classification of this information is inconsistent with the clear definitions in the Protective Order, years of FCC practice and precedent, and the Commission's goal of transparency in decisionmaking. 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 – even if material to ensuring a full and fair record before the Commission.

Absent the relief requested, counsel for T-Mobile and Sprint are unable to even inform their clients about the positions that Comcast is taking outside the public record with respect to their merger; let alone provide an informed response to alleged acts by their clients. To be clear, counsel for the Applicants are not seeking to share any competitively sensitive information with their clients, but rather to enable responses to claims that have been made about the effects of the merger and the conduct of their clients. Indeed, the information in question is of the nature and detail typically found in petitions or comments filed publicly in merger proceedings.

Applicants request that the Commission require Comcast promptly to designate its submissions consistently with the provisions of the Protective Order, which should result in the submissions being refiled with few, if any, redactions. If Comcast fails to do so, the Commission should place Comcast's unredacted filings in the public record.

## **I. REQUIREMENTS OF THE PROTECTIVE ORDER**

The Protective Order is clear on its face that its purpose is to

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<sup>3</sup> "Participant" has the meaning provided in the Protective Order.

(i) limit access to proprietary or confidential information that may be filed in this proceeding, and (ii) more strictly limit access to certain particularly sensitive competitive information, which, if released to competitors or those with whom the Submitting Party . . . does business, would allow those persons to gain a significant competitive advantage or an advantage in negotiations.”<sup>4</sup>

The Protective Order goes on to specify that Confidential Information means:

information that is not otherwise available from publicly available sources and that is subject to protection under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and the Commission’s implementing rules,”<sup>5</sup>

whereas Highly Confidential Information means:

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 . . . 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.<sup>6</sup>

In the above definition, the use of the word “and” after the last semicolon makes clear that all of the articulated criteria in this definition must be met in order for particular information to be eligible for classification as Highly Confidential Information. Indeed, Appendix A states clearly that “only information and documents set forth in this Appendix and that otherwise meet the definition of Highly Confidential Information or Stamped Highly Confidential Documents may be designated as Highly Confidential.”<sup>7</sup> The categories of information set forth in Appendix A describe *highly detailed and granular information* that are among the company’s most competitively sensitive and closely held information. These categories are:

1. Information that *details* the terms and conditions of or strategy related to a Submitting Party’s most sensitive business negotiations or contracts (e.g., marketing, service or product agreements, agreements relating to potential mergers and acquisitions, and comparably sensitive contracts).
2. Information that discusses *specific steps* that will be taken to integrate

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<sup>4</sup> *Id.* at ¶1.

<sup>5</sup> *Id.* at ¶2.

<sup>6</sup> *Id.* Appendix A has not been amended since its issuance with the Protective Order.

<sup>7</sup> *Id.* at App. A.

- companies or discussions of *specific detail or disaggregated quantification* of merger integration benefits or efficiencies (including costs, benefits, timeline, and risks of the integration).
3. Information that discusses *in detail* current or future plans to compete for a customer or specific groups or types of customers (e.g., business or wholesale customers), including *specific* pricing or contract proposals, pricing strategies, product strategies, advertising or marketing strategies, future business plans, procurement strategies, technology implementation or deployment plans and strategies (e.g., engineering capacity planning documents), plans for handling acquired customers, and human resources and staffing strategies.
  4. Information that discloses the *identity or characteristics* of specific customers or of those a company is targeting or with whom a company is negotiating (including identifying information about specific customer facilities, information about customers' levels of demand, and information regarding pricing proposals).
  5. Information that provides *granular information* about a Submitting Party's current or future costs, revenues, marginal revenues, market share, or customers.
  6. *Detailed 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.
  7. Information that provides *numbers* of customers and revenues *broken down* by customer type (e.g., business) and zip code or market area (e.g., CMA/MSA/RSA, DMA, state, regional cluster).
  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.
  9. Information that provides *detailed or granular* engineering capacity information or information about specific facilities, including collocation sites, cell sites, or maps of network facilities.
  10. Information that provides *detailed* technical performance data and test results.<sup>8</sup>

In addition, to ensure that only eligible information is marked as Highly Confidential Information, the Protective Order requires that the Commission staff pre-approve the appropriateness of the designation in writing before the information is submitted.<sup>9</sup>

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<sup>8</sup> *Id.* (emphasis added).

## **II. THE DESIGNATIONS IN COMCAST’S FILING DO NOT COMPORT WITH THE DEFINITIONAL OR PROCEDURAL REQUIREMENTS OF THE PROTECTIVE ORDER**

Comcast has designated all of its November 19 Response and the vast majority of its October 22 Response as Highly Confidential Information – including footnote cites to information available on public websites. Yet, plainly none of this information falls within the Protective Order’s definition of Highly Confidential Information. Some of the redacted information is indisputably public and the remainder is simply general advocacy that wholly lacks the detailed specificity about Comcast’s operations, commercial relationships or business plans necessary to fall within the categories described in Appendix A of the Protective Order. And, clearly none of this information is “particularly sensitive competitive information, which, if released to competitors or those with whom the Submitting Party . . . does business, would allow those persons to gain a significant competitive advantage or an advantage in negotiations.”<sup>10</sup>

Comcast’s response to Request 2 is illustrative. Comcast marks the entirety of this response as Highly Confidential. The information, however, is indisputably not sensitive competitive or business proprietary information. Comcast’s discussion is general in nature with no description of specific details. Such discussion plainly is not sufficiently granular or competitively sensitive to be classified as Confidential, let alone Highly Confidential. Indeed, the description does not fall within any of the categories listed in Appendix A of the Protective Order – which is a prerequisite to classification as Highly Confidential Information.

Comcast redacts less of its response to Request 3. However, those redactions are also improper and inconsistent with the Protective Order. For similar reasons to those discussed above, there is no basis for marking as Highly Confidential Comcast’s general views. Like the response to Request 2, this response also contains no granular or specific details regarding the categories in Appendix A that would permit any aspect of the response to be classified as Highly Confidential.

By marking these passages as Highly Confidential, Comcast prevents counsel for the Applicants from disclosing what amounts to general advocacy to their clients, thus impairing the ability of the Applicants to respond effectively.<sup>11</sup> Where no granular, competitively sensitive

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<sup>9</sup> *Id.* at ¶3. Specifically, the Protective Order states that “before a Submitting Party may designate particular documents or information as Highly Confidential, it must receive the written approval of the Commission staff, which, based on the Submitting Party’s representations, will make a preliminary determination whether the proposed designation meets the requirements set forth in this Protective Order.” *Id.*

<sup>10</sup> *Id.* at ¶1.

<sup>11</sup> While paragraph 17 of the Protective Order permits counsel to “render advice to their clients relating to the conduct of the proceeding . . . relying generally on examination of Confidential Information or Highly Confidential Information,” that paragraph specifically prevents counsel

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information is contained in these passages, there is no basis for denying the Applicants' access to such characterizations or hindering their ability to respond.

For the foregoing reasons, Applicants request that the Commission direct Comcast promptly to refile its submissions consistently with the provisions of the Protective Order. If Comcast fails to do so, the Commission should place Comcast's unredacted filings in the public record.

Respectfully submitted,

**T-Mobile US, Inc.**

**Sprint Corporation**

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from disclosing information designated as Confidential or Highly Confidential. Protective Order at ¶17.