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January 22, 2013

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VIA ECFS

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

Re: Applications of Deutsche Telekom AG, T-Mobile USA, Inc., and MetroPCS Communications, Inc. for Consent to Assign or Transfer Control of Licenses and Authorizations. WT Docket No. 12-301

Dear Ms. Dortch:

Deutsche Telekom AG ("DT") and T-Mobile USA, Inc. ("T-Mobile USA") (collectively, "Applicants") respectfully submit this response to the January 17, 2013 letter submitted by The Greenlining Institute ("Greenlining"). Greenlining's letter opposes the Applicants' January 7, 2013 objection to providing Greenlining with the Applicants' unredacted response to the Commission's December 20, 2012 Information and Discovery Request ("Information Request"). The Applicants reiterate that Greenlining's lack of participation in the above-captioned proceeding renders it ineligible to access the unredacted Information Request response. The Applicants also categorically deny that T-Mobile USA promised Greenlining access to confidential and highly confidential materials in exchange for delaying filing in the FCC proceeding.

¹ Letter from Paul Goodman, The Greenlining Institute, to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket No. 12-301 (Jan. 17, 2013) ("Greenling Reply").

² Letter from Nancy J. Victory, Wiley Rein LLP, to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket No. 12-301, Re: Information Request (Jan. 7, 2013) ("Information Request response").

³ See id. at 1-2.



I. GREENLINING IS NOT A PARTICIPANT IN THIS PROCEEDING AND THEREFORE NOT ENTITLED ACCESS TO CONFIDENTIAL AND HIGHLY CONFIDENTIAL MATERIALS

The Applicants reiterate their objection to Greenlining obtaining access to the confidential and highly confidential information in the Applicants' response to the Information Request. ⁴ The Commission has previously found that entities who have not filed pleadings during the comment cycle are not entitled to access to confidential and highly confidential materials filed in the proceeding, ⁵ and should do so again here. ⁶ Having failed to make any submission during either the initial or

⁴ Letter from Nancy J. Victory, Wiley Rein LLP, to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket No. 12-301, Re: Objection to Greenlining (Jan. 7, 2013) ("DT/TMUS Objection").

⁵ See, e.g. Letter from Nancy J. Victory, Counsel for Verizon Wireless, and Peter J. Schildkraut, Counsel for AT&T Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket No. 09-121 (Dec. 9, 2009) (objection sustained through telephone call with Bureau). Similarly, the Bureau has previously sustained an objection to access to confidential and highly confidential information where it determined that the request for access was likely not motivated by "genuine participation in [the] administrative proceeding" where the entity made a minimal filing after the pleading cycle closed. See Letter from Rick Kaplan, Chief, Wireless Telecommunications Bureau to Joseph I. Marchese, Bursor & Fisher, 26 FCC Rcd. 11,235 (WTB rel. 2011).

The Commission has recognized that "the decision of what type of access to permit for reviewing confidential material is a balancing judgment, and there are costs on both sides of the equation." *In the Matter of Application of WorldCom, Inc. and MCI Communications Corp. for Transfer of Control of MCI Communications Corp. to WorldCom, Inc.*, Order Adopting Protective Order, CC Docket No. 97-211, DA 98-1072, 133 FCC Rcd. 11,166, 11,169, ¶ 6 (June 5, 1998) ("*MCI/Worldcom Protective Order*"). In restricting access of confidential information to "participants in this proceeding," the Protective Orders strike this balance. As in similar proceedings, the Commission has "limit[ed] access to confidential documents to a narrow group of counsel in order to reduce the potential for anti-competitive harm." *Id.* at 11,167, ¶ 5; *see id.* at 11,170, ¶ 7 (limiting access to those counsel "who are actively engaged in the conduct of this



the reply comment period for this transaction, Greenlining cannot be a participant in this proceeding as defined by the Protective Order and Second Protective Order. Accordingly, Greenlining is plainly ineligible to access such protected information.

Greenlining asserts that it still qualifies as a participant under the protective orders because it "has a good faith intention to file comments" in the docket and is exploring the possibility of submitting a "late-filed Petition to Deny." However, the comment period in this proceeding has closed, and the Commission-prescribed thirty-day period for filing a petition to deny has long since passed. 10 Greenlining concedes that it was aware of the pleading cycle established by the Commission, but made a "tactical decision to delay filing at the FCC" until after reviewing the Applicants' confidential and highly confidential material. 11 That argument not only ignores established FCC procedures but is illogical—during the pleading cycle,

(Continued . . .)

proceeding"). This reasonable restriction on access to confidential information should be respected.

Protective Order, WT Docket No. 12-301, DA 12-1664, ¶¶ 1-2 (WTB rel. Oct. 17, 2012 ("Protective Order"); Second Protective Order, WT Docket No. 12-301, DA 12-1665, ¶¶ 1-2, (WTB rel. Oct. 17, 2012)); see also DT/TMUS Objection at 1-2 (citing both Protective Orders in WT Docket No. 12-301).

Greenlining Reply at 2.

See Deutsche Telekom AG, T-Mobile USA, Inc. and MetroPCS Communications, Inc. Seek FCC Consent to the Transfer of Control of PCS Licenses and AWS-1 Licenses and Leases, One 700 MHz License, and International 214 Authorizations Held by MetroPCS Communications, Inc. and by T-Mobile USA, Inc. to Deutsche Telekom AG, Public Notice, WT Docket No. 12-301, DA 12-1730 (Oct. 26, 2012) ("Public Notice") (setting a comment deadline of November 26, 2012 and a reply deadline of December 17, 2012).

⁴⁷ C.F.R. § 1.939(a)(2) ("Petitions to deny for non-auctionable applications that are subject to petitions under § 309(d) of the Communications Act must comply with the provisions of this section and must be filed no later than 30 days after the date of the Public Notice listing the application or major amendment to the application as accepted for filing.").

See Greenlining Reply at 2 n.3.



there was no way of knowing if the Commission would later be issuing an information request that would require the submission of further confidential information by the Applicants. ¹²

II. T-MOBILE USA CATEGORICALLY DENIES GREENLINING'S ALLEGATIONS OF A QUID PRO QUO

Though T-Mobile USA and Greenlining have engaged in discussions since the announcement of the proposed transaction, at no time did T-Mobile USA promise Greenlining access to all of T-Mobile USA's confidential materials in exchange for Greenlining delaying or not participating in the FCC comment cycle. ¹³ T-Mobile USA categorically denies Greenlining's allegation of a *quid pro quo*.

Until Greenlining's request for the highly confidential and confidential materials on January 7, 2013, T-Mobile USA's discussions with Greenlining focused exclusively on review of the transaction by the California Public Utilities Commission ("CPUC"), not by the FCC. T-Mobile USA reached out to Greenlining—a California-based advocacy group—to discuss the proposed transaction's impact on California and possible review by the CPUC. T-Mobile USA's state regulatory team, along with local California counsel for T-Mobile USA and MetroPCS, conducted this outreach to Greenlining. These discussions led to T-Mobile USA and Greenlining entering into a non-disclosure agreement ("NDA"), which permitted Greenlining to access confidential materials the Applicants submitted to the CPUC. Under the terms of the NDA, Greenlining was authorized to use the confidential materials for the limited purpose of discussions between the signatories to the NDA and advocacy before the CPUC.

Pursuant to the NDA, the Applicants provided Greenlining with an unredacted version of their CPUC notice filing ¹⁴ and other confidential materials supplied to the CPUC. These exchanges between Greenlining and T-Mobile USA

¹² Indeed, the FCC did not issue an information request until December 20, 2012, three days after the close of the comment cycle in this proceeding.

See Greenlining Reply at 2.

¹⁴ Letter from Leon M. Bloomfield and Suzanne Toller to Michael Amato, Acting Director, Telecommunications Division, California Public Utilities Commission (Nov. 8, 2012) ("CPUC Notice").



occurred in late November and early December 2012. At no time during these discussions did T-Mobile USA provide or promise to provide confidential or highly confidential material to Greenlining in exchange for Greenlining's commitment to forego participation in the FCC's comment cycle. Notably, after receiving and reviewing the Applicants' confidential CPUC submissions, Greenlining elected not to make any written submission to the CPUC. ¹⁵

The Applicants did not interact further with Greenlining about information regarding the proposed transaction until Greenlining contacted the Applicants' FCC counsel on January 7, 2013 to request access to the Applicants' unredacted response to the Information Request. Since that time, the Applicants have engaged in discussions with Greenlining in an attempt to understand and address any concerns Greenlining may have with respect to the proposed transaction. In a January 14, 2013 conference call, Greenlining indicated its interest in accessing the confidential and highly confidential materials filed in response to the Information Request in order to support the proposed transaction at the FCC. T-Mobile USA expressed its appreciation, but indicated that given the late stages of the FCC process, a filing of any kind—even a supportive filing—could delay the proceeding. To attempt to address Greenlining's concerns, T-Mobile USA offered to provide Greenlining with access to the unredacted narrative response to the FCC's Information Request ("narrative response") pursuant to the existing, California-specific NDA between the parties. However, Greenlining rejected this offer and submitted its opposition.

Based on its own review of the materials submitted by the Applicants, the CPUC allowed its merger notification period to expire on December 10, 2012 without opening an investigation or otherwise requesting further information. Under California law, upon expiration of the notification period without action by the CPUC, the parties to the transaction are not required to take any further action. California Public Utilities Commission, Investigation on the Commission's Own Motion Into Mobile Telephone Service and Wireless Communications, Decision No. 95-10-032, 1995 Cal. PUC LEXIS 888 at *46 (Oct. 18, 1995).

At no time did T-Mobile USA represent to Greenlining that it would produce the unredacted narrative response pursuant to an "as-yet-unsigned non-disclosure agreement." Greenlining Reply at 3. Not only is the allegation factually inaccurate, it makes little sense. A "confidential information first, NDA later" approach would leave T-Mobile's confidential and highly confidential material entirely unprotected.



Finally, while Greenlining suggests that the Applicants' failure to provide access to the confidential and highly confidential materials submitted in response to the Information Request suggests that they must have something to hide, the Commission has repeatedly recognized that it is appropriate to "limit access to confidential documents to a narrow group of counsel in order to reduce the potential for anti-competitive harm." The Applicants merely seek to have the Commission uphold this established and reasonable restriction on access to sensitive information.

For the foregoing reasons, the Applicants' objection to Greenlining's access to confidential and highly confidential information should be sustained. Please do not hesitate to contact the undersigned counsel for the Applicants should there be any questions or should additional information be required.

Respectfully submitted,

/s/ Nancy J. Victory

Nancy J. Victory

Attachments

cc: Paul Goodman, The Greenlining Institute

Best Copy and Printing

David Hu Kathy Harris Kate Matraves Jim Bird

David Krech

 $^{^{17}}$ MCI/Worldcom Protective Order at 11,167, ¶ 5; see id. at 11,170, ¶ 7 (limiting access to those counsel "who are actively engaged in the conduct of this proceeding").