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July 29, 2015

**EX PARTE VIA ECFS**

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Room TW-A325  
Washington, D.C. 20554

**Re: *Comment Sought on Competitive Bidding Procedures for Broadcast Incentive Auction 1000, Including Auctions 1001 and 1002, AU Docket No. 14-252 Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions, GN Docket No. 12-268***

Dear Ms. Dortch:

T-Mobile USA, Inc.<sup>1</sup> (“T-Mobile”) and Sprint Corporation (“Sprint”) (collectively, the “Parties”) submit this *ex parte* letter in response to Verizon’s *ex parte* letter<sup>2</sup> to the Commission regarding the Parties’ July 16, 2015 *ex parte* filing that was accompanied by a request for confidentiality

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<sup>1</sup> T-Mobile USA, Inc. is a wholly-owned subsidiary of T-Mobile US, Inc., a publicly traded company.

<sup>2</sup> Letter from John T. Scott, III, VP & Deputy General Counsel, Verizon, to Marlene H. Dortch, Secretary, Federal Communications Commission, AU Docket No. 14-252, GN Docket No. 12-268 (filed July 24, 2015) (“Verizon Ex Parte”).

for certain competitively sensitive information (“Confidential Information”) contained in an attachment to the letter.<sup>3</sup>

On Thursday, July 23, 2015, T-Mobile and Sprint, through counsel, were contacted by Verizon’s in-house counsel regarding gaining access to the Confidential Information. Counsel for T-Mobile and Sprint proposed providing the Confidential Information to Verizon’s outside counsel or outside consultants subject to non-disclosure terms similar to those that apply to Highly Confidential Information in merger proceedings. Under these proposed terms, Verizon could use the data to respond to the Parties’ advocacy, so long as individuals involved in Verizon’s bidding activity did not review the Confidential Information and use it to the detriment of the Parties. The Verizon representative rejected this proposal and claimed to have no outside consultants and no outside advisors available to review this information due to financial constraints.

Counsel to T-Mobile and Sprint subsequently indicated that the companies would consider allowing internal Verizon attorneys, experts or staff to review the Confidential Information so long as those individuals would not be involved in bids or bidding strategy for Verizon. The Verizon representative indicated that she was not aware of any internal staff person that was available to review the Confidential Information. The Verizon representative indicated that if she could not find an internal staff person unconnected to bidding or bidding strategy to review the material, Verizon would file a formal objection to the Parties’ confidential submission.

Verizon filed a formal objection late Friday, July 25, 2015. Despite having a market capitalization of more than \$186 billion and approximately 177,000 employees, Verizon apparently could not find external counsel, a consultant or a single internal staff member to review the Confidential Information. In its objection, which did not appear in the record until Monday, July 27, 2015, Verizon claims the Confidential Information cannot be confidential because the theoretical simulations do not disclose anything proprietary about either company’s actual plans to bid.<sup>4</sup> Verizon cites only FOIA Exemption 4 as the legal standard under which the Commission is required to keep the confidentiality of information subject to a request for confidentiality.<sup>5</sup> Verizon ignores the separate provisions of the Commission’s rules, Sections 0.457(d) and 0.459, which protect confidential commercial and other information not routinely

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<sup>3</sup> See Letter from Trey Hanbury, Hogan Lovells US LLP, to Marlene H. Dortch, Secretary, Federal Communications Commission, AU Docket No. 14-252, GN Docket No. 12-268 (filed July 16, 2015) (“T-Mobile and Sprint Ex Parte”).

<sup>4</sup> Verizon Ex Parte at 2.

<sup>5</sup> *Id.* at 1.

available for public inspection.<sup>6</sup> T-Mobile and Sprint cited each of these provisions, in addition to Exemption 4, as a basis for confidential treatment of their submission.

The Commission also has adopted a protective order in the Incentive Auction and Mobile Spectrum Holdings proceedings to allow outside counsel or consultants that have signed the protective order to review confidential materials.<sup>7</sup> Several outside attorneys that Verizon has retained have executed Acknowledgments of Confidentiality and presumably remain available and qualified to review the Confidential Information at issue here.<sup>8</sup> Furthermore, Verizon has taken advantage of the Commission's confidentiality procedures in other proceedings on numerous other occasions, and, indeed, Verizon's outside counsel sought access to confidential information in another proceeding as recently as July 21, 2015.<sup>9</sup> As a result, Verizon's claim that it cannot identify the external or internal resources necessary to review a spreadsheet in this proceeding strains credulity.

In this case, the Confidential Information demonstrates potential foreclosure bidding tactics that only Verizon (and AT&T) are capable of implementing in the 600 MHz Incentive Auction. This type of commercial work product identifies the unintended and undesirable anti-competitive consequences of the dominant carriers' likely bidding strategy under the proposed rules; this information is not the type of material that any company would make routinely available for public inspection to the dominant carriers that are uniquely able to carry out this strategy. Therefore, the Confidential Information is eligible for confidential treatment under the Commission's rules.

Verizon nevertheless asserts that the Confidential Information is not eligible for confidential treatment because T-Mobile and Sprint are competitors, but disclosed the Confidential Information to each other and that it is therefore not "commercially sensitive."<sup>10</sup> This argument ignores the context of the Incentive Auction proceeding. The Confidential Information contains

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<sup>6</sup> 47 C.F.R. §§ 0.457(d), 0.459.

<sup>7</sup> *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions and Policies Regarding Mobile Spectrum Holdings*, Protective Order, GN Docket No. 12-268, WT Docket No. 12-269 (rel. Mar. 27, 2014).

<sup>8</sup> Letter from Adam D. Krinsky, Counsel to Verizon, to Marlene H. Dortch, Secretary, Federal Communications Commission, GN Docket No. 12-268, WT Docket No. 12-269, Attachments (Apr. 4, 2014) (submitting Acknowledgments of Confidentiality signed by Adam D. Krinsky, Craig E. Gilmore, and J. Wade Lindsay, outside counsel to Verizon in the above-referenced proceedings).

<sup>9</sup> *See, e.g.*, Letter from William F. Maher, Jr., Counsel to Verizon, to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket No. 15-44 (July 21, 2015) (seeking confidential treatment for information under the procedures of a protective order).

<sup>10</sup> *Id.* at 2.

data that could cause significant competitive harm if provided to the two dominant wireless carriers for use in their bidding strategies. By contrast, Sprint and T-Mobile do not have the market power or highly concentrated spectrum holdings necessary to attempt the foreclosure bidding tactics that the Confidential Information demonstrates. In any case, T-Mobile and Sprint have agreed not to disclose this information to any parties other than the Commission for the purposes of regulatory advocacy. The Confidential Information, therefore, remains commercially sensitive information that is not routinely available for public inspection and eligible for confidential treatment under Sections 0.457(d) and 0.459 of the Commission's rules.<sup>11</sup>

Additionally, Verizon suggests that there is no possible means for two competitors to “lawfully discuss and agree on joint predictions as to what they, their competitors, and broadcasters may bid.”<sup>12</sup> This argument is nonsense. The Parties' submission was a joint regulatory effort for purposes of a change in government policy (in response to the Commission staff's express request for comments on its proposed rules) and thus exempt from the type of rules Verizon cites.<sup>13</sup> Moreover, the information presented concerns a strategy that Verizon (and AT&T) can effect, but Sprint and T-Mobile cannot; therefore, the illustrative values in the spreadsheet do not pose a legal concern even if the communications were not exempt.

In a last-ditch effort to have the information stricken from the record, Verizon complains that it is too late in the Commission's decision-making process to submit confidential data on the record. The information, however, remains readily available for inspection by persons other than those who could use that information to implement the anti-competitive bidding strategy that T-Mobile and Sprint are seeking to prevent. Furthermore, Verizon's complaint belies the very reason the Commission had for extending the comment cycle and delaying a vote on the Incentive Auction Public Notice: to collect more data.

The Commission should reject Verizon's request to make the Parties' Confidential Information publicly available; however, should the Commission determine that the Confidential Information does not qualify for confidential treatment, the Parties respectfully request to withdraw the redacted data from the record to avoid the competitive harm that would occur from its disclosure to Verizon and AT&T.

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<sup>11</sup> 47 C.F.R. §§ 0.457(d), 0.459.

<sup>12</sup> Verizon Ex Parte at 2.

<sup>13</sup> See *Enforcement Perspectives on the Noerr-Pennington Doctrine*, FTC Staff Report (2006), available at [https://www.ftc.gov/sites/default/files/documents/advocacy\\_documents/ftc-staff-report-concerning-enforcement-perspectives-noerr-pennington-doctrine/p013518enfperspectnoerr-penningtondoctrine.pdf](https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-report-concerning-enforcement-perspectives-noerr-pennington-doctrine/p013518enfperspectnoerr-penningtondoctrine.pdf).

Consistent with section 1.1206(b)(2) of the Commission's rules, an electronic copy of this letter is being filed in the above-referenced docket. Please direct any questions regarding this filing to me.

Respectfully submitted,

*/s/ Trey Hanbury*

Trey Hanbury  
Counsel to T-Mobile USA, Inc.

Enclosures

cc: Jim Schlichting  
Gary Epstein  
Evan Kwerel  
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