



300 New Jersey Avenue, NW  
Suite 700  
Washington, DC 20001  
202-379-7121  
[www.comcastcorporation.com](http://www.comcastcorporation.com)

Francis M. Buono  
SVP & Sr. Deputy General Counsel  
Comcast Corporation

December 19, 2018

**VIA ELECTRONIC FILING**

Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 Twelfth Street, S.W.  
Washington, D.C. 20544

**Re: *Applications of T-Mobile US, Inc. and Sprint Corporation, Consolidated Applications for Consent to Transfer Control of Licenses and Authorizations, WT Docket No. 18-197, Response to Objection to Confidentiality Designations by Comcast Corporation***

Dear Ms. Dortch:

Comcast Corporation (“Comcast”) hereby responds to T-Mobile and Sprint’s (together, “Applicants”) challenge to the designation of Comcast’s response to Request No. 2 and portions of its response to Request No. 3 of the Commission’s October 3, 2018 Information and Document Request as Highly Confidential under the terms of the Protective Order adopted in this proceeding.<sup>1</sup>

As a preliminary matter, it is worth underscoring that Comcast is *not* a voluntary participant in or party to this proceeding, and has undertaken substantial effort to respond to the Commission’s Request for Information (“RFI”) to help facilitate the Commission’s review of the Proposed Transaction. Although Applicants assert that Comcast’s response includes information typically found in petitions and comments in a merger proceeding, which Comcast disputes, *Comcast has filed neither here, nor has Comcast engaged in any advocacy in this proceeding* – i.e., Comcast has not filed a petition to deny, comment, or substantive *ex parte* in this docket. Rather, it has merely responded truthfully and in good faith to a formal RFI from the Commission. Applicants are essentially arguing that a company’s internal assessments of the effects of a potential significant marketplace development, such as the Proposed Transaction under review, are somehow *per se* outside the scope of the Commission’s confidentiality

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<sup>1</sup> See Letter from Nancy J. Victory, Counsel for T-Mobile US, Inc. and Regina M. Keeney, Counsel for Sprint Corporation, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 18-197 (Dec. 12, 2018); *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”). Comcast’s responses were submitted on October 22, 2018; a modified response to Request No. 2 was submitted on November 19, 2018 pursuant to discussions with Commission staff.

protections just because they state a point of view – a position that has no basis in the Commission’s practice or precedent.

Indeed, as confirmed in prior procedural discussions with Commission staff, Comcast’s strategic perspective on, and assessment of, the competitive impact of the Proposed Transaction on Comcast’s nascent wireless business and its television and broadband businesses – including discussions of Comcast’s wireless business strategy, contractual terms, and related business negotiations – constitutes competitively sensitive information that is not otherwise publicly available and falls squarely within the Commission’s definition of Highly Confidential Information. Specifically, Comcast’s responses include Highly Confidential Information within categories 1 (“terms and conditions of or strategy related to [Comcast’s] most sensitive business negotiations or contracts”), 3 (“current or future plans to compete for a customer, including . . . future business plans”), and 6 (“[d]etailed information describing or illustrating how [Comcast] analyzes its competitors,” etc.) of Appendix A of the Protective Order. Comcast’s considered assessments of the Proposed Transaction and its potential impacts on Comcast’s businesses are *not* public; and Applicants provide no evidence otherwise (nor could they). As such, the unredacted version of Comcast’s response is, and should remain, available only to Outside Counsel and Consultants under the Protective Order.

Applicants, however, are asking the Commission to make Comcast’s – a *non-party’s* – Highly Confidential internal competitive and strategic analyses widely available to the public. Such a request is at odds with the Commission’s confidentiality policy and implementing regulations.<sup>2</sup> Public disclosure of this sensitive commercial information would result in competitive harm to Comcast. Although Applicants claim that the protection of a non-party’s internal analyses and business strategies is “inconsistent . . . with years of FCC practice and precedent,” Applicants tellingly fail to cite any supporting practice or precedent. In fact, in

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<sup>2</sup> Under the Commission’s rules, Applicants bear the burden of establishing – i.e., making a “persuasive showing” – that public disclosure of Comcast’s confidential commercial information, which otherwise may be withheld from public disclosure under Freedom of Information Act (“FOIA”) Exemption 4, would be in the public interest. See *Applications of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership For Consent To Assign or Transfer Control of Licenses and Authorizations*, Order, 30 FCC Rcd. 10360 ¶¶ 35-43 (“*Charter/TWC Protective Order*”) (outlining requirements for parties seeking public release of confidential information); see also *Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, Report and Order, 13 FCC Rcd. 24816 ¶ 16 (1998); 47 C.F.R. §§ 0.457, 0.461. The Protective Order’s definition of “Highly Confidential Information” explains that such information is “subject to protection under FOIA and the Commission’s implementing rules.” Protective Order ¶ 2. As the D.C. Circuit and the Commission have explained, “[f]inancial or commercial information provided to the government on a voluntary basis is exempt under [FOIA] Exemption 4 if it is of a kind that the provider would not customarily release to the public.” *Allnet Communications Services Freedom of Information Act Request*, Memorandum Opinion and Order, 8 FCC Rcd. 5629 ¶ 4 (1993) (citing *Critical Mass Energy Project v. NRC*, 975 F.2d 871 (D.C. Cir. 1992)) (internal quotations omitted). As noted above, the information and statements at issue here are “not customarily release[d] to the public” by Comcast. Applicants have failed to make this requisite “persuasive showing” and have offered no valid basis for publicly disclosing non-public information to which their many Outside Counsel and Consultants who have signed Protective Order acknowledgments already have *complete unredacted* access.

Comcast's experience, it is common in such cases for non-parties to a transaction review proceeding to broadly redact responses to an information request as Highly Confidential. This makes sense, because non-parties by definition have not already voluntarily shared such information in the pleading cycle. For example:

- In connection with the Commission's prior review of Comcast's proposed transaction with Time Warner Cable, companies that were not parties to, or participants in, the transaction proceeding fully redacted or substantially redacted their responses to the Commission's information requests, which presumably included information akin to what Comcast has provided here.<sup>3</sup> Indeed, even certain companies that *were* participants in the proceeding fully redacted their information request responses.<sup>4</sup>
- Certain other non-parties to the same transaction proceeding relied on a heightened confidentiality designation specific to the protective order in that proceeding to redact their narrative responses to the Commission's information requests in their entirety; as a result of that special designation and these non-parties' broad redactions, only Commission staff and not even Comcast's outside counsel could review the responses, which presumably included these non-parties' assessments of that transaction similar to those at issue here.<sup>5</sup>

Applicants *themselves* have taken a similar approach in other transaction review proceedings:

- In the Cingular/AT&T transaction review, both T-Mobile and Sprint, who were not participants in the proceeding, fully redacted their responses to the Commission's information requests as Highly Confidential.<sup>6</sup>

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<sup>3</sup> See, e.g., Submission of Akamai Technologies, Inc., MB Docket No. 14-57 (Jan. 23, 2015) (fully redacting all responses, exhibits, and even accompanying cover letter); Letter from Scott Blake Harris, Counsel to Akamai Technologies, Inc., to Marlene H. Dortch, Secretary, FCC, MB Docket No. 14-57 (Apr. 15, 2015) (fully redacting further response to information request); Letter from Nicholas Alexander, Associate General Counsel for Level 3 Communications, LLC, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 14-57 (Feb. 11, 2015) (redacting significant portions of its response).

<sup>4</sup> See, e.g., Letter from Eric J. Branfman, Counsel to RCN Telecom Services., LLC, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 14-57 (Oct. 31, 2014) (fully redacting its response, including narrative responses).

<sup>5</sup> See, e.g., Letter from Mace Rosenstein, Counsel for Twenty-First Century Fox, Inc., to Marlene H. Dortch, Secretary, FCC, MB Docket No. 14-57 (Apr. 2, 2015) (noting that the response is redacted in its entirety as "Video Programming Confidential Information" and available for review "solely by Commission staff"); Letter from Thomas Barnett, Counsel for The Walt Disney Co., to Marlene H. Dortch, Secretary, FCC, MB Docket No. 14-57 (Apr. 2, 2015) (same); Letter from Charles Rule, Counsel for CBS Corp., to Marlene H. Dortch, Secretary, FCC, MB Docket No. 14-57 (Apr. 2, 2015) (same).

<sup>6</sup> See, e.g., Letter from Cheryl Tritt, Counsel for T-Mobile USA, Inc., to Marlene H. Dortch, Secretary, FCC, WT Docket No. 04-70 (Aug. 4, 2004); Letter from Roger Sherman, Senior Attorney, Sprint, to Erin McGrath, FCC, WT Docket No. 04-70 (Aug. 19, 2004).

- Notably, in the Commission’s review of the AT&T/T-Mobile proposed transaction in 2011, Sprint, which *had filed a petition to deny* in that proceeding, nonetheless broadly designated its responses to the Commission’s Information Requests as Highly Confidential, *including assessments and analyses of Sprint’s views on mobile wireless services or products offered by other wireless providers.*<sup>7</sup>

Applicants’ characterization of Comcast’s responses as merely general advocacy is remarkable. Applicants appear to argue that the narrative form of Comcast’s responses somehow makes them inherently equivalent to a public comment. This is mistaking form over substance. The Commission, in its RFI, instructed Comcast to provide its assessment of the Proposed Transaction’s impact on specific Comcast businesses. Comcast took on these narrowly targeted questions, which go to the heart of Comcast’s business strategies and planning, and provided its considered internal assessments in narrative form, as instructed. These responses did not advocate for what the Commission should do in its review of the Proposed Transaction or how the Commission should address the public interest more generally. Thus, the mere narrative form of Comcast’s responses does not diminish the confidentiality protections to which they are entitled.

Nor is it credible for Applicants’ counsel to claim that the protection of Comcast’s Highly Confidential Information precludes T-Mobile’s and Sprint’s counsel from fully advising their clients and responding to Comcast. As Applicants’ objection letter notes, paragraph 17 of the Protective Order expressly allows Outside Counsel to advise their client of the general subject matter of Highly Confidential Information so long as the Highly Confidential response itself is not disclosed. Indeed, Comcast confirmed this practical and commonsense interpretation of the Commission’s Protective Order with Applicants’ counsel by phone and in writing over a month ago – on November 16, 2018.<sup>8</sup> Applicants’ counsel neglect to mention this communication in advancing their dubious claim that they are unable to advise their clients about Comcast’s submissions or discuss with them how to respond. It is axiomatic that Outside Counsel know both how to abide by Commission protective orders by not disclosing the details of an entity’s Highly Confidential response and, at the same time, how to ask sufficient questions of their clients in order to develop an informed response to a given subject matter. This line is inherent in the Commission’s balanced approach to maintaining the confidentiality of companies’

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<sup>7</sup> See, e.g., Letter from David H. Pawlik, Counsel to Sprint Nextel Corporation, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 11-65 (June 29, 2011); Letter from David H. Pawlik, Counsel to Sprint Nextel Corporation, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 11-65 (June 17, 2011).

<sup>8</sup> Specifically, counsel for Comcast advised counsel for T-Mobile, in writing, of its view that “in the course of advising your client, and consistent with paragraph 17 of the protective order in WT Docket No. 18-197, you may generally discuss with your client at a high level the substance of Comcast’s October 22, 2018 narrative responses to the FCC’s information requests in this proceeding, without revealing specific details of the Highly Confidential Information therein.” Email from Francis M. Buono, Comcast Corporation, to Nancy J. Victory, Counsel for T-Mobile US, Inc. (Nov. 16, 2018 at 10:10pm ET). Counsel for Comcast further illustrated this commonsense approach by specifying: “This includes asking your client questions to solicit relevant information based on Outside Counsel’s review of this [Highly Confidential] submission.” *Id.*

proprietary information while also enabling Outside Counsel to effectively advise, represent, and advocate on behalf of their clients.<sup>9</sup>

Beyond overstating the Protective Order's effects on their ability to respond to Comcast, Applicants' desire for "prompt" resolution of its objections should be viewed with skepticism given that they have waited *nearly two months* since Comcast's submission of its RFI responses to initiate a formal challenge to Comcast's confidentiality designations. The urgency here seems to be simply a matter of some perceived advantage to pursuing this now. It is also worth noting that, on the very same day that Applicants filed this challenge, T-Mobile submitted a letter defending its ability to withhold as attorney work product, and therefore inaccessible to the public or interested parties, *its own* key internal documents that go to the 5G and other benefits which Applicants offer as the key reason the Proposed Transaction is in the public interest and thus should be approved. While Comcast takes no position here on the merits of T-Mobile's arguments to maintain the confidentiality of Applicants' documents, we cannot help but highlight the double standard Applicants are pressing for here as they encourage the Commission to *make public* a *non-party's* internal, commercially sensitive information.<sup>10</sup>

The balance of equities and the public interest considerations clearly weigh in favor of maintaining Comcast's Highly Confidential designations. In advocating for stronger confidentiality protections, Chairman Pai previously criticized the prior Commission's confidentiality policies as "not provid[ing] sufficient protection for commercially sensitive information" and "deter[ring] companies from voluntarily disclosing commercially sensitive information to the FCC."<sup>11</sup> Likewise, Commissioner O'Rielly warned that exposing providers' sensitive information to public disclosure as part of a transaction review "subjects innumerable parties, even those not seeking Commission approval of a transaction, to potentially irreparable harm when information they thought would be protected is disclosed as well."<sup>12</sup> The harms

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<sup>9</sup> The Commission has explained that protective orders are specifically employed "to balance the interests in disclosure and the interests in preserving the confidentiality of competitively sensitive materials." *Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, Notice of Inquiry and Notice of Proposed Rulemaking, 11 FCC Rcd. 12406 ¶¶ 25-26 (1996). Moreover, the provision expressly stating that a protective order does not preclude Outside Counsel from generally advising their clients regarding Confidential and Highly Confidential Information has been standard in Commission protective orders for decades.

<sup>10</sup> See Letter from Nancy J. Victory, Counsel for T-Mobile US, Inc., to Marlene H. Dortch, Secretary, FCC, WT Docket No. 18-197 (Dec. 12, 2018) (defending T-Mobile's decision to withhold documents relating to the engineering models Applicants used to analyze the merger of T-Mobile and Sprint including, in particular, the development of a 5G engineering model that assessed the benefits of a combined New T-Mobile 5G network relative to the benefits of the 5G networks pursued independently as standalone companies).

<sup>11</sup> Dissenting Statement of Commissioner Ajit Pai, *Charter/TWC Protective Order*, 30 FCC Rcd. at 10401-02. Then-Commissioner Pai further warned that these policies "open[] the door to the wide dissemination of large swaths of confidential commercial information. This is not only bad for individual competitors in the marketplace, it is bad for competition itself." *Id.*

<sup>12</sup> Dissenting Statement of Commissioner Michael O'Rielly, *Charter/TWC Protective Order*, 30 FCC Rcd. at 10404.

Ms. Marlene H. Dortch

December 19, 2018

Page 6

outlined by Chairman Pai and Commissioner O’Rielly should not be ignored here – and certainly not on the basis of the specious arguments that Applicants have made.

The Commission, therefore, should deny Applicants’ attempt to upend confidentiality protections for Comcast’s commercially sensitive information.

Respectfully submitted,

/s/ Francis M. Buono

Francis M. Buono  
Senior Vice President, Legal Regulatory  
Affairs & Senior Deputy General Counsel  
Comcast Corporation

cc: Joel Rabinovitz  
Kathy Harris  
Linda Ray  
Kate Matraves  
Jim Bird  
David Krech  
Nancy Victory, counsel for T-Mobile US, Inc.  
Regina Keeney, counsel for Sprint Corporation