Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of		
	)	
WORLDCALL INTERCONNECT, INC.	)	
a/k/a EVOLVE BROADBAND,	)	
Complainant	)	
	)	
v.	)	File No. EB-14-MD-011
	)	ECFS Docket No. 14-221
AT&T MOBILITY LLC,	)	
Defendant	)	

To: Chief, Markets Disputes Resolution Division

REPLY TO RESPONSE

Commnet Wireless, LLC ("Commnet"), by its attorney, hereby submits this Reply to the Response to Counterparties' Objections to Production of Roaming Agreements ("Response"), filed January 16, 2015 by Worldcall Interconnect, Inc. ("WCX") herein.[1] As discussed herein, due to the unique position of the Commnet Group[2] as the direct competitor of WCX's 100% commonly-owned affiliate in the US Virgin Islands ("USVI"), coupled with the fact that WCX's outside law firm physically occupies the same office space as does WCX, requires additional

[1] If and to the extent that the Enforcement Bureau did not contemplate counterparties filing in reply to any WCX response to objections, Commnet hereby requests leave to submit this Reply. The WCX Response makes untrue characterizations of the December 26, 2014 Commnet Objection herein, and makes lengthy personal attacks upon Commnet. Moreover, as Commnet had only a very short time during a holiday period to prepare and file its Objection, while WCX took three full weeks to prepare and file its Response, procedural due process and elemental considerations of fairness support the Bureau permitting the filing of this Reply.

[2] Commnet is a 100% subsidiary of Atlantic Tele-Network, Inc. ("ATN"). ATN is also the 100% owner of Choice Communications, LLC ("Choice") and various other FCC-regulated retail wireless businesses (ATN and its various direct and indirect subsidiaries, collectively, the "Commnet Group"), all of which market their wireless telecommunications service offerings under the "Choice Wireless" name in various geographic areas.

protections for the Commnet/AT&T roaming agreement ("Commnet Agreement") than would otherwise be the case.

In the Response, WCX goes to great lengths to argue the relevance of the Commnet Agreement. While Commnet does not concede the relevance of the Commnet Agreement, Commnet will assume its relevance for purposes hereof. However, the Protective Order issued by the Enforcement Bureau ("Bureau") herein is currently insufficient to protect the interests of the Commnet Group. Accordingly, as discussed below, Commnet requests that any production of the Commnet Agreement be subject to further assurances by WCX representatives.

Also in the Response, WCX falsely claimed that: Commnet was accusing WCX counsel in advance of planning to violate the Protective Order and engaging in a "personal attack" on WCX counsel (Response, pp.8, 21), Commnet was reckless in claiming that WCX has constructed nothing to date (Response, p.16), "Worldcall [Inc., WCX's 100% commonly-owned affiliate holding 700 MHz licenses for the USVI] is a separate company and WCX will not purport to speak on its behalf" (Response, p.20). Commnet replies to these false or misleading statements as well.

I. This Is Not the Usual Outside Counsel Relationship

WCX is not a large corporation with a substantial number of in-house counsel. WCX, by its own admission, is a small company located at 1250 S. Capital of Texas Hwy Bldg 2-235, West Lake Hills TX 78746. That is the same exact address, *including the same suite number*, where Messrs. McCullough and Henry have their law office. In other words, in this case, the client and the outside law firm have a relationship with a number of the attributes of an in-house counsel relationship, including occupancy of the same, shared office space and the absence of a robust in-house counsel staff as buffer between outside counsel and the client company's

management. Therefore, Commnet's argument in the Objection -- that there is an overwhelming likelihood that the lawyers will be put into the impossible position which public policy insists be avoided in the first place – is well grounded.

II. Worldcall and WCX Are a Single Entity for Confidentiality Purposes

WCX's assertion that it does not speak for its affiliate, Worldcall, and its implicit suggestion that Worldcall would not have access to whatever material the WCX principals receive, is unavailing. Worldcall and WCX comprise the same individuals in the same offices (shared with the law firm), whether wearing their Worldcall or their WCX hat at any given moment in time. Therefore, confidential material which would be of special interest to Worldcall as it plans its launch of service in the USVI must be kept away from these individuals.

III. The Commnet Group Is Differently Situated from Other Counterparties

Today, there is one, and only one, wireless carrier in the USVI occupying the space of the "local independent" competing against the nationwide carriers and the wireless arm of the entrenched wireline incumbent – Choice, a part of the Commnet Group. The market niche occupied by the Commnet Group in the USVI is precisely the same niche which Worldcall will try to occupy. Therefore, the Commnet Group, alone among the dozens (or hundreds?) of counterparties to AT&T roaming agreements, is especially vulnerable in the event of any breakdown in the confidentiality arrangements.

IV. Special Care Is Needed When the Information Is So Useful to the Litigant against the Non-Party/Contract-Counterparty

The courts, and at least two of the five sitting Commissioners, have recognized that this Commission needs to take extra care where, as here, a litigant is seeking access to highly confidential information belonging to a non-party/counterparty-to-a-contract that the litigant can use against the non-party in unrelated areas. Indeed, this precise issue is being litigated before

the U.S. Court of Appeals for the D.C. Circuit in Case No. 14-1242, *CBS Corporation v. FCC*. There, numerous non-party content providers have appealed a Commission decision requiring that the merger applicants in two proposed mergers (AT&T/DirecTV and Comcast/Time-Warner) produce all of their programming agreements with non-party content providers, as well as records of the pre-signing negotiations leading up to each content provision agreement.

In the decision under appeal, by a 3-2 vote, the Commission upheld the right of those opponents to obtain the information on a highly confidential basis, even though the confidential information would be highly useful in the opponents' unrelated dealings with the contract-counterparties, to the detriment of the contract-counterparties. *Comcast Corp.*, *Order*, FCC 14-202, released November 14, 2014 ("*Comcast Order*"), *stayed pending review sub nom. CBS Corp. v. FCC*, (unreported) November 21, 2014 ("*Stay Order*").[3]

In the *Stay Order*, the Court ruled: "Petitioners have satisfied the requirements for a stay pending court review. *See Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008) [("*Winter*")]". Those requirements for a stay pending court review include, among others, a likelihood of prevailing on the merits. *Winter, id.*, at 20. Because there is a likelihood of the *Comcast Order* being overturned on the merits, its dissenting opinions are relevant.

Commissioner Pai dissented in part because the involved information would be extremely useful to anyone negotiating future programming agreements with a content provider, *i.e*, could be used directly against the content provider. *Comcast Order*, p.4. Commissioner Pai also cautioned: "Once a party has accessed confidential information, the cat cannot be put back in the bag. The harm is irreparable." *Id.*, pp.3-4.

Similarly, in his dissent, Commissioner O'Rielly explained, *id*., at 5 (emphasis added):

[3] Copies of the *Comcast Order* and the *Stay Order* are attached hereto for convenience.

> [T]he content producers *are not parties to the transactions and their rights cannot and should not be trampled over* for some ulterior political goal. No matter how safe or protected this information may seem, you can never promise with any level of certainty that the information won't get out in some form or be used in separate proceedings: This bell cannot be unrung.

V. On Balance, Disclosure Is Not Appropriate

Under the circumstances, even if relevant, the potential harm is so great here that the Bureau should deny production of the Commnet Agreement. The Commnet Agreement is one of many counterparty agreements, and WCX would still have access to all the others, which, unlike the Commnet Agreement, do not involve Worldcall's direct competitor in the USVI. Thus, the Commnet Agreement is of limited additional utility to WCX. Confidential information should not be disclosed, even under protective order, where there is only a chance that it will prove useful in the litigation. *See, e.g., Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, 13 FCC Rcd 24816, 24823 (1998), and cases cited therein.

VI. Proposed Modified Form of Declaration if Disclosure Is Required

However, if the Bureau insists upon making the Commnet Agreement available, then at minimum, the Bureau should amend the proposed form of Declaration pertaining to Highly Confidential materials, to conform more closely to the added protections the Commission afforded to non-litigant/counterparties in the Comcast and DirecTV proceedings (which added protections, as discussed above, although superior to what was provided to Commnet, may soon be found insufficient to protect non-parties in Commnet's position).

In those proceedings, the Commission required each individual (including each outside attorney) seeking access to Highly Confidential materials to certify, among other things, that the individual is not in any way "involved in competitive decision-making" for the client. *See*

Amended Modified Joint Protective Order, DA 14-1604 (Media Bur., released Nov. 4, 2014) ("*Comcast Protective Order*"), at Appendix B thereto (copy attached for convenience).[4]

Accordingly, Commnet requests that, at a minimum, WCX's representatives seeking access to the Commnet Agreement have the following certifications added to their declarations, pursuant to an appropriate "Modified Protective Order":

> I acknowledge that nothing in the Modified Protective Order limits any other rights and remedies available to a Submitting Party or a Third Party Interest Holder at law or in equity against me if I use Confidential or Highly Confidential Information in a manner not authorized by this Modified Protective Order.
>
> I certify that I am not, and shall not become, involved in Competitive Decision-Making for either the Reviewing Party or any affiliate of the Reviewing Party (including without limitation Worldcall, Inc.).

In addition, the following definitions should be added in such Modified Protective Order:

> "Competitive Decision-Making" means a person's activities, association, or relationship with any of his clients involving advice about or participation in the relevant business decisions or the analysis underlying the relevant business decisions of the client in competition with or in a business relationship with the Submitting Party or with a Third Party Interest Holder.
>
> "Third Party Interest Holder" means a person who is not a Submitting Party who has a confidentiality interest in Confidential Information or Highly Confidential Information that is submitted under this Modified Protective Order.

Unless Commnet can be assured, at a minimum, that Worldcall will not be consulting with any of the Declaration signatories with regard to future competitive decision-making respecting the USVI, it is unfair and unjust to disclose the Commnet Agreement to Commnet's competitor in the USVI.

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[4] That order defines "Competitive Decision-Making" as: "a person's activities, association, or relationship with any of his clients involving advice about or participation in the relevant business decisions or the analysis underlying the relevant business decisions of the client in competition with or in a business relationship with the Submitting Party or with a Third Party Interest Holder." *Id.*, p.1.

VII. There Is No Public Evidence That WCX Has Constructed

WCX scolds Commnet for not having engaged in a thorough enough investigation before making statements in the Objection to which WCX takes offense. However, Commnet received the notice of this proceeding only on Monday, December 22, 2014, when a Federal Express package came into its receiving area. Undersigned counsel received no notice of this matter until the afternoon of the next day, when the material, having been routed internally within Commnet, was e-mailed to him. None of the materials provided gave any indication that there was any newly-issued ECFS docket number. Only the manual EB file number was provided. Commnet made a diligent search of ULS and timely filed its objection.

According to ULS files, neither WCX nor Worldcall has filed any interim construction notification pertaining to any 700 MHz license held by either of them. That was so as of December 26, 2014, and remains so today. While the Reply Declaration of Lowell Feldman states, at numbered page 78 (also numbered as "page 132 of 1361") claims that WCX already serves 35% of its licensed CMA, Mr. Feldman cites only to non-public materials to support this claim, primarily a so-called Exhibit 3 to his declaration, which Exhibit 3 is not available to Commnet. However, ULS is the primary source for whether a 700 MHz licensee is constructed and providing service, and once a 700 MHz licensee is serving at least 35% of its CMA, it files its interim construction benchmark notification with the Commission.[5] The absence of any

[5] The Commission's "35%" is in fact far less than an actual 35%, because in calculating coverage to meet the Commission's definition, public lands (*i.e.*, federal, state or local-government-owned land other than Tribal Land) are included only to the extent covered by the licensee. So, for example, if a licensee covers a state park, the licensee gets to include that public land as part of its covered area, but if that licensee fails to cover other parks elsewhere in the CMA, the licensee can ignore those uncovered government lands as outside the CMA when calculating its 35%. *See* 47 CFR §27.14(g).

corroborating public evidence, and especially the absence of any interim benchmark filing with respect to WCX's call sign WQJZ320 in ULS, supports Commnet's conclusion in this regard.

VIII. Commnet Has Not Impugned the Integrity of Counsel.

In its Objection, p.4, Commnet expressly assumed that WCX's counsel would honor the letter of the Protective Order. Commnet specifically complained about the impossibility of counsel trying to forget the knowledge gained from reading the Commnet Agreement when giving future advice regarding competitive decision-making. *Id*. WCX's Response, falsely asserting a personal attack by Commnet on WCX's counsel, is an effort to distract from the matter at hand.

Where there are two unaffiliated entities with different individuals, it is a simple matter to protect confidential material by putting a protective wall between those two entities. Where there are affiliated entities or two divisions within the same entity, one can still erect a protective wall if the two sides are staffed by different individuals, and care is taken only to have the permitted individuals on one side of the wall obtain access. But it is impossible to put a protective wall inside the brain of a single individual, whereby that individual would have access to the confidential information for use on one project, but somehow block off the knowledge gained when working on a separate project. That is why protective orders in general avoid putting any individual into such a predicament. It is this dilemma that Commnet seeks to avoid.

One regular means of protecting highly confidential materials in litigation is to separate in-house counsel, who presumably are also the regular business advisers within the corporation, from outside counsel specially retained to handle the litigation, and to provide confidential/protected document access only to the latter. And in the normal course, such a procedure is sufficient to achieve the desired end.

Unfortunately, as Commnet noted in its Objection, p.4, this matter is not the normal course. Unless further protections are instituted, for the reasons discussed above, Messrs. McCullough and Henry will be in the impossible situation which protective orders are intended to avoid – a single individual trying to use the confidential information for one project but then block it out of his mind for the next project.

CONCLUSION

Under the current version of the Protective Order, Commnet has no real protection against the disclosure and potential use of confidential and competitive information. Commission policy is to preclude those involved in a litigant's competitive decision-making from obtaining access to confidential information belonging to innocent non-parties. The current Protective Order arrangement frustrates that Commission policy.

In this case, the outside counsel are not the run-of-the-mill outside counsel; their separation from the client is less than the norm, and the likelihood they are involved in competitive decision-making with the client and its commonly-owned affiliate in the USVI is very high. The Commnet Agreement, even if relevant, may not be material, and on balance, the lack of materiality combined with the enhanced danger of disclosure with respect to the USVI compel a decision to deny disclosure of the Commnet Agreement. Finally, if disclosure is necessary, at minimum, the protective order here should be modified to conform to protections awarded to non-litigant contract counterparties in other Commission cases.

Respectfully submitted,
COMMNET WIRELESS, LLC

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