

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Applications of AT&T Inc. and)	WT Docket No. 11-65
Deutsche Telekom AG)	DA 11-799
)	ULS File No. 0004669383
For Consent to Assign or Transfer)	
Control of Licenses and Authorizations)	

**OBJECTION OF SPRINT NEXTEL CORPORATION
TO DISCLOSURE OF CONFIDENTIAL DOCUMENTS**

Pursuant to the first Protective Order in the above-referenced proceeding,¹ Sprint Nextel Corporation (“Sprint”) objects to the Acknowledgments of Confidentiality filed on behalf of (i) Dr. Volker Stapper, Vice President of International Competition & Media Policy for Deutsche Telekom AG (“Deutsche Telekom”); (ii) Thomas Sugrue, Senior Vice President of Government Affairs for T-Mobile USA, Inc. (“T-Mobile”); and (iii) Kathleen O’Brien Ham, Vice President of Federal Regulatory Affairs for T-Mobile (collectively, the “Vice Presidents”).² Sprint objects to the Vice Presidents because, in their capacity as senior in-house executives, they likely are engaged in Competitive Decision-Making and will be unable to “divide their minds in two” and selectively suppress Sprint’s Confidential Information once learned, no matter how well-intentioned their efforts may be to do so. Thus, the Commission should rule that the Vice Presidents are ineligible to access Sprint’s Confidential Information and Stamped Confidential Documents under the Protective Order.

¹ *Applications of AT&T Inc. and Deutsche Telekom AG for Consent to Assign or Transfer Control of Licenses and Authorizations*, Protective Order, 26 FCC Rcd 5889 (2011) (DA 11-674) (“Protective Order”).

² Letter from Eric W. DeSilva, Wiley Rein (Counsel for Deutsche Telekom and T-Mobile), to Marlene H. Dortch, FCC, WT Docket No. 11-65 (May 24, 2011).

The Protective Order defines “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.³

Similarly, courts have stated that the term “Competitive Decision-Making” is “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.”⁴ In applying this standard, what matters most is a person’s “actual activity and relationship with” clients.⁵ Sprint respectfully submits that that inquiry, which necessarily is fact-intensive,⁶ suggests that the Vice Presidents likely play a significant role in the Competitive Decision-Making of Deutsche Telekom and T-Mobile.

FCC and judicial precedents have established that Vice Presidents (or other senior executives, including in-house attorneys) are often subject to an unacceptable risk that they will be actively involved in Competitive Decision-Making, or that they will “inadvertently disclose” confidential information to other executives responsible for formulating business decisions

³ Protective Order ¶ 2.

⁴ *U.S. Steel Corp. v. United States*, 730 F.2d 1465, 1468 n. 3 (Fed. Cir. 1984).

⁵ *Id.* at 1469. The definition of “Competitive Decision-Making” in the Protective Order similarly focuses on a person’s “activities, association, or relationship with any of its clients.” Protective Order ¶ 2.

⁶ *See, e.g., U.S. Steel*, 730 F.2d at 1468 (“the factual circumstances surrounding each individual counsel’s activities, association, and relationship with a party” must govern); *United States v. Sungard Data Systems, Inc.*, 173 F. Supp. 2d 20, 24 (D.D.C. 2001) (an “individualized, fact specific determination is to be preferred over generalizations . . . in determining access to confidential information.”).

within a company.⁷ The risk of inadvertent disclosure has also been described as the risk that reviewing parties will be unable to “create a wall in the middle of their minds, separating the confidential information they have reviewed from their daily contact with their employers.”⁸

In one FCC decision involving Verizon, for example, the FCC found that two Senior Vice Presidents had not explained the basis for their requests to review confidential data; the FCC stated that “[w]ithout such an explanation, it is difficult to fathom that a ‘Senior Vice President’ of a company does not participate in competitive decision-making.”⁹ In a prior case involving Sprint, the FCC concluded that “[w]e are unconvinced that, given their high positions within the company and the scope of federal and state regulation over the communications industry, [two in-house counsel at Sprint, including a Vice President] do not provide advice or participate in the formulation of Sprint’s business decisions regarding compliance with state and federal regulations.”¹⁰ Similarly, as one federal court stated, it was reasonable to inquire whether a company’s in-house counsel “could lock-up trade secrets in his mind, safe from inadvertent disclosure to his employer once he had read the documents.”¹¹ The court concluded the counsel

⁷ See, e.g., *GTE Corp., Transferor and Bell Atlantic Corp., Transferee; For Consent to Transfer of Control*, Order Ruling on Joint Objections, 14 FCC Rcd 3364, ¶ 2 (1999) (“*GTE Order*”); *Application of WorldCom, Inc. and MCI Communications Corp. for Transfer of Control of MCI Communications Corp. to WorldCom, Inc.*, Order Adopting Protective Order, 13 FCC Rcd 11166, ¶ 5 (1998) (“*WorldCom Protective Order*”).

⁸ *WorldCom Protective Order* ¶ 7 (internal quotation marks omitted).

⁹ *Application of WorldCom, Inc. and MCI Communications Corp. for Transfer of Control of MCI Communications Corp. to WorldCom, Inc.*, Order Ruling on Joint Objections, 13 FCC Rcd 13478, ¶ 2 (1998) (“*WorldCom Order on Objections*”).

¹⁰ *GTE Order* ¶ 2; see also *WorldCom Protective Order* ¶ 5 (“We decline . . . to allow in-house economists, analysts, or other in-house staff access to confidential information” because “there is a greater risk of inadvertent disclosure by such individuals that is not justified given the sensitive nature of the information at issue.”).

¹¹ *Brown Bag Software v. Symantec Corp.*, 960 F.2d 1465, 1471 (9th Cir. 1992) (protective order struck a reasonable balance “by shielding [company’s] in-house counsel from personal

was engaged in competitive decision-making, noting that his knowledge of trade secrets would place him in the “untenable position” of having to refuse his employer legal advice on a host of business decisions.¹²

Here, the Vice Presidents appear to be in the same untenable position: in their capacities as senior in-house executives, they likely are involved in business decisions in their respective companies. Alternatively, even if they are not directly involved in Competitive Decision-Making, it is reasonable to assume that they have close and frequent contacts with others who make those decisions. To expect them to “divide their mind in two” and “lock up” in one part of their mind the Confidential Information learned in this proceeding would seem to be wishful thinking.

Sprint is aware of no facts demonstrating that the Vice Presidents do not give advice of the type that courts have deemed to constitute Competitive Decision-Making,¹³ or that they are sufficiently quarantined from business executives in their firms as to preclude the inadvertent disclosure of Confidential Information to those executives.¹⁴ To the contrary, Applicants already

knowledge of a competitor’s trade secrets, but allowing access to information through an independent consultant.”).

¹² *Id.*

¹³ Competitive Decision-Making has been found to include a variety of areas. *See, e.g., Volvo Penta of the Ams., Inc. v. Brunswick Corp.*, 187 F.R.D. 240, 242 (E.D. Va. 1999) (competitive decision-making involves decisions, for example, “that affect contracts, marketing, employment, pricing, product design”); *Intervet, Inc. v. Merial Ltd.*, 241 F.R.D. 55, 57 (D.D.C. 2007) (competitive decision-making involves, for example, “pricing, marketing, or design issues”); *Glaxo Inc. v. Genpharm Pharm., Inc.*, 796 F. Supp. 872, 874 (E.D.N.C. 1992) (competitive decisions include decisions about “pricing, scientific research, sales or marketing”).

¹⁴ Any such quarantine would have to be institutionalized and strictly enforced. As the Court of Appeals for the D.C. Circuit has stated, “it is very difficult for the human mind to compartmentalize and selectively suppress information once learned, no matter how well-intentioned the effort may be to do so.” *FTC v. Exxon Corp.*, 636 F.2d 1336, 1350 (D.C. Cir. 1980), *quoted with approval in In re Deutsche Bank Trust Co. Ams. and Total Bank Solutions, LLC*, 605 F.3d 1373, 1378 (Fed. Cir. 2010).

have conceded the following facts indicating that the Vice Presidents *are* actively involved in Competitive Decision-Making:

- Applicants concede that Dr. Stapper “advises Deutsche Telekom on international competition policy” and ensures that “competition policy” issues “are appropriately framed and advanced.”¹⁵ Sprint respectfully submits that in framing and advancing competition policy, Dr. Stapper almost certainly gives “advice about or participat[es] in the relevant business decisions” of Deutsche Telekom, thereby engaging in the very core of Competitive Decision-Making.¹⁶
- Applicants concede that Mr. Sugrue plays a “role” in “decisions” involving Competitive Decision-Making.¹⁷ Although Applicants attempt to minimize this role, Sprint respectfully submits that in carrying out his various duties as a Senior Vice President, it would be impossible for Mr. Sugrue to “create a wall in the middle of his mind” and segregate Sprint’s Confidential Information (which may not be disclosed or acted upon) from other information not so proscribed. Under these circumstances, the FCC’s prior skepticism – that “it is difficult to fathom that a ‘Senior Vice President’ of a company does not participate in competitive decision-making” – is fully warranted.¹⁸
- Applicants concede that Ms. Ham plays a senior managerial role at T-Mobile: she not only “is responsible for managing all federal regulatory policy work of T-Mobile,”¹⁹ but also apparently oversees her own “regulatory team” that is “involved” in decisions that include Competitive Decision-Making.²⁰ Her ability to erect a “wall” in her mind and refrain from Competitive Decision-Making appears as implausible as that of Mr. Sugrue.

¹⁵ Opposition to Rural Cellular Objection to Disclosure of Confidential Documents filed by Wiley Rein, WT Docket No. 11-65, at 2-3 (June 1, 2011) (“June 1 Opposition”).

¹⁶ Protective Order ¶ 2.

¹⁷ June 1 Opposition at 3.

¹⁸ *WorldCom Order on Objections* ¶ 2.

¹⁹ June 1 Opposition at 3.

²⁰ *Id.*

Accordingly, the Commission should conclude that all three Vice Presidents are engaged in Competitive Decision-Making and are barred from access to any of Sprint's Confidential Information or Stamped Confidential Documents.

Respectfully submitted,

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July 14, 2011

Certificate of Service

I hereby certify that on this 14th day of July, 2011, I caused true and correct copies of the foregoing Objection to be served as follows:

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