

**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
TO DISCLOSURE OF CONFIDENTIAL DOCUMENTS**

Pursuant to the first Protective Order in the above-referenced proceeding,¹ Sprint Nextel Corporation (“Sprint”), through undersigned counsel, objects to the Acknowledgment of Confidentiality filed on behalf of Robert W. Quinn, Jr., the Senior Vice President-Federal Regulatory & Chief Privacy Officer of AT&T Inc. (“AT&T”).² Sprint objects to Mr. Quinn because, in his capacity as a senior in-house executive, he likely is engaged in Competitive Decision-Making at AT&T and, thus, is ineligible to access Confidential Information under the Protective Order.

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

¹ *Applications of AT&T Inc. and Deutsche Telekom AG for Consent to Assign or Transfer Control of Licenses and Authorizations*, WT Docket No. 11-65, Protective Order, DA 11-674 (rel. Apr. 14, 2011) (“*Protective Order*”).

² Letter from Peter J. Schildkraut, Counsel for AT&T, to Marlene H. Dortch, FCC, WT Docket No. 11-65 (June 13, 2011) (attaching acknowledgment of confidentiality signed by Robert W. Quinn).

³ *Protective Order* ¶ 2.

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 the result of that inquiry, which necessarily is fact-intensive,⁶ suggests that Mr. Quinn likely plays a significant role in the Competitive Decision-Making of AT&T.

FCC and judicial precedents have established that Senior 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 within a company.⁷ 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

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.”).

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

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.”⁸ As the FCC concluded in another FCC precedent regarding Sprint, “[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.”⁹ 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.”¹⁰ The court concluded the counsel 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.¹¹

Here, Mr. Quinn appears to be in the same untenable position: in his capacity as a Senior Vice President, he likely is involved in formulating, analyzing, giving advice about, or otherwise participating in AT&T’s business decisions. Alternatively, even if he is not directly involved in Competitive Decision-Making, it is reasonable to assume that he has close and frequent contacts

⁸ *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).

⁹ *GTE Order* ¶ 2; *see also WorldCom 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.”).

¹⁰ *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 knowledge of a competitor’s trade secrets, but allowing access to information through an independent consultant.”).

¹¹ *Id.*

with other AT&T executives who make those decisions. To expect Mr. Quinn to “divide his mind in two” and “lock up” in one part of his mind the Confidential Information learned in this proceeding is likely wishful thinking.

Sprint is aware of no facts demonstrating that Mr. Quinn does not give advice of the type that FCC and courts have deemed to constitute Competitive Decision-Making,¹² or that he is sufficiently quarantined from other AT&T business executives as to preclude the inadvertent disclosure of Confidential Information to those executives.¹³ Accordingly, without further facts about the duties and activities undertaken by Mr. Quinn, and his relationships and contacts with other AT&T executives, the Commission must conclude that Mr. Quinn is engaged in Competitive Decision-Making.

Respectfully submitted,

/s/ Richard D. Mallen

Richard D. Mallen

Lawler, Metzger, Keeney & Logan, LLC

2001 K Street NW, Suite 802

Washington, DC 20006

(202) 777-7700

Counsel for Sprint Nextel Corporation

June 16, 2011

¹² 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”).

¹³ Any such quarantine would have to be institutionalized and strictly enforced. As the U. S. Court of Appeals for the D.C. Circuit has stated, “[I]t 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. Amers. and Total Bank Solutions, LLC*, 605 F.3d 1373, 1378 (Fed. Cir. 2010).

Certificate of Service

I hereby certify that on this 16th day of June, 2011, I caused true and correct copies of the foregoing Objection to be served as follows:

Via electronic mail to:

Kathy Harris
Mobility Division
Wireless Telecommunications Bureau
Federal Communications Commission
kathy.harris@fcc.gov

Kate Matraves
Spectrum and Competition Policy Division
Wireless Telecommunications Bureau
Federal Communications Commission
catherine.matraves@fcc.gov

David Krech
Policy Division
International Bureau
Federal Communications Commission
david.krech@fcc.gov

Jim Bird
Office of General Counsel
Federal Communications Commission
jim.bird@fcc.gov

Best Copy and Printing, Inc.
FCC@BCPIWEB.COM

Stacy Ferraro
Spectrum and Competition Policy Division
Wireless Telecommunications Bureau
Federal Communications Commission
stacy.ferraro@fcc.gov

Via U.S. mail and email to:

Peter J. Schildkraut
Arnold & Porter LLP
555 Twelfth Street NW
Washington, DC 20004
Outside Counsel to AT&T Inc.

Nancy J. Victory
Wiley Rein LLP
1776 K Street NW
Washington, DC 20006
Outside Counsel to Deutsche Telekom AG and T-Mobile USA, Inc.

/s/ Ruth E. Holder
Ruth E. Holder