

John T. Scott, III
VP & Deputy General Counsel



Ex Parte

July 24, 2015

Ms. Marlene Dortch
Secretary
Federal Communications Commission
455 Twelfth Street, S.W.
Washington, D.C. 20554

1300 I Street, NW
Suite 400 West
Washington, DC 20005

Phone: 202-515-2412
Fax: 202-289-6781
john.scott@verizon.com

Re: Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions, GN Docket No. 12-268; Competitive Bidding Procedures for Broadcast Incentive Auction 1000, Including Auctions 1001 and 1002, AU Docket No. 14-252; Policies Regarding Mobile Spectrum Holdings, WT Docket No. 12-269

Dear Ms. Dortch:

Three years after the FCC began its incentive auction rulemaking and 14 days before the sunshine period starts, T-Mobile and Sprint filed jointly fifteen pages of “simulations of potential broadcaster and wireless carrier bidding” that they claim support their request to trigger the set-aside earlier in the auction.¹ All of these data are redacted. And although they shared and discussed the data with each other and with FCC staff, T-Mobile and Sprint claim that this information cannot be made publicly available because they are confidential under the FCC’s FOIA rules.

The FCC should reject T-Mobile and Sprint’s filing outright without consideration. Alternatively, the FCC should deny their request for confidential treatment and make the filing public.

The T-Mobile/Sprint bidding simulations do not qualify for confidential treatment. The FOIA is a disclosure statute with a “strong presumption in favor of disclosure.”² Those seeking confidential treatment bear the burden of showing that the material they seek to withhold from public inspection is exempt from disclosure under FOIA.³ This Sprint and T-Mobile cannot do.

¹ See Letter from Trey Hanbury, Hogan Lovells US LLP, to Marlene H. Dortch, FCC, AU Docket No. 14-252 & GN Docket No. 12-268 (filed July 16, 2015).

² “FOIA mandates a ‘strong presumption in favor of disclosure’ . . . and . . . the statutory exemptions, which are exclusive, are to be ‘narrowly construed.’” *National Ass’n of Home Builders v. Norton*, 309 F.3d 26, 32 (D.C. Cir. 2002), quoting *United States Dep’t of State v. Ray*, 502 U.S. 164, 173 (1991) and *Dep’t of the Air Force v. Rose*, 425 U.S. 352, 361 (1976) (observing that “disclosure, not secrecy, is the dominant objective of” FOIA).

³ 47 C.F.R. § 0.459(d)(2).

First, they assert that the simulations are only “theoretical” predictions of the prices broadcasters might accept to turn in their licenses and the prices forward auction bidders may pay. If theoretical, the data could not be confidential, because they do not disclose anything proprietary about either company’s actual plans to bid.

Second, T-Mobile and Sprint claim the simulations are “commercially sensitive.” But they jointly developed the data – despite being competitors and despite telling the Commission that they are both “likely” to participate in the incentive auction. By definition, data that are shared between direct competitors cannot be commercially sensitive or proprietary. Indeed it is not clear how two competitors in an upcoming auction could lawfully discuss and agree on joint predictions as to what they, their competitors, and broadcasters may bid.

T-Mobile and Sprint have failed to show that their data are exempt from public disclosure under FOIA Exemption 4.⁴ The Commission should thus deny the request for confidentiality.⁵

It is too late in the proceeding for the FCC to follow its usual process for protecting confidential information. Were the Commission to agree with T-Mobile and Sprint that their simulations are entitled to confidential treatment, its usual course would be to adopt a protective order to enable interested parties to review the data. The Commission recognizes that in some notice-and-comment proceedings, parties may want to submit proprietary information, and that it needs to balance protecting legitimately private information with protecting other parties’ opportunity to comment on that information. In those situations it adopts protective orders that enable other parties to review the information, subject to safeguards to protect its sensitive nature, such as limiting disclosure to counsel.

It is far too late in the proceeding for that process to work effectively or fairly. By waiting until the last minute to file detailed data, T-Mobile and Sprint have made it impractical for the Commission to develop and adopt a protective order, allow commenters time to meaningfully review and comment on the T-Mobile/Sprint data, and still adopt auction rules on August 6, two weeks away. Sunshine occurs next week. As a result, the Commission may not rely on this data without violating the APA. The APA requires that an agency “make available to the public, *in a form that allows for meaningful public comment*, the data” upon which its determinations rely.⁶ It “is an abuse of discretion for [an agency] to act on the basis” of data submitted *ex parte* and without giving interested parties a fair opportunity to review and comment on the data.⁷ And making this data available by special arrangement with individual parties does not satisfy the APA because it fails to allow the public to respond.

⁴ 5 U.S.C. § 552(b)(4) (FOIA Exemption 4 applies to “trade secrets and commercial or financial information obtained from a person and privileged or confidential.”).

⁵ See *Request for Confidential Treatment of Nexus Communications, Inc.*; 28 FCC Rcd 5535 (WCB 2013) (denying confidential treatment of FCC Form 555 filing); *Qwest Communications International, Inc.*, 18 FCC Rcd 22980 (EB 2003) (denying confidential treatment for certain documents relating to interconnection agreements); *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, 16 FCC Rcd 13996 (WTB 2001) (denying request for confidential treatment of certain E911 Phase II trial results).

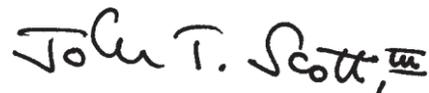
⁶ *AMA v. Reno*, 57 F.3d 1129, 1132 (D.C. Cir. 1995) (emphasis added).

⁷ *Delta Data Systems Corp. v. Webster*, 744 F.2d 197, 203 (D.C. Cir. 1984).

For these reasons, the Commission may not consider these data and must strike T-Mobile and Sprint's submission from the record. In the alternative, the Commission should allow T-Mobile and Sprint to withdraw their submission pursuant to rule section 0.459(e).⁸ Or, in the interests of ensuring the integrity of its rulemaking process, the Commission should immediately make the submission available for public inspection.⁹

This letter is being filed pursuant to Section 1.1206 of the Commission's Rules. Should you have any questions please contact the undersigned.

Sincerely,

A handwritten signature in black ink that reads "John T. Scott, III". The signature is written in a cursive style with a horizontal line underlining the name.

John T. Scott, III

cc: Renee Gregory
Jessica Almond
Matthew Berry
Brendan Carr
Valery Galasso
Erin McGrath
Louis Peraertz
David Strickland
Roger Sherman
Gary Epstein
Howard Symons
Jim Schlichting
Evan Kwerel

⁸ 47 C.F.R. § 0.459(e).

⁹ *Id.*; see also *National Association of Broadcasters, On Request for Inspection of Records*, 24 FCC Rcd 12320, 12330 (“Even when particular information falls within the scope of a FOIA exemption, federal agencies generally are afforded the discretion to release the information on public interest grounds.”) (quoting *Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, 13 FCC Rcd 24816, 24818 (1998)).