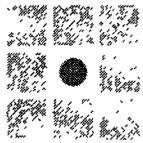


MAY 25 2012

Federal Communications Commission  
Office of the Secretary

# Public Knowledge

May 24, 2012

**EX PARTE OR LATE FILED**

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 Twelfth Street, SW  
Washington, DC 20554

Re: Applications of Cellco Partnership d/b/a Verizon Wireless, SpectrumCo, LLC, and  
Cox TMI Wireless for Consent to Assign Licenses; WT Docket No. 12-4  
Notice of *Ex Parte* Meeting

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Dear Ms. Dortch:

Pursuant to the protective orders in this docket please find attached two copies of a redacted version of a reply to the joint opposition to PK's confidentiality challenge, and one highly confidential version.

Sincerely,

/s/

John Bergmayer  
Senior Staff Attorney

No. of Copies rec'd 0+1  
List ABCDE

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MAY 25 2012

Federal Communications Commission  
Bureau / Office

REDACTED – FOR PUBLIC INSPECTION

Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matter of

Application of Cellco Partnership d/b/a  
Verizon Wireless and SpectrumCo LLC for  
Consent to Assign Licenses

Application of Cellco Partnership d/b/a  
Verizon Wireless and Cox TMI Wireless,  
LLC for Consent to Assign Licenses

EX PARTE OR LATE FILED

WT Docket No. 12-4

**REPLY TO OPPOSITION TO CONFIDENTIALITY CHALLENGE**

Jodie Griffin  
Harold Feld  
John Bergmayer  
PUBLIC KNOWLEDGE  
1818 N Street, NW, Suite 410  
Washington, DC 20036

May 25, 2012

## INTRODUCTION

The joint opposition of Verizon, Comcast, Time Warner Cable, and Brighthouse Networks<sup>1</sup> to Public Knowledge’s Challenge to Confidentiality Designation<sup>2</sup> is most notable for what it does *not* do. The opposition does not respond to the vast majority of the provisions specifically identified by Public Knowledge as not qualifying for confidential protection. The opposition does not argue that the information at issue constitutes a trade secret. The opposition does not explain how the information at issue could be used by a competitor against the JOE. The opposition does not even attempt to justify their own prior claim that the cover page of the JOE Agreement is highly confidential. Applicants have failed to rebut Public Knowledge’s explanations for why [BEGIN HIGHLY CONFIDENTIAL] <sup>3</sup>

[END HIGHLY CONFIDENTIAL] do not qualify for confidential protection and should be made public. As a result, the Commission should require the Applicants to submit the relevant information into the public record in this proceeding.

### I. IMPROPER CONFIDENTIALITY DESIGNATIONS IMPOSE SIGNIFICANT BURDENS ON REVIEWING PARTIES.

As a preliminary matter, contrary to Applicants’ claims, the fact that some Public Knowledge employees have signed acknowledgement of confidentiality in this proceeding is entirely irrelevant to Public Knowledge’s ability to challenge the protection of information that is improperly categorized as confidential. Applicants argue that Public Knowledge should be

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<sup>1</sup> Letter from John T. Scott III, Verizon, *et al.* to Marlene H. Dortch, Secretary, FCC, at 1 (May 16, 2012) (“Opposition to Confidentiality Challenge”).

<sup>2</sup> Challenge to Confidentiality Designation of Public Knowledge, WT Docket No. 12-4 (May 9, 2012).

<sup>3</sup> [BEGIN HIGHLY CONFIDENTIAL]

[END HIGHLY CONFIDENTIAL]

satisfied with the status quo because a small number of Public Knowledge employees have signed the confidentiality acknowledgements and thereby gained access to the text.<sup>4</sup> By this logic, the Commission's process for challenging confidentiality designations would be utterly useless. Under Applicants' argument, only entities that did not already have access to confidential information could challenge claims of confidentiality, even though they would have no way to ascertain whether the information was confidential or not. Moreover, the protective orders in this proceeding in no way require that confidentiality challenges only be made by those who are ignorant of the content of the documents at issue.<sup>5</sup>

Moreover, designating a document as confidential or highly confidential imposes restrictions both on entities with and without access to the documents. Applicants protest that two dozen entities have access to the documents under the protective orders, but this falls far short of full public review and debate. Those few parties with access to the confidential and highly confidential documents must expend significant time and resources to obtain and protect the information from disclosure. Additionally, these parties are prevented from discussing such information with people who have not signed the necessary protective orders who otherwise would be able to provide valuable analysis and other assistance. For example, Public Knowledge might wish to inform companies that their interests would could be adversely affected by the JOE, but be unable to explain exactly why. The over-classification of non-sensitive documents

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<sup>4</sup> Opposition to Confidentiality Challenge at 2.

<sup>5</sup> See *Applications of Cellco Partnership d/b/a Verizon Wireless and SpectrumCo LLC for Consent to Assign Licenses, Application of Cellco Partnership d/b/a Verizon Wireless and Cox TMI Wireless, LLC for Consent to Assign Licenses*, Protective Order, WT Docket No. 12-4, DA 12-50, ¶ 3 (Jan. 17, 2012) ("Protective Order"); *Applications of Cellco Partnership d/b/a Verizon Wireless and SpectrumCo LLC for Consent to Assign Licenses, Application of Cellco Partnership d/b/a Verizon Wireless and Cox TMI Wireless, LLC for Consent to Assign Licenses*, Second Protective Order, WT Docket No. 12-4, DA 12-51, ¶ 4 (Jan. 17, 2012) ("Second Protective Order").

means that PK might not be able to properly solicit the insight of impartial observers (such as academics) or inform members of Congress and their staff of the dangers of the JOE.

## **II. APPLICANTS HAVE MANIPULATED CONFIDENTIALITY PROCEDURES FOR STRATEGIC ADVANTAGE**

The unprecedented and vigorous manner in which Applicants have challenged potential opponents from gaining access to the highly confidential documents—first Netflix, now Frontier—highlights the importance of correct classification.<sup>6</sup> These competitors should have access in the process of a permit-but-disclose proceeding so that they may file comments that inform the Commission’s process (that is, after all, the purpose of designating a proceeding permit-but-disclose). Applicants insist on a hyper-technical reading of the terms of the protective order to exclude potential opponents, arguing that this is necessary to protect the integrity of their confidential information. But they waive their objections when potential allies wish to sign the orders,<sup>7</sup> losing all concern about limiting the number of people to whom confidential information is revealed. These actions are inconsistent with a genuine desire to keep confidential information in limited circulation and demonstrate how the Applicants manipulate the protective orders for strategic advantage. The Commission can partially remedy this behavior by removing the information PK has requested from the scope of the protective orders.

Indeed, even designation of material that would rate only confidential as highly confidential has profound consequences with regard to the ability of parties or potential parties to

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<sup>6</sup> See Letter from John T. Scott III, Verizon, *et al.* to Marlene H. Dortch, Secretary, FCC, WT Docket No. 12-4 (Apr. 11, 2012) (opposing participation of Netflix), *available at* <http://apps.fcc.gov/ecfs/comment/view?id=6017029616>; Letter from John T. Scott III, Verizon, *et al.* to Marlene H. Dortch, Secretary, FCC, WT Docket No. 12-4 (May 16, 2012) (opposing participation of Frontier), *available at* <http://apps.fcc.gov/ecfs/comment/view?id=6017035715>.

<sup>7</sup> See Comments of Geoffrey A. Manne, Executive Director, International Center for Law and Economics & Berin Szoka, President, TechFreedom, WT Docket No. 12-4 (Mar. 26, 2012), *available at* <http://apps.fcc.gov/ecfs/comment/view?id=6017026771>.

assess the information and respond in a thorough and complete manner. The Second Protective Order restricts companies' access to highly confidential information much more than the Protective Order restricts access to confidential information. Only outside counsel and outside consultants may access highly confidential information, but in-house personnel may access confidential information, so long as they are not involved in competitive decision-making and have signed the appropriate confidentiality acknowledgements.<sup>8</sup> Companies are less likely to investigate documents to ascertain whether their interests will be harmed by a proposed transaction when they must hire outside counsel to do so for them. As a result, the Commission may not hear from entities with legitimate interests in the proceeding. Accordingly, the Commission should ensure that documents only receive highly confidential protection when they actually qualify as highly confidential.

### **III. THE COMMISSION MUST TAKE INTO ACCOUNT THE PUBLIC'S RIGHT TO MEANINGFULLY PARTICIPATE IN ITS PROCEEDINGS**

For the reasons above, the Commission should reject Applicants' effort to trivialize their improper classification of documents. But in addition to these practical reasons, granting confidentiality only to documents that legitimately deserve it serves a broader goal of public participation and transparency in agency actions. The Freedom of Information Act, for example, "is an attempt to meet the demand for open government while preserving workable confidentiality in governmental decision-making," and its "basic objective . . . is disclosure."<sup>9</sup> This also aligns with the purposes of the procedures set out in the Administrative Procedure Act: increasing the public's ability to access information about agency action and increasing

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<sup>8</sup> Compare Second Protective Order, ¶ 7 with Protective Order, ¶ 5.

<sup>9</sup> *Chrysler Corp. v. Brown*, 441 U.S. 281, 290–92 (1979).

opportunities for the public to give input on agency decisions that will impact the public.<sup>10</sup> The designation of material as confidential or highly confidential is a limited exception designed to strike a balance between the need to protect genuinely sensitive information and the principle that all agency decisions are based on an open record, in a transparent manner that promotes both the principle of civic engagement and the principle of accountability.

#### IV. THE JOE IS CENTRAL TO THIS PROCEEDING

Applicants also continue to protest that the JOE Agreement is not connected to the proposed license transfer.<sup>11</sup> This argument is incorrect, and ignores the fact that the Commission has already explicitly recognized that the Applicants' side agreements are an integral part of the Commission's review in this proceeding.<sup>12</sup>

The JOE Agreement is properly considered as part of this proceeding. As Public Knowledge has explained, the JOE is intimately connected to the proposed license transfer,

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<sup>10</sup> See 5 U.S.C. § 551 *et seq.* See also United States Department of Justice Attorney General's Report on the Administrative Procedure Act (1941), *available at* <http://www.law.fsu.edu/library/admin/1941report.html> (including keeping the public informed of agency procedures and rules and providing for public participation in the rulemaking process among the basic purposes of the APA).

<sup>11</sup> Opposition to Confidentiality Challenge at 2.

<sup>12</sup> See Letter from Rick Kaplan, Chief, Wireless Telecommunications Bureau, FCC, to Michael Samscock, Cellco Partnership, WT Docket No. 12-4 (Mar. 8, 2012); Letter from Rick Kaplan, Chief, Wireless Telecommunications Bureau, FCC, to Lynn Charytan, Comcast Corp., WT Docket No. 12-4 (Mar. 8, 2012); Letter from Rick Kaplan, Chief, Wireless Telecommunications Bureau, FCC, to Steven Teplitz, Senior Vice President, Government Affairs, Time Warner Cable Inc., WT Docket No. 12-4 (Mar. 8, 2012); Letter from Rick Kaplan, Chief, Wireless Telecommunications Bureau, FCC, to Bright House Networks, LLC, WT Docket No. 12-4 (Mar. 8, 2012); Letter from Rick Kaplan, Chief, Wireless Telecommunications Bureau, FCC, to Jennifer Hightower, Cox TMI Wireless, LLC, WT Docket No. 12-4 (Mar. 8, 2012).

agency, and resale agreements between the Applicants.<sup>13</sup> Additionally, the governance of the JOE gives rise to an attributable interest under Title III and Section 652.<sup>14</sup> When the Commission evaluates the impact of a proposed license transfer on the public interest under Section 301(d), the Commission must first determine who the licensee is, including which entities have an attributable interest in the licensee. The JOE is thus directly relevant to the Commission's inquiry in this proceeding.

Applicants have failed to counter Public Knowledge's arguments that **[BEGIN HIGHLY CONFIDENTIAL]** **[END HIGHLY CONFIDENTIAL]** does not contain confidential commercial information. Applicants also assert that its competitors keep information similar to the information at issue confidential, but fail to name any actual examples.<sup>15</sup>

It is telling that, even though Public Knowledge specifically described every provision of **[BEGIN HIGHLY CONFIDENTIAL]** **[END HIGHLY**

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<sup>13</sup> See Petition to Deny of Public Knowledge *et al.*, WT Docket No. 12-4, at 17-21 (Feb. 21, 2012); Reply Comments of Public Knowledge *et al.*, WT Docket No. 12-4, at 2-6, 22-25 (Mar. 26, 2012).

<sup>14</sup> See **[BEGIN HIGHLY CONFIDENTIAL]**  
**[END HIGHLY CONFIDENTIAL]**

<sup>15</sup> Opposition to Confidentiality Challenge at 1. The Applicants note that companies like Google, Microsoft, and Apple create similar joint entities that do not disclose their ownership and governance, but Applicants fail to actually specify any such joint entities. As such, the Commission should pay no heed to Applicants' vague allusion that unspecified entities treat their basic governance information as commercially sensitive. Applicants cite three cases involving FOIA Exemption 4 as evidence that the information PK has requested is properly classified. See Percy Squire, *Memorandum Opinion and Order*, 26 FCC Rcd. 14930 (2011); Josh Wein, *Memorandum Opinion and Order*, 24 FCC Rcd 12347 (2009); Johan Karlsen, *Memorandum Opinion and Order*, 24 FCC Rcd 12299 (2009). But just as the applicants merely conclude that the information at issue is properly classified without fully explaining the competitive harm that would follow from its disclosure, they have not demonstrated that the governance and licensing information at issue are analogous to the information discussed in those orders.

**CONFIDENTIAL]** that should be made publicly available, Applicants only even attempt to specifically justify highly confidential treatment of one provision: **[BEGIN HIGHLY CONFIDENTIAL]** **[END HIGHLY CONFIDENTIAL]**

Applicants' unsupported assertions characterizing the JOE as a harmless joint research agreement demonstrate exactly why it is so important that the public be able to review and evaluate basic information about how the JOE is governed. Public Knowledge can explain, and has explained,<sup>16</sup> why the JOE poses a competitive threat to the development of vital new technologies in the wireless and wireline markets, but the public cannot be included in this critical debate unless the governance of the JOE is submitted into the public record. The Commission should require the Applicants to resubmit the JOE Agreement with non-confidential information, like **[BEGIN HIGHLY CONFIDENTIAL]** **[END HIGHLY CONFIDENTIAL]** properly included in the public record.

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<sup>16</sup> See Reply Comments of Public Knowledge *et al.*, WT Docket No. 12-4, at 6-20 (Mar. 26, 2012).

**CONCLUSION**

For the reasons above the Commission should grant PK's challenge to the confidentiality designation of certain material. A redacted version of this reply is being filed electronically pursuant to Section 1.1206 of the Commission's Rules and the Protective Orders in this proceeding.

Respectfully submitted,

/s/ Jodie Griffin  
Staff Attorney  
PUBLIC KNOWLEDGE  
jodie@publicknowledge.org

Harold Feld  
Legal Director

John Bergmayer  
Senior Staff Attorney

