

REDACTED – FOR PUBLIC INSPECTION

May 16, 2012

VIA ELECTRONIC FILING

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

Re: *Application of Celco Partnership d/b/a Verizon Wireless and SpectrumCo LLC For Consent To Assign Licenses; In re Application of Celco Partnership d/b/a Verizon Wireless and Cox TMI Wireless, LLC, For Consent to Assign Licenses, WT Docket No. 12-4*

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Dear Ms. Dortch:

On May 9, 2012, Public Knowledge challenged the confidentiality designation of certain provisions in the Innovation Technology Joint Venture (“Joint Venture”) agreement filed with the Commission in this proceeding.¹ Public Knowledge’s challenge should be denied. Not only are the commercial agreements as a whole not relevant to the Commission’s review of the spectrum assignment applications in this proceeding, but the specific provisions Public Knowledge seeks to make public – details concerning the governance, management, and licensing of technology of the Joint Venture – lack any connection to any issue in the license assignment proceeding. These provisions contain sensitive commercial material that would provide competitors with an unfair advantage in predicting and responding to the Joint Venture’s strategies, causing competitive harm to the Joint Venture and its members. Requiring this information to be made public, when competitors’ similar information is not, could not only harm Applicants and the Joint Venture, but also chill research and development efforts more

¹ On May 15, Communications Workers of America (“CWA”) filed a letter in support of Public Knowledge’s challenge, advancing the same position as Public Knowledge. For the same reasons described herein, CWA’s challenge to the confidentiality designations should also be denied.

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broadly. At the very minimum, the provisions for which Public Knowledge seeks public disclosure qualify as “Confidential,” meaning that public disclosure is not warranted.²

Moreover, even if the agreement and these provisions were relevant to this proceeding – and they are not – such public disclosure is still not justified here. Public Knowledge has eight individuals who have signed the Protective Orders and *already have access to the filed agreement*. In fact, more than 150 other individuals (representing more than two dozen parties) have signed the Protective Orders and have the ability to review and comment on the agreement.

A. Neither the Agreement Nor the Specific Provisions at Issue Here Are Relevant to the Spectrum License Assignment Proceeding, and Disclosure Would Have a Chilling Effect on Innovation and Investment.

As Applicants have explained, the separate commercial agreements entered into by Verizon Wireless and the cable companies are not relevant to the Commission’s review of the spectrum license assignment applications.³ Indeed, the Commission has no jurisdiction to do so because the Commission’s statutory directive is to review the license assignment applications before it. The license assignments and commercial agreements are separate from, and not contingent on, each other, and long-standing precedent establishes that Section 310(d) – the provision of the Act applying to these license assignments – calls for review of a license assignment itself, not of any other transactions, even when those transactions involve the same parties.⁴

That is all the more true here. Technology joint ventures are common in the communications industry, and the Commission does not ordinarily subject them to review or compel disclosure of parties’ agreements. And here, not only is the Joint Venture as a whole irrelevant to the license assignment proceeding, but its governance and licensing procedures are doubly so. The Joint Venture is dedicated to investment and innovation in new, consumer-friendly services and next-generation technology. It operates in a robustly competitive marketplace, with companies like Google, Microsoft, and Apple, and many others all attempting to develop technologies that function across multiple platforms. These other entities do not

² Public Knowledge also requests that the cover page of the agreement be made public. While it is difficult to imagine what probative value the cover page has to a determination of whether the spectrum license assignment is in the public interest, Applicants do not object and have included the cover page as Appendix A to this filing.

³ See Joint Opposition to Petitions to Deny and Comments, WT Docket No. 12-4, at 70-79; Letter from Bryan N. Tramont, Counsel for Verizon Wireless, *et al.*, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 12-4, at 2-4 (Feb. 9, 2012).

⁴ See Joint Opposition at 70-79. The commercial agreements are already in force and do not effectuate license assignments or a change in ownership or control of a licensee or common carrier Section 214 authorization, and only such actions require advance Commission review and approval. *Id.*

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disclose publicly the details of their agreements, management, or licensing provisions, and there is no reason to single out the Joint Venture for different treatment than the other entities against which it competes.

And, the precedent of public disclosure here could have a chilling effect. Given the competitive harm that would flow from public disclosure (as discussed below), requiring the agreements to be made public here risks creating disincentives for companies to enter into similar research and development agreements. Such limitations on companies' incentives to invest and innovate should be steadfastly avoided.

B. Public Disclosure of the Provisions Would Cause Competitive Harm.

Public Knowledge attempts to characterize the provisions at issue as mundane terms that lack competitive sensitivity. That characterization is incorrect. The provisions that Public Knowledge seeks to make public set forth the details about how the Joint Venture is managed, including specifics about how the board operates, voting, and other sensitive terms that **[BEGIN HIGHLY CONFIDENTIAL]**

[END HIGHLY

CONFIDENTIAL]

The FCC has long recognized that the need to develop a complete record to inform its decision-making process will sometimes require parties to submit highly sensitive, confidential information. As such, the Commission's rules incorporate FOIA Exemption 4, which permits parties to withhold from public inspection "trade secrets and commercial or financial information obtained from a person and privileged or confidential."⁵ The Commission's implementing rules provide that "trade secrets or privileged or confidential commercial, financial or technical data" are exempt from FOIA's public inspection rules.⁶ Further, under FOIA Exemption 4, "records are 'commercial' as long as the submitter has a commercial interest in them."⁷ Commercial or financial information is confidential if its disclosure will either (1) impair the government's ability to obtain necessary information in the future; or (2) cause substantial harm to the competitive position of the person from whom the information was obtained.⁸

⁵ 5 U.S.C. § 552(b)(4).

⁶ 47 C.F.R. § 0.457(d)(2).

⁷ *Robert J. Butler*, Memorandum Opinion and Order, 6 FCC Rcd 5414, 5415 (1991) (citing *Public Citizen Health Research Group v. F.D.A.*, 704 F.2d 1280, 1290 (D.C. Cir. 1983); *American Airlines v. National Mediation Board*, 588 F.2d 863, 868 (2d Cir. 1978)).

⁸ *See National Parks and Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974) (footnote omitted); *see also Critical Mass Energy Project v. NRC*, 975 F.2d 871, 879-80 (D.C. Cir. 1992), *cert. denied*, 507 U.S. 984 (1993).

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The Commission has previously held that information relating to a party's business operations and plans and some forms of corporate governance information may be filed confidentially or subject to protective order, pursuant to FOIA Exemption 4.⁹ Similarly, in the Protective Orders in this proceeding, the Commission has recognized that the terms of sensitive business contracts should not be disclosed publicly. These orders define "Confidential Information" to mean "information that is not otherwise available from publicly available sources and that is subject to protection under FOIA and the Commission's implementing rules."¹⁰ 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 does business, would allow those persons to gain a significant advantage in the marketplace or in negotiations" and that is further described by category in the protective order.¹¹ The provisions at issue fall squarely within the first category of information eligible for Highly Confidential treatment in Appendix A of the Second Protective Order, which covers "[i]nformation that details the terms and conditions of or strategy related to a Submitting Party's most sensitive contracts (e.g., marketing, service or product agreements, nondisclosure agreements relating to potential mergers and acquisitions, and comparably sensitive contracts)."

Here, the governance and licensing provisions are "information that details the terms and conditions of . . . a Submitting Party's most sensitive contracts" and are properly designated as Highly Confidential. Public disclosure of such information would distort the marketplace by providing competitors with insight into the joint venture's decision-making processes.¹² Competitors with knowledge of the decision-making structure of the joint venture and the precise terms of how the joint venture's technology may or may not be licensed would have an advantage in predicting the joint venture's activities and strategies. For example, with respect to

⁹ See, e.g., *In the Matter of Percy Squire*, Memorandum Opinion and Order, 26 FCC Rcd. 14930 (2011) (permitting a party to withhold from public disclosure under FOIA Exemption 4 information that could prejudice the party in its future business dealings); *In the Matter of Josh Wein*, Memorandum Opinion and Order, 24 FCC Rcd 12347 (2009) (permitting redaction of information relating to a party's business operations and plans under FOIA Exemption 4 because disclosure of the information to competitors could damage the party's competitive position by giving competitors insight into the party's business methods and strategies).

¹⁰ See Protective Order at ¶ 2.

¹¹ See Second Protective Order at ¶ 2.

¹² The Commission has permitted parties to withhold similar corporate governance information in the past. See, e.g., *In the Matter of Johan Karlsen*, Memorandum Opinion and Order, 24 FCC Rcd 12299 (2009) (granting confidential treatment based on FOIA Exemption 4 to information regarding the number of shares, types/class of shares, and percentages of ownership interests).

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the licensing provision, [BEGIN HIGHLY CONFIDENTIAL]

[END HIGHLY CONFIDENTIAL]

Public disclosure of these terms would permit third parties to unfairly anticipate and respond to the Joint Venture's efforts, thus harming the Joint Venture and diminishing competition generally.

C. Public Knowledge and Other Protective Order Signatories Can Already Review and Comment on the Agreement.

The reasons to deny Public Knowledge's challenge are all the more compelling in light of the fact that Public Knowledge *already has access to and already has reviewed and commented upon the terms of the Agreement*. Eight people at Public Knowledge have signed the Protective Orders in this proceeding, and they have had access to the Agreement since it was filed with the Commission in January. Apart from Public Knowledge, more than 150 other individuals have signed the Protective Orders on behalf of about two dozen parties and can similarly review and comment on the Agreement pursuant to the Protective Order processes. Accordingly, Public Knowledge fails to make a "persuasive showing" that it needs to strip the Agreement of its confidential status to adequately assess and comment upon the spectrum assignment applications.¹³ The Protective Order process is designed to balance the need to protect parties' sensitive business information – like the provisions of the Agreement – with the ability of authorized individuals to review and comment on that information.¹⁴ The proper balance has been struck here, and public disclosure of the Agreement is not necessary and should not be mandated.

D. At the Very Least, the Provisions Are Entitled to Confidential Treatment under the Protective Order.

The Agreement is properly designated as Highly Confidential under the Second Protective Order for the reasons explained above. However, at the very least, the information is entitled to Confidential treatment under the Protective Order. The Protective Order is designed to "limit access to proprietary or confidential information"¹⁵ and contains a lower threshold for confidentiality than the Second Protective Order. Parties may designate information as

¹³ 47 C.F.R. § 0.457(d)(2).

¹⁴ See Protective Order ¶ 1 ("We conclude that the procedures we adopt in this Protective Order give appropriate access to the public while protecting proprietary and confidential information from improper disclosure, and that the procedures thereby serve the public interest."). See also Second Protective Order ¶ 1.

¹⁵ Protective Order ¶ 1.

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Confidential if the information “is not otherwise available from publicly available sources and ...[] subject to protection under FOIA and the Commission’s implementing rules.”¹⁶ Unlike the Second Protective Order, there is no requirement that the information constitute a party’s “most sensitive business data which, if released to competitors or those with whom the Submitting Party does business, would allow those persons to gain a significant advantage in the marketplace or in negotiations[.]”¹⁷ The terms of the agreement have not been released to the public (outside of the Protective Order processes), and the Agreement is subject to protection under FOIA Exemption 4 because, as described above, it contains sensitive “commercial” information.¹⁸ This entitles the agreement to Confidential treatment under the Protective Order, and there is no basis for concluding that certain provisions of the Agreement – currently designated as Highly Confidential – should instead be made *totally public*.

Please do not hesitate to contact the undersigned should you have any questions.

¹⁶ *Id.* ¶ 2 (definition of “Confidential Information”).

¹⁷ Second Protective Order ¶ 2 (definition of “Highly Confidential Information”).

¹⁸ *See* 5 U.S.C. § 552(b)(4).

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Sincerely,

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APPENDIX A

LIMITED LIABILITY COMPANY AGREEMENT

of

JOINT OPERATING ENTITY, LLC

dated as of

December 2, 2011