Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Applications for Consent to the	)	
Transfer of Control of Licenses	)	
	)	
Comcast Corporation and	)	MB Docket No. 02-70
AT&T Corp., Transferors,	)	
	)	
To	)	
	)	
AT&T Comcast Corporation,	)	
Transferee	)	

JOINT RESPONSE OF COMCAST CORPORATION AND AT&T CORP. TO OPPOSITION OF VERIZON TO JOINT OBJECTION OF COMCAST AND AT&T TO DISCLOSURE OF CONFIDENTIAL INFORMATION

Comcast Corporation ("Comcast") and AT&T Corp. ("AT&T") (collectively, the "Applicants") hereby respond to the Opposition filed by Verizon Telephone Companies and Verizon Internet Solutions d/b/a/Verizon.net ("Verizon")[1] in this proceeding. The Applicants previously demonstrated that Verizon's in-house counsel, Mr. John P. Frantz, should not be allowed access to the Confidential Information submitted under seal in this

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[1] Opposition of Verizon Telephone Companies and Verizon Internet Solutions d/b/a/Verizon.net to Joint Objection of Comcast and AT&T to Disclosure of Confidential Information, MB Dkt. No. 02-70 (filed July 22, 2002) ("Verizon Opposition"); *see also* Declaration of John P. Frantz (attached as Exhibit A to Verizon Opposition) ("Frantz Decl.").

proceeding[2] because of the significant risk of inadvertent disclosure. The Applicants further showed that Commission precedent fully supported denial of Mr. Frantz's request for access. Verizon's opposition falls well short of refuting the Applicants' showing that Mr. Frantz is ineligible to review the Confidential Information. The Commission, therefore, should deny Mr. Frantz's request for such access.[3]

I. Verizon Has Failed To Demonstrate That Its In-House Counsel Is Not Involved In Competitive Decision-Making.

In their joint objection, the Applicants demonstrated that the disclosure of Confidential Information to Mr. Frantz presents an "unacceptable opportunity for inadvertent disclosure," and, consequently, his request for access should be denied. The Applicants noted that, as Vice President and Counselor to the General Counsel of Verizon, Mr. Frantz holds a senior corporate position in the company and works closely with Verizon's Executive Vice President and General Counsel, who in turn provides legal advice to senior management at Verizon. As Verizon's predecessor corporation, Bell Atlantic, has noted, "[t]he close relation between regulation and business in the telecommunications industry presumably is why the Commission has adopted a rule that lawyers at a sufficiently high position in a telecommunications company should not be

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[2] *Applications for Consent to the Transfer of Control of Licenses From Comcast Corporation and AT&T Corp., Transferors, To AT&T Comcast Corporation, Transferee*, 17 FCC Rcd 5926 (2002) ("Protective Order").

[3] As the Applicants pointed out in their joint objection, they do not object to outside counsel of record for Verizon reviewing the Confidential Information. Thus, the Commission's decision to disqualify Mr. Frantz will not deprive Verizon of "an opportunity to participate in this proceeding or unduly limit the Commission's ability to make a reasoned decision on the merits of this merger application." *See Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, 13 FCC Rcd 13478, ¶ 6 (1998) ("*WorldCom/MCI Order*").

granted access to confidential documents absent being walled off from competitive decisionmaking."[4]

In response, Verizon does not allege that Mr. Frantz is "walled off" from competitive decision-making. Instead, it submitted a declaration in which Mr. Frantz describes his responsibilities as Vice President and Counselor to the General Counsel. Those duties include the following:

- "I represent Verizon in antitrust and other litigation in federal and state courts." Frantz Decl. ¶ 3.
- "I am involved in regulatory proceedings related to mergers." *Id.* ¶ 4.
- "I am presently serving as Verizon's lead counsel in the Justice Department's investigation of the AT&T-Comcast merger, and I participated in the drafting of Verizon's comments to the Commission on that same merger." *Id.*
- "I assist Verizon's General Counsel in litigation and regulatory matters." *Id.* ¶ 5.
- "I am not involved in any business decisions made at Verizon." *Id.* ¶ 6.

Verizon contends that the foregoing statements are sufficient to establish that Mr. Frantz is entitled to review the Confidential Information. Verizon further asserts that granting access to Mr. Frantz would be consistent with past Commission decisions, including one involving Bell Atlantic, Verizon's predecessor corporation. Neither assertion withstands serious scrutiny.

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[4] *See* Bell Atlantic Opposition to Petition for Reconsideration of Sprint, CC Dkt. No. 98-184, at 3 (filed Apr. 5, 1999) ("Verizon Recon Reply"). This statement was made in response to precisely the same claim that Verizon raises here – namely, that a disqualification of Mr. Frantz would be improper under the *Matsushita* precedent. *Compare* Sprint Petition for Reconsideration, CC Dkt. No. 98-184, at 5-6 (filed March 25, 1999) ("Sprint Petition") (citing *Matsushita Elec. Indus. Co. v. United States*, 929 F.2d 1577 (Fed. Cir. 1991)), *with* Verizon Opposition at 7-8. The other cases cited by Verizon are similarly unconvincing. For example, in *United States v. Sungard Data Systems*, 173 F. Supp. 2d 20 (D.D.C. 2001), the court allowed in-house counsel access to confidential materials, but imposed additional protections ("severe, personal sanctions" including a $250,000 fine that could not be reimbursed by the employer) not present here to guard against inadvertent disclosure.

Contrary to Verizon's claims, the job responsibilities described by Mr. Frantz in his declaration are remarkably similar to the job duties of other in-house counsel that the Commission previously has barred from reviewing sensitive information. In the WorldCom/MCI merger, for example, Bell Atlantic filed declarations on behalf of its two in-house counsel that described their duties as follows:[5]

- "My job is to provide legal representation and advice relating to regulatory proceedings at the FCC, the State commissions, and the courts that affect the interests of Bell Atlantic." Young Decl. ¶ 2.
- "My principal duties are to write briefs and argue cases involving antitrust, regulatory, and intellectual property issues." Thorne Decl. ¶ 2.
- "As an active advocate in the current proceeding, I have reviewed and edited all the briefs Bell Atlantic has filed at the FCC concerning the WorldCom/MCI merger." Young Decl. ¶ 2.
- "I act as a lawyer in and for the company, not as a business officer." Young Decl. ¶ 3; *see also* Thorne Decl. ¶ 3.
- "In particular, I work 'with' the business side of the company, as all lawyers work with their clients, in that I provide *legal* advice (in my case, about regulatory issues) to business people in the company." Young Decl. ¶ 3; *see also* Thorne Decl. ¶ 3.
- "But Bell Atlantic makes its business decisions about what products, prices, marketing strategies, etc., are most competitively advantageous without my analyzing or contributing information, or playing a decisionmaking role, on those competitive business issues. The business people in the company perform those functions." Young Decl. ¶ 3; *see also* Thorne Decl. ¶ 3.

The Commission found these declarations to be insufficient, and ruled (as Verizon acknowledges here) that Bell Atlantic had "merely asserted, 'without any type of substantiation,' that these attorneys were not involved in competitive decision-making."[6]

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[5] *See* Declaration of Edward D. Young, III ("Young Decl.") & Declaration of John Thorne ("Thorne Decl."), attached to Opposition of Bell Atlantic to Joint Objection of WorldCom and MCI to Disclosure of Stamped Confidential Documents, CC Dkt. No. 97-211 (filed June 18, 1998).

[6] *See* Verizon Opposition at 8, citing *WorldCom/MCI Order* ¶ 2.

Verizon also cannot reconcile its claims in this proceeding with the position its predecessor corporation advanced in similar disputes in the past. During the pendency of the Bell Atlantic/GTE merger, Bell Atlantic succeeded in preventing two of Sprint's in-house counsel from reviewing information filed by Bell Atlantic that was subject to a protective order.[7] The declarations filed by Sprint in that proceeding in support of its in-house counsel, which Bell Atlantic asserted were inadequate,[8] contained substantially the same description of job duties as Mr. Frantz's declaration here.

Specifically, those declarations indicated that Sprint's in-house counsel were "responsible for preparing, assisting in the preparation of, reviewing, and filing written pleadings with the FCC and the [DOJ], concerning regulatory issues that concern Sprint."[9] The declarations further stated that counsel, in their 15 and 16 years, respectively, as in-house counsel for the company, had not been involved in competitive decision-making and that they had "neither been asked, nor ha[d] [they] offered, to participate in setting rates, targeting particular markets, developing new products or product lines, or any similar business decisions."[10]

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7 *See GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, for Consent to Transfer of Control*, 14 FCC Rcd 3364, ¶ 2 (1999) ("*BA/GTE Order*"). Verizon attempts to distinguish the *BA/GTE Order* by (inaccurately) claiming that "Sprint acknowledged that it used the two attorneys' advice 'to inform business strategies and decisions.'" Verizon Opposition at 7 n.23. Sprint, however, disputed this fact. *See* Sprint Petition at 9 n.23.

8 *See* Verizon Recon Reply at 3-4 n.2.

9 *See* Declaration of Leon M. Kestenbaum ¶ 3 ("Kestenbaum Decl."), attached to Sprint Petition; *see also* Declaration of Craig D. Dingwall ¶ 3 ("Dingwall Decl."), attached to Sprint Petition.

10 Kestenbaum Decl. ¶ 4; Dingwall Decl. ¶ 4.

Although these statements are substantially similar to statements in Mr. Frantz's declaration in the instant proceeding, Bell Atlantic argued that Sprint's declarations did "not rebut the allegation that these attorneys may be involved in competitive decisionmaking" and that they contained only "conclusory assertion[s]" that the two attorneys were not involved in competitive decision-making.[11] Indeed, Verizon urged the Commission to reject these "cleverly-worded affidavits" as insufficient to overcome its prior ruling.[12]

Finally, contrary to Verizon's suggestion, prior review of confidential materials pursuant to a protective order does not inoculate in-house counsel from disqualification.[13] Indeed, Mr. Frantz's supervisor, John Thorne, who apparently has obtained access via protective orders "notwithstanding his more senior title and position,"[14] was one of the in-house counsel disqualified by the Commission in the WorldCom/MCI proceeding.[15] Similarly, Sprint's vice president of federal regulatory affairs, who was allowed access

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11 Verizon Recon Reply at 3-4 n.2.

12 *Id.* To the Applicants' knowledge, the Commission never ruled on the Sprint Petition. Verizon further argued that the declarations "say nothing about whether these individuals have actually have [sic] participated in such decisions – just whether they have offered or been asked to participate. Moreover, the affidavits say nothing about whether the individuals have advised other Sprint personnel to make these decisions, or anything about the many other kinds of competitive decisions not addressed in the affidavits." *Id.* By Verizon's own standard, Mr. Frantz's affidavit is similarly "cleverly-worded" and "not sufficient."

13 Since it appears that no party objected to Mr. Frantz obtaining access to their confidential material in the other proceedings cited by Verizon, *see* Verizon Opposition at 5, it is not surprising that Mr. Frantz was not disqualified. As noted, even if Mr. Frantz has never been disqualified, that fact is not dispositive of the instant objection.

14 Frantz Decl. ¶ 7.

15 *WorldCom/MCI Order* ¶ 2.

under the terms of an identical standard in the WorldCom/MCI protective order, was subsequently disqualified under the Bell Atlantic/GTE protective order.[16]

II. Conclusion

Verizon has failed to refute the Applicants' showing that disclosure of Confidential Information to Mr. Frantz clearly would present an "unacceptable opportunity for inadvertent disclosure." The Commission should deny Mr. Frantz access to the Confidential Information pursuant to the Protective Order.[17]

Respectfully submitted,

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16 *See* Sprint Petition at 11 n.25.

17 Verizon also notes that Mr. Frantz "is the only in-house attorney for Verizon seeking access to the confidential materials submitted by the Applicants." Verizon Opposition at 6 n.19. As Verizon itself noted in response to similar arguments during its own merger proceeding, in the event that Mr. Frantz is disqualified, Verizon is free to request access for a lower level attorney who meets the standards of the Protective Order. Verizon Recon Reply at 4.

Certificate of Service

I hereby certify that on this 25th day of July 2002, I caused a copy of the attached Joint Response to Opposition of Verizon to be hand delivered (†) or electronically mailed (*) to the following:

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