



July 25, 2012

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

***Subject: Objection to Acknowledgments of Confidentiality filed by Sorenson counsel
CG Docket No. 03-123 & CG Docket No. 10-51***

Dear Ms. Dortch:

Purple Communications (“Purple”) files this reply to Wiltshire & Grannis LLP’s (“Wiltshire”) response to CSDVRS, LLC (“CSDVRS”) and Purple’s objection to Acknowledgments of Confidentiality in CG Docket Nos. 10-51 and 03-123.¹

On June 14, 2012, several attorneys and staff from Wiltshire, regulatory counsel for Sorenson Communications, Inc. (“Sorenson”), submitted Acknowledgments of Confidentiality in an effort to obtain access to Confidential and Highly Confidential materials filed in this proceeding.² Purple and CSDVRS filed timely objections to Wiltshire’s submission.³ Wiltshire filed a response to the objections,⁴ which contained mischaracterizations of fact and law and also misinterpreted the “competitive decision-making” standard that forms the basis of Purple’s objection to Wiltshire’s request to obtain access to confidential materials filed in this proceeding.

Both the Protective Order and the Second Protective Order define “Competitive Decision-Making” to mean “that a person’s activities, association, or relationship with any of its clients involve advice about *or* participation in the relevant business decisions *or* the analysis underlying the relevant business decisions of the client in competition with or a business relationship with the Submitting Party.”⁵ Thus, activities contemplated within the provided definition include advice about business

¹ Letter from Christopher J. Wright, John T. Nakahata, Charles D. Breckinridge and Peter J. McElligott, Counsel to Sorenson Communications, Inc., Wiltshire & Grannis LLP, to Marlene H. Dortch, Secretary, FCC, CG Docket Nos. 03-123 & 10-51 (filed June 29, 2012) (“Wiltshire Response”).

² Letter from Christopher J. Wright, Counsel to Sorenson Communications, Inc., Wiltshire & Grannis LLP, to Marlene H. Dortch, Secretary, FCC, CG Docket Nos. 03-123 & 10-51 (filed June 14, 2012).

³ Letter from John Goodman, Chief Legal Officer, Purple Communications, Inc., to Marlene H. Dortch, Secretary, FCC, CG Docket Nos. 03-123 & 10-51 (filed June 25, 2012) (“Purple Objection”); Letter from Jeff Rosen, General Counsel, CSDVRS, LLC to Marlene H. Dortch, Secretary, FCC, CG Docket Nos. 03-123 & 10-51 (filed June 21, 2012) (“CSDVRS Objection”).

⁴ Wiltshire Response.

⁵ *Structure and Practice of the Video Relay Service Program and Telecommunications Relay Services and Speech-to-Speech Services for Individual with Hearing and Speech Disabilities*, Protective Order, CG Docket Nos. 10-51 & 03-123, ¶ 2 (rel. Mar. 14, 2012) (emphasis added); *Structure and Practice of the Video Relay Service Program and Telecommunications Relay Services and Speech-to-Speech*

decisions, participation in business decisions, *or* the analysis underlying business decisions of the client in competition. In its Response, Wiltshire focuses its arguments on the participation element of the definition, insisting that “[Wiltshire] has no seat and gets no vote at the decision-making table.”⁶ Wiltshire glosses over the advice and analysis portions of the definition, admitting that “[Wiltshire] *advises* Sorenson about its regulatory options and responsibilities, and *Sorenson* presumably uses that advice in making business decisions.”⁷ Clearly, by Wiltshire’s own admission, its relationship with Sorenson “involve[s] advice about . . . the relevant business decisions or the analysis underlying the relevant business decisions” that affect the competitive relationship between Sorenson and Purple. The very nature of Wiltshire’s role as Sorenson’s regulatory counsel involves providing Sorenson strategic advice such that allowing Wiltshire access to confidential information will directly influence how Wiltshire advises Sorenson’s decision-making to its competitive advantage.

A. Wiltshire’s Involvement In Competitive Decision-Making Presents A Serious Risk Of Inadvertent Disclosure Of Confidential Material To Sorenson

U.S. Steel stated that competitive decision-making

would appear serviceable as shorthand for a counsel’s activities, association, and relationship with a client that are such as to involve counsel’s advice and participation *in any or all* of the client’s decisions (pricing, product design, *etc.*) made in light of similar or corresponding information about a competitor.⁸

The purpose of including the competitive decision-making standard in the First and Second Protective Orders is to prevent “inadvertent disclosure” of competitive information from counsel to client.⁹ In determining the risk of inadvertent disclosure, “the factual circumstances surrounding each individual counsel’s activities, association, and relationship with a party, whether counsel be in-house or retained, must govern.”¹⁰ This factual, counsel-by-counsel standard should turn on the extent to which counsel is involved in competitive decision-making with its client.¹¹ Accordingly, the risk of inadvertent disclosure increases as counsel’s involvement and participation increases with respect to the client’s decisions made in light of similar or corresponding information about a competitor.

In examining the risk of inadvertent disclosure in relation to counsel’s involvement and participation in the client’s decisions, courts are aware that “pricing [and] product design”¹² are not the only two types of activities that would implicate outside counsel in competitive decision-making.¹³

Services for Individual with Hearing and Speech Disabilities, Second Protective Order, CG Docket Nos. 10-51 & 03-123, ¶ 2 (rel. May 31, 2012).

⁶ See Wiltshire Response at 2.

⁷ See *id.* (emphasis in original).

⁸ *U.S. Steel*, 730 F.2d at 1468 n.3 (emphases added).

⁹ *U.S. Steel v. U.S. Int’l Trade Comm’n*, 730 F.2d 1465, 1467 (Fed. Cir. 1984).

¹⁰ *Id.* at 1468.

¹¹ See *id.*; see also, *In re Deutsche Bank Trust Co. Ams.*, 605 F.3d 1373, 1378 (Fed. Cir. 2010).

¹² *U.S. Steel*, 730 F.2d at 1468 n.3.

¹³ *In re Deutsche Bank*, 605 F.3d at 1378-79 (“Although pricing and product design were listed as specific exemplars of activity involving competitive decisionmaking, subsequent opinions have

Indeed, the phrase “(pricing, product design, *etc.*)”¹⁴ reveals that outside counsel’s involvement in other types of activities or client decisions may involve outside counsel in competitive decision-making.

Allowing Wiltshire to access the confidential information of Sorenson’s competitors would create a serious risk for inadvertent disclosure of such information to Sorenson, given Wiltshire’s intertwinement with Sorenson’s key decision making. Accordingly, the Commission should not grant Wiltshire’s request to access confidential documents relating to Purple filed in this matter.

B. Wiltshire Advises And Participates In Sorenson’s Key Competitive Decision-Making Process

In light of the legal standard, the definition of “competitive decision-making” set out in the First and Second Protective Orders, and a counsel-by-counsel analysis of Wiltshire’s activities in this matter, it is clear that Wiltshire is involved in Sorenson’s competitive decision-making process. The fact that Wiltshire does not partake in decisions “outside of the regulatory arena”¹⁵ is not indicative of Wiltshire’s independence. In fact, the role of regulatory counsel, by its nature, involves providing advice and participating in competitive decision-making. By definition, Wiltshire’s representation of Sorenson’s positions before the Commission must involve participation in Sorenson’s competitive decision-making. Wiltshire’s argument that it only serves as Sorenson’s mouthpiece cannot stand. Indeed, as discussed below, Wiltshire is integrally involved in Sorenson’s corporate strategies through regulatory matters such as this one.

Wiltshire incorrectly states, “Purple and CSDVRS essentially argue that [Wiltshire] should be barred from accessing confidential or highly confidential information *in this proceeding* because of [Wiltshire’s] purported knowledge of Sorenson’s (or its owners’) regulatory strategy and objectives.”¹⁶ However, the purpose of providing examples of Wiltshire’s participation and involvement in Sorenson’s key decision making was precisely to demonstrate that Wiltshire’s exposure to Sorenson’s strategic thinking would present an insurmountable risk of inadvertent disclosure of confidential information to its client.¹⁷ Given the extent to which Wiltshire is entwined with Sorenson’s business affairs, it is clear that the risk of inadvertent disclosure is extremely high.

The Wiltshire Response also fails to consider the definitions provided in *U.S. Steel* and the First and Second Protective Orders: namely, that counsel’s *advice* in the client’s decisions regarding similar information from a competitor also constitutes involvement in competitive decision-making.¹⁸ Wiltshire’s heavy involvement in Sorenson’s dealings with the Commission, the industry, and TRS stakeholders is demonstrative of Wiltshire’s participation in Sorenson’s competitive decision-making process.¹⁹

recognized that they are only two activities that might implicate or involve competitive decisionmaking”).

¹⁴ *U.S. Steel*, 730 F.2d at 1468 n.3 (emphasis added).

¹⁵ Wiltshire Response at 3.

¹⁶ Wiltshire Response at 3.

¹⁷ See Purple Objection; *see also* CSDVRS Objection.

¹⁸ See *U.S. Steel*, 730 F.2d at 1468 n.3.

¹⁹ See CSDVRS Objection at 2-3; *see also* Purple Objection at 1-2.

Further, Wiltshire's denial that it is "omnipresent in Sorenson's dealings with the Commission, the industry, and TRS stakeholders"²⁰ runs counter to the factual history in this matter. Purple almost entirely interacted with Wiltshire on subjects involving VRS reform matters, VRS rates, and fraud prevention efforts. Wiltshire has filed a multitude of documents on behalf of Sorenson, many of which included strategic and financial in-person meetings with executive management from Sorenson, Madison Dearborn, and senior staff at the FCC. Last, as CSDVRS noted, Sorenson's lack of in-house counsel suggests that Wiltshire's role in this matter is more than that of traditional outside counsel. Wiltshire even admits in its Response that its role is "one of advising and advocating."²¹ While Wiltshire's advice is enough to implicate Wiltshire as a competitive decision-maker under both the legal standard and the definitions provided in the Protective Orders,²² a review of Docket 10-51 indicates that Wiltshire regularly goes beyond merely advising its client. In fact, Wiltshire is intrinsically involved in many aspects of Sorenson's key decision making and strategic analysis.²³

For the foregoing reasons, Wiltshire's intertwining with Sorenson's key decision making cannot go overlooked. Accordingly, the Commission should not permit any person associated with Wiltshire access to any confidential information of Sorenson's competitors.

PURPLE COMMUNICATIONS, INC.



John Goodman
Chief Legal Officer

CC: Sean Lev, OGC
Gregory Hlibok, CGB-DRO
Jeffrey Rosen
Christopher Wright
John Nakahata

²⁰ CSDVRS Objection at 2.

²¹ Wiltshire Response at 3.

²² See Protective Order ("Competitive Decision-Making" means that a person's activities, association, or relationship with any of its clients involve advice about *or* participation in the relevant business decisions *or* the analysis underlying the relevant business decisions of the client in competition with or a business relationship with the Submitting Party") (emphases added); see also Second Protective Order (same).

²³ Indeed, Sorenson and Wiltshire collectively filed the Wiltshire Response, on Wiltshire letterhead, despite Wiltshire's insistence that it is only involved as traditional outside counsel. See Wiltshire Response at 1.