

THE KONKURRENZ GROUP

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REDACTED—FOR PUBLIC INSPECTION

January 30, 2019

VIA ECFS

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

RE: Consolidated Applications of T-Mobile US, Inc. and Sprint Corporation for Consent to Transfer Control of Licenses and Authorizations, WT Docket No. 18-197

Dear Ms. Dortch:

In accordance with Protective Order (DA 18-624) in the above-captioned proceeding, the Communications Workers of America (“CWA”) submits the attached public, redacted version of a letter from the undersigned to Nancy J. Victory identifying various deficiencies with T-Mobile’s revised December 27, 2018 privilege log. CWA has indicated with the legend “**{{BEGIN HCI END HCI}}**” where Highly Confidential Information has been redacted.

CWA respectfully requests the Commission to require T-Mobile to fully comply with Instructions 17 and 18 (which apply to claims of privilege) in the “General Information and Document Request for T-Mobile,” dated August 15, 2018, and to consider pausing the clock until T-Mobile has fully complied and has produced all non-privileged documents.

A Highly Confidential version of this filing is being filed with the Commission on this date and will be made available pursuant to the terms of the Protective Order. Please contact me with any questions.

Sincerely,



Allen P. Grunes
Counsel to Communications Workers of America
Attachment

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January 30, 2019

Via Email

Nancy J. Victory, Esq.
DLA Piper LLP
500 Eighth Street, NW
Washington, DC 20004

**Re: T-Mobile Privilege Log, Applications of T-Mobile US, Inc. and Sprint Corporation,
WT Docket No. 18-197**

Dear Nancy:

As you know, we represent the Communications Workers of America (“CWA”) in connection with the proposed transaction. T-Mobile has provided an updated privilege log (the fifth iteration of the log to date) to the Commission on December 27.¹ Despite T-Mobile’s asserted “considerable additional efforts” on the revised log, it still contains many of the same deficiencies that I previously identified in my two prior letters. In fact, as discussed below, it does not even address the most glaring examples of improper privilege claims that were brought to your attention in both of those letters, including assertions of privilege over documents that T-Mobile has shared with its competitors or with public interest groups or with members and staff of the Commission.

The log provided to the Commission on December 27 has {{BEGIN HCI [REDACTED] END HCI}} entries, a reduction of a miniscule number (to be exact, {{BEGIN HCI [REDACTED] END HCI}} entries) from the November 15 log. The December log still claims privilege over {{BEGIN HCI [REDACTED] END HCI}} pages of documents that continue to be withheld in their entirety. It is particularly troubling to see that {{BEGIN HCI [REDACTED] END HCI}} entries are now designated as “Pending Further Review.” It is not apparent why this “further review” is taking place only now. But it is clear that, as of the date of the updated log, there is not a complete record available to the Commission or reviewing parties that would allow anyone to properly evaluate T-Mobile’s own documents relevant to the proposed transaction.

¹ Letter from Nancy J. Victory to Marlene H. Dortch, WT Docket No. 18-197 (Dec. 27, 2018).

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This conclusion is further reinforced by T-Mobile's decision to withhold documents relating to the Applicants' 5G engineering model as "work product." Applicants now claim that the 5G engineering model was not prepared in the ordinary course of business but rather at the direction of counsel for the merging parties.² While that claim raises significant questions about the reliability of the model, the decision to withhold numerous underlying documents means the Commission and other reviewers are prevented from seeing the full picture.

Further, since its last log, T-Mobile has produced a handful of documents that were previously withheld as privileged.³ A review of these de-privileged and produced documents shows how flimsy some of T-Mobile's privilege claims were. In its December 18 production, T-Mobile produced TMUS-FCC-07786008 (which had been PRIV00086652 on the November 15 log). This document is **{{BEGIN HCI [REDACTED] END HCI}}**⁴ More problematic is TMUS-FCC-07786502 (previously withheld on the November 15 log as PRIV00134759), a 2017 presentation **{{BEGIN HCI [REDACTED] END HCI}}**⁵ Similarly, TMUS-FCC-07786694, a presentation entitled **{{BEGIN HCI [REDACTED] END HCI}}**⁶ There is no reason why any of these documents should have been

² See Letter from Nancy J. Victory to Marlene H. Dortch, WT Docket No. 18-197 (Dec. 12, 2018).

³ See Letter from Nancy J. Victory to Marlene H. Dortch, WT Docket No. 18-197 (Dec. 18, 2018).

⁴ TMUS-FCC-07786008, **{{BEGIN HCI [REDACTED] END HCI}}** Another example of an innocuous email previously withheld as attorney-client privileged is TMUS-FCC-07786743 (PRIV00169121 on the November 15 log),

{{BEGIN HCI [REDACTED] END HCI}} These examples only serve to confirm the breadth of T-Mobile's overly broad privilege designations.

⁵ TMUS-FCC-07786502 at TMUS-FCC-07786507.

⁶ See TMUS-FCC-07786694, **{{BEGIN HCI [REDACTED] END HCI}}** Additional relevant documents that were previously withheld include TMUS-FCC-07787630, **{{BEGIN HCI [REDACTED] END HCI}}**

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withheld as privileged – except for the fact that they are inconsistent with what the Applicants have been representing to the Commission. There is no privilege that shields bad documents.

The defects identified in my October 23 and November 15 letters remain largely unaddressed. I write once more to reiterate these issues and request yet again that T-Mobile promptly correct them:

1. T-Mobile continues to assert privilege over communications and documents that were shared with third parties, including other companies and the government;
2. The log submitted on December 27 still contains many incomplete and vague entries;
3. T-Mobile continues to assert privilege over documents merely because they were written by, or provided to, an attorney;
4. T-Mobile continues to assert privilege over widely disseminated communications and other documents that are not likely to be privileged; and
5. In a substantial number of cases, T-Mobile has withheld documents containing allegedly privileged material in their entirety, rather than producing the documents with the privileged material redacted.

As you know, the burden of claiming and demonstrating privilege rests with T-Mobile. In many cases, on the basis of the provided log, CWA and other third party reviewers cannot properly assess the validity of T-Mobile's privilege claims. We therefore reiterate our request that T-Mobile either provide additional detail to substantiate its privilege claims or produce the withheld materials forthwith.

Communications with Third Parties

T-Mobile continues to withhold many documents that were shared with third parties, including those I identified in my prior letters. For instance, document PRIV00028231 **{{BEGIN HCI** [REDACTED] **END HCI}}**. The log submitted on December 27 offers no further explanation of why this email is considered **{{BEGIN HCI** [REDACTED] **END HCI}}**. As I have stated more than once, it is difficult to see how such entities could share a common legal interest with T-Mobile, much less an attorney-client relationship. Another entry I previously identified, PRIV00088520, is withheld as **{{BEGIN HCI** [REDACTED] **END HCI}}**.

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██████████ **END HCI}}** Indeed, *no* attorney is a sender or recipient of the email.) This is the tip of the iceberg.

Emails to **{{BEGIN HCI ██████████ END HCI}}** continue to be withheld as privileged. This was brought to your attention in my prior letters, yet remains unaddressed.

Along with its log, T-Mobile provided an updated “Index of Names on the Privilege Log,” listing approximately **{{BEGIN HCI ██████████ END HCI}}** individuals. The revised index also continues to suffer from serious deficiencies. Various government entities are still listed on the index, including **{{BEGIN HCI ██████████**
██████████ **END HCI}}**⁷
still appear on the revised index. In total, the index lists over **{{BEGIN HCI ██████████ END HCI}}** separate third-party entities in the “affiliation” column.

T-Mobile still claims privilege over communications such as PRIV00038715, which was from **{{BEGIN HCI ██████████**
██████████ **END HCI}}**⁸
Similarly, T-Mobile claims privilege over communications such as PRIV00143050 **{{BEGIN HCI ██████████**
HCI ██████████ **END**
HCI}} and PRIV00053965, which was sent to **{{BEGIN HCI ██████████**
██████████ **END**
██████████ **HCI}}**

The Title field for **{{BEGIN HCI ██████████ END HCI}}** entries is blank. The Affiliation field for **{{BEGIN HCI ██████████ END HCI}}** entries is also blank, including for **{{BEGIN HCI ██████████**
██████████ **END HCI}}** The index continues to include vague entries such as **{{BEGIN HCI ██████████**
██████████

⁷ Additional examples include individuals listed as being affiliated with **{{BEGIN HCI ██████████**
██████████ **END HCI}}**

⁸ Other previously-identified examples include PRIV00122799, which included **{{BEGIN HCI ██████████**
██████████ **END HCI}}** and PRIV00004080, which included **{{BEGIN HCI ██████████**
██████████ **END HCI}}**

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END HCI}} It also includes **{{BEGIN HCI**

END HCI}} These materials and others disclosed to third parties should be released immediately. There is simply no reason why they continue to be withheld.

T-Mobile has still made no showing, and there is no basis to conclude, that any of these communications with third parties are shielded by the attorney-client privilege or any other legal privilege.

Incomplete or Vague Entries

A privilege log must be sufficiently detailed so that the claim of privilege can be assessed. The Request for Information to T-Mobile requires that “[t]he description of the subject matter of each document shall describe the nature of the document in a manner that, though not revealing information that is itself privileged, provides sufficiently detailed information to enable the Commission to assess the applicability of the privilege claimed.”⁹

The limited additions to the log submitted on December 27 do not provide the requisite detail that would allow CWA, the Commission, or anyone else to evaluate T-Mobile’s claims of privilege. **{{BEGIN HCI** **END HCI}}** entries still do not include an author/sender of the document. For example, PRIV00141004, **{{BEGIN HCI**

END HCI}} In numerous other instances, the author or recipients are still identified by vague or meaningless descriptors such as **{{BEGIN HCI** **END HCI}}**

In addition, there are now **{{BEGIN HCI** **END HCI}}** documents withheld or redacted under a claim of “work product,” but the descriptions still lack the specificity required by the Commission’s instructions. The general assertion that a document was “prepared in

⁹ Applications of T-Mobile US, Inc. and Sprint Corporation for Consent to Transfer Control of Licenses and Authorizations, WT Docket No. 18-197, General Information and Document Request for T-Mobile (Aug. 15, 2018) (“T-Mobile RFF”) Instruction 18.

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anticipation of litigation” regarding generic issues such {{BEGIN HCI [REDACTED] END HCI}} is insufficient under the instructions.¹⁰

Documents Provided to an Attorney But not Requesting Legal Advice, or not Involving an Attorney

T-Mobile also appears to assert privilege over documents merely because they were written by, or provided to, an attorney. But that is not the relevant test. The attorney-client privilege only applies to communications that were intended to be confidential and made for the purpose of seeking or providing legal advice.

For instance, PRIV00045649 is {{BEGIN HCI [REDACTED] END HCI}} It seems more likely that this and similar documents are unprivileged business documents. Simply because an attorney is copied does not convert an unprivileged business document into a privileged document.

The problem is compounded as T-Mobile identifies {{BEGIN HCI [REDACTED] END HCI}} people on the index with a symbol indicating that the individual is an attorney.¹¹ But individuals with this notation include those associated with third parties, including, for example, {{BEGIN HCI [REDACTED] END HCI}}

Widely Disseminated Communications and Documents

There are still thousands of entries on the privilege log that were shared with or distributed to large numbers of people. Several hundred were sent to more than {{BEGIN HCI [REDACTED] END HCI}} recipients. Many were sent to recipients that T-Mobile describes on the index

¹⁰ See T-Mobile RFI Instruction 18(4) (“For each document withheld under a claim that it constitutes or contains attorney work product, also state whether the Company asserts that the document was prepared in anticipation of litigation or for trial and, if so, specify the anticipated litigation or trial upon which the assertion is based.”).

¹¹ We assume that the notation “ ^ ” after a person’s name indicates that person is an attorney “acting in a legal capacity with respect to the withheld document or communication” per Instruction 18 of the T-Mobile RFI.

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as {{BEGIN HCI [REDACTED] END HCI}} In numerous cases, T-Mobile asserts the attorney-client privilege as a basis to withhold these documents. But wide distribution of a communication is an indication that it is unlikely to be protected by the attorney-client privilege.

As we noted previously, given the extensive circulation of many of the withheld communications, it is difficult to see how those communications were attorney-client privileged. If the large sets of recipients or the distribution lists included even one individual outside of T-Mobile who was not outside counsel, T-Mobile likely would have waived the applicable privilege.

Withholding Entire Documents Instead of Redacting

With a relative handful of exceptions, T-Mobile has continued to withhold documents in their entirety rather than redacting the privileged portions and producing the unredacted portions. It has produced in redacted form only 4% of the documents listed on the log.

To the extent that any of the {{BEGIN HCI [REDACTED] END HCI}} withheld in their entirety contain both privileged and non-privileged content, T-Mobile must produce such documents in redacted form if it is able to do so. Along these lines, {{BEGIN HCI [REDACTED] END HCI}} documents withheld in full are more than 20 pages long, and more than {{BEGIN HCI [REDACTED] END HCI}} are more than 100 pages long.¹² We are highly skeptical that all or most of these documents were properly withheld in their entirety.

Conclusion

The revised privilege log still has numerous deficiencies, and T-Mobile's continued failure to correct them impedes our ability to review the merits of the claimed privileges. T-Mobile's designation of log entries as "pending further review" is also an improper deflection of its obligation to thoroughly explain its decision to withhold these documents from scrutiny. CWA requests that T-Mobile provide the Commission with a revised privilege log and produce any documents for which it no longer asserts a claim of privilege. CWA also requests that, for any document which has only a portion that is privileged, the remainder of the document be produced in a redacted form.

¹² Document PRIV00132968, withheld in its entirety, is listed as being {{BEGIN HCI [REDACTED] END HCI}} pages long.

Nancy J. Victory, Esq.
January 30, 2019
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We are filing this letter with the Commission pursuant the procedures in the protective order.

Please contact me with any questions.

Sincerely,

A handwritten signature in blue ink that reads "Allen P. Grunes". The signature is written in a cursive style with a long, sweeping tail on the "n" at the end.

Allen P. Grunes