December 2, 2013

Diane Cornell
Special Counsel
Office of the Chairman
Federal Communications Commission
445 12th St. SW
Washington, DC 20554

Dear Ms. Cornell:

Thank your for the opportunity to submit ideas on FCC process reform. As an organization that has been involved with many issues at the FCC for many years, Public Knowledge (PK) has many thoughts on this issue. It is more difficult for members of the public, as well as public interest organizations with limited resources, to work around some of the deficiencies in FCC processes. A few large companies have access to private sources of information, support staff, and internal databases that exist partly to overcome deficiencies in FCC sources of data. Most other organizations do not. PK would benefit from certain FCC process and information reforms that would help the FCC do its job more efficiently and that would make organizations like PK more effective. Additionally, based on discussions with the open hardware community PK believes that certain reforms with regard to device certification may be in order. These short comments are not intended to address all of the broad questions involved in FCC process reform; rather, they are focused on a few problematic issues that PK has encountered recently.

Continue Expanding Spectrum Dashboard Functionality

While the FCC Spectrum Dashboard is an important first step toward increasing the transparency of spectrum holdings and making spectrum licensing

information more discoverable, much work needs to be done. PK has previously submitted comments and spoken to FCC staff regarding FCC spectrum data, and continues to think that the FCC's public tools could be enhanced to provide historical, build-out, and other information that could help organizations gain a better insight into spectrum policy issues. For ease of reference, PK attaches its previous public comments on this matter.

The FCC's Use of Protective Orders in Proceedings Should Be Restricted to Genuinely Commercially Sensitive Material

In the course of specific proceedings PK has argued that parties seeking license transfer approval or other matters improperly classify documents. PK believes that confidential treatment ought only be accorded to trade secrets or material that, if public, would harm a party in the marketplace. Information that is inconvenient or embarrassing, or even treated as "confidential" within a company, does not necessarily quality, and not all information that falls under FOIA exemption 4 should be withheld from disclosure. Over-use of confidentiality designations creates a significant barrier to public participation in FCC proceedings, and is burdensome even for those organizations, such as PK, that from time to time sign protective orders in matters of public importance. For ease of reference, PK attaches previous public comments that have touched on these issues.[1]

Information on Open Proceedings

A significant barrier to public participation in FCC proceedings is uncertainty as to what those proceedings actually are. While the Commission maintains a

[1] PK is not asking the Commission to consider the party or proceeding-specific issues raised in any attached filings in this matter.

(currently non-functional) list of "Hot Dockets,"[2] there is no one place where all open FCC docketed proceedings or other matters are listed. Additionally, the ECFS system does not prevent someone from filing new information in dockets that are nominally "closed," meaning that interested parties must continually monitor even those dockets for new information. Better organization and management of FCC dockets, a single complete list of all open dockets, and a means to prevent "closed" dockets from being populated with new filings, would make participation in FCC processes simpler.

Complaint Tracking

The FCC should provide more information on consumer complaints. Information about consumer complaints about cramming or other unauthorized fees, poor service, dropped calls, or Open Internet discrimination would help consumers make informed choices about where to do business, as well as improve the debate about public policy issues.

Device Certification for Smaller Creators

Increasing accessibility of design tools and manufacturing options are beginning to create a new era of small scale, commercial hardware design. Many of these new products are coming from the open source hardware community, which focuses on rapid, collaborative design and manufacturing. While open source hardware is sold for profit (the openness refers to the ability of people to access schematics and to build upon existing products), services such as Kickstarter allow these products to come to market much more quickly and with much lower

[2] http://apps.fcc.gov/ecfs/userManual/upload/hot_docket_list.jsp

investment than more traditional hardware products. This is broadening the universe of commercial electronics inventors and, by extension, the universe of individuals and small companies navigating the device certification process.

While the open source hardware community understands the need for device certification, at this point navigating the device certification process presents them with a number of challenges. The open source hardware community would welcome the opportunity to discuss its challenges with the Commission in hopes of resolving as many of them as possible. This is not a request for an overhaul of the device certification process, which appears to work well for more traditional stakeholders. Instead, the community would simply like to discuss opportunities to reduce any potentially unnecessary or overly-burdensome barriers they have experienced.

* * *

Public Knowledge looks forward to discussing ideas for FCC process reform with the Chairman's office and any Commission staff.

Respectfully submitted,

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Senior Staff Attorney
PUBLIC KNOWLEDGE
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Suite 410
Washington, DC 20036

This appendix of previously-filed documents by Public Knowledge is included because these filings contain discussion of some of the process reform issues raised in PK's submission on FCC Process Reform.

REDACTED—FOR PUBLIC INSPECTION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of Application of Cellco Partnership d/b/a Verizon Wireless and SpectrumCo LLC for Consent to Assign Licenses Application of Cellco Partnership d/b/a Verizon Wireless and Cox TMI Wireless, LLC for Consent to Assign Licenses	WT Docket No. 12-4

CHALLENGE TO CONFIDENTIALITY DESIGNATION OF PUBLIC KNOWLEDGE

Jodie Griffin
Harold Feld
PUBLIC KNOWLEDGE
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May 9, 2012

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INTRODUCTION

Pursuant to the Commission's Protective Order[1] and Second Protective Order[2] in the current proceeding, Public Knowledge hereby challenges the Applicants' designation of certain portions of their Joint Operating Entity ("JOE") Agreement as highly confidential. Specifically, Public Knowledge challenges the Applicants' claims to confidentiality of **[BEGIN HIGHLY CONFIDENTIAL] [END HIGHLY CONFIDENTIAL]** and **[BEGIN HIGHLY CONFIDENTIAL] [END HIGHLY CONFIDENTIAL]** of the Joint Operating Entity Agreement. This challenge seeks to make public information regarding the basic governance structure of the JOE. The governance structure of the JOE is neither highly confidential nor confidential, but is critical to assessing the public interest impacts of the proposed transactions; understanding the connections between the Applicants' spectrum, marketing, resale, and JOE agreements; and determining whether the JOE will establish the basis for a future cartel between its members. This information must therefore be made available for public review and discourse.[3]

ARGUMENT

The proposed deals between Verizon and SpectrumCo and Verizon and Cox TMI Wireless present a host of concerns for both competitors and consumers and threaten to stifle

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[1] *Applications of Cellco Partnership d/b/a Verizon Wireless and SpectrumCo LLC for Consent to Assign Licenses, Application of Cellco Partnership d/b/a Verizon Wireless and Cox TMI Wireless, LLC for Consent to Assign Licenses*, Protective Order, WT Docket No. 12-4, DA 12-50, ¶ 3 (Jan. 17, 2012) ("Protective Order").

[2] *Applications of Cellco Partnership d/b/a Verizon Wireless and SpectrumCo LLC for Consent to Assign Licenses, Application of Cellco Partnership d/b/a Verizon Wireless and Cox TMI Wireless, LLC for Consent to Assign Licenses*, Second Protective Order, WT Docket No. 12-4, DA 12-51, ¶ 4 (Jan. 17, 2012) ("Second Protective Order").

[3] Portions of the JOE Agreement that contain confidential or highly confidential information may still be redacted from public inspection.

innovation in the delivery of voice, video, and data service.[4] If approved, the ramifications of these deals would reach consumers, competitors, future innovators, and the very landscape of the communications ecosystem. The Commission has therefore recognized the public's right to access information about the proposed transactions, while protecting the Applicants' legitimate need to prevent competitors from accessing certain commercially-sensitive information. Unfortunately, the Applicants have upset this balance by flouting the Commission's rules and taking advantage of the Protective Orders to hide non-confidential information from the public eye. This conduct undermines the Commission's purpose of respecting "the right of the public to participate in this proceeding in a meaningful way."[5]

Applicants Verizon Wireless and SpectrumCo have unjustifiably designated portions of their Joint Operating Entity ("JOE") Agreement as highly confidential. Those portions are neither highly confidential nor even confidential, and so must be resubmitted in this proceeding with non-confidential portions unredacted and available for public inspection.[6] The Commission has established that the burden falls upon a submitting party to justify treating its information as confidential or highly confidential.[7] Here, the Applicants have failed to make the requisite showing, and therefore must stop attempting to hide this relevant and important information from the public eye.

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[4] *See generally* Petition to Deny of Public Knowledge *et al.*, WT Docket No. 12-4 (Feb. 21, 2012); Reply Comments of Public Knowledge *et al.*, WT Docket No. 12-4 (Mar. 26, 2012).

[5] Protective Order at ¶ 1; Second Protective Order at ¶ 1.

[6] Applicants may clearly designate information that is in fact confidential or highly confidential as such, and redact such information as appropriate in the resubmitted version of the JOE Agreement.

[7] Protective Order at ¶ 3 (citing 47 C.F.R. § 0.459(b)); Second Protective Order at ¶ 4 (citing 47 C.F.R. § 0.459(b)).

In its protective orders for this proceeding, the Commission has allowed parties to claim confidentiality for "information that is not otherwise available from publicly available sources and that is subject to protection under FOIA and the Commission's implementing rules."[8] A party claiming highly confidential treatment must show that the information at issue "is not otherwise available from publicly available sources; that the Submitting Party has kept strictly confidential; that is subject to protection under FOIA and the Commission's implementing rules; that the Submitting Party claims constitutes some of its most sensitive business data which, if released to competitors or those with whom the Submitting Party does business, would allow those persons to gain a significant advantage in the marketplace or in negotiations; and that it is described in Appendix A to this Second Protective Order, as the same may be amended from time to time."[9]

The Commission's rules effectively grant confidential treatment to trade secrets and commercially confidential information exempted from mandatory disclosure by Exemption 4 of the Freedom of Information Act ("FOIA")[10] or protected by the Trade Secrets Act.[11] Any information that does not qualify as a trade secret or commercially confidential information therefore may not receive confidential treatment and be kept secret from the public.

I. THE INFORMATION AT ISSUE ONLY PERTAINS TO THE BASIC GOVERNANCE STRUCTURE OF THE JOINT OPERATING ENTITY.

Applicants have claimed confidentiality for the entire JOE Agreement, including information that pertains to the basic governance of the JOE. This information is not

[8] Protective Order at ¶ 2.

[9] Second Protective Order at ¶ 2.

[10] *See* 5 U.S.C. § 552(b)(4).

[11] *See* 18 U.S.C. § 1905.

commercially confidential and offers no competitive advantage to other companies, but does shed light on the management and motivations of the JOE, information that is critical to public review and input in this proceeding. Outside entities and members of the public cannot fully appreciate the anticompetitive threats of the JOE or the JOE's connection to other agreements under review in this proceeding without having access to basic information as to who controls the JOE and how it is governed. The mere fact that this information undermines the Applicants' arguments to the Commission does not justify hiding the information from the public—indeed, it only gives the Commission more reason to ensure that the public has a meaningful opportunity to review and discuss the information.

Here Public Knowledge only challenges Applicants' claim of confidentiality for information pertinent to the basic governance of the JOE. **[BEGIN HIGHLY CONFIDENTIAL] [END HIGHLY CONFIDENTIAL]** which contains this information, does not include any information that constitutes a trade secret or commercially confidential information. **[BEGIN HIGHLY CONFIDENTIAL]**

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[13] **[BEGIN HIGHLY CONFIDENTIAL] [END HIGHLY CONFIDENTIAL]**

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This information—namely, **[BEGIN HIGHLY CONFIDENTIAL]** **[END HIGHLY CONFIDENTIAL]**—holds no competitive value for the Applicants. The fact that **[BEGIN HIGHLY CONFIDENTIAL]** **[END HIGHLY CONFIDENTIAL]** is unsurprising and tells competitors nothing about the JOE's product plans, pricing mechanisms, or financial health. Similarly, **[BEGIN HIGHLY CONFIDENTIAL]** **[END HIGHLY CONFIDENTIAL]** provides no insight into the competitive offerings or operations of the JOE, and indeed offers little information beyond shedding light on the opportunity the JOE presents for the Applicants to collude or otherwise behave anticompetitively.

The remainder of **[BEGIN HIGHLY CONFIDENTIAL]** **[END HIGHLY CONFIDENTIAL]** similarly contains no information that is commercially confidential or would give competitors an advantage over the JOE and its members. **[BEGIN HIGHLY CONFIDENTIAL]**

[14] **[BEGIN HIGHLY CONFIDENTIAL]** **[END HIGHLY CONFIDENTIAL]**

[15] **[BEGIN HIGHLY CONFIDENTIAL]** **[END HIGHLY CONFIDENTIAL]**

[END HIGHLY CONFIDENTIAL]

None of these provisions contain any commercially sensitive information. **[BEGIN HIGHLY CONFIDENTIAL]**

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[25] **[BEGIN HIGHLY CONFIDENTIAL] [END HIGHLY CONFIDENTIAL]**

[END HIGHLY CONFIDENTIAL] This information is limited to the basic governance of the JOE; information that cannot offer any competitive advantage but nonetheless is critical to understanding the anticompetitive implications of the proposed transactions in this proceeding.

II. THE INFORMATION AT ISSUE DOES NOT FALL WITHIN EXEMPTIONS FROM THE DISCLOSURE MANDATE OF THE FREEDOM OF INFORMATION ACT.

The Freedom of Information Act was enacted as "an attempt to meet the demand for open government while preserving workable confidentiality in governmental decision-making," and its "basic objective . . . is disclosure."[27] The limited exceptions to FOIA's disclosure mandate are tailored to serve the efficient operation of the government and protect the legitimate interests of persons in protecting specific kinds of information.[28]

To be clear, FOIA, standing alone, does not *forbid* the release of any information. To the contrary, FOIA imposes upon agencies "a general obligation . . . to make information available to the public."[29] FOIA then creates certain enumerated exceptions, to which agencies' disclosure mandate does not apply.[30] Under Exemption 4, agencies are not required to publicly disclose "trade secrets and commercial or financial information obtained from a person and privileged or confidential."[31] While FOIA does not require the Commission to disclose trade secrets or confidential commercial information, it also does not, on its own, prohibit such disclosure. Indeed, FOIA's basic purpose of openness means that a party opposing disclosure bears the

[26] *See* 47 C.F.R. § 0.457.

[27] *Chrysler Corp. v. Brown*, 441 U.S. 281, 290–92 (1979).

[28] *Nat'l Parks & Conserv. Ass'n v. Morton*, 498 F.2d 765, 767 (D.C. Cir. 1974) ("*Nat'l Parks I*").

[29] *Chrysler*, 441 U.S. at 291–92; *see* 5 U.S.C. § 552(a).

[30] 5 U.S.C. § 552(b). *See also Chrysler*, 441 U.S. at 292 ("By its terms, subsection (b) demarcates the agency's obligation to disclose; it does not foreclose disclosure.").

[31] 5 U.S.C. § 552(b)(4).

burden of proving that an exemption applies.[32] "Conclusory and generalized allegations are . . . unacceptable" to "sustain[] the burden of nondisclosure under the FOIA."[33]

When combined with the Trade Secrets Act ("TSA"), Exemption 4 of FOIA generally delineates the contours of what the Commission will automatically disclose of the information it receives from companies. The TSA prohibits the Commission from making known "in any manner or to any extent not authorized by law" information it receives from companies that "concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association . . . ."[34] The Trade Secrets Act therefore "limit[s] an agency's ability to make a discretionary release of otherwise exempt material."[35] The scope of information covered by the TSA is "at least coextensive with . . . Exemption 4 of FOIA,"[36] which means that "unless another statute or a regulation authorizes

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[32] *See Nat'l Parks & Conserv. Ass'n v. Kleppe*, 547 F.2d 673, 679 n.20 (D.C. Cir. 1976) ("*Nat'l Parks II*").

[33] *Nat'l Parks II*, 547 F.2d at 680.

[34] 18 U.S.C. § 1905 (punishing anyone who "publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law . . . .").

[35] *Department of Justice Guide to the Freedom of Information Act*, UNITED STATES DEP'T OF JUSTICE, at 355 (2009), *available at* http://www.justice.gov/oip/foia_guide09.htm.

[36] *CNA Fin. Corp. v. Donovan,* 830 F.2d 1132, 1151 (D.C.Cir.1987).

disclosure of the information, the Trade Secrets Act requires each agency to withhold any information it may withhold under Exemption 4 of the FOIA."[37]

However, the TSA's prohibition does not include disclosures that are "authorized by law."[38] FOIA, for example, authorizes certain disclosures because it "provide[s] legal authorization for and compel[s] disclosure of financial or commercial material that falls outside of Exemption 4."[39] Additionally, "properly promulgated, substantive agency regulations [with] the 'force and effect of law'" may qualify as "authoriz[ations] by law" for the purposes of § 1905.[40] Accordingly, the Commission's rules have in fact provided for the public inspection of documents that fall under Exemption 4, following a "persuasive showing as to the reasons for inspection."[41] The Commission has confirmed that these provisions "constitute the requisite legal authorization for disclosure of competitively sensitive information under the Trade Secrets Act."[42]

Here, the information for which Public Knowledge is challenging confidentiality protection is neither a trade secret nor confidential commercial information. As a result, the information cannot be hidden behind claims of confidentiality and must be released to the public in this proceeding.

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[37] *Canadian Commercial Corp. v. Dep't of the Air Force*, 514 F.3d 37, 39 (D.C. Cir. 2008).

[38] 18 U.S.C. § 1905.

[39] *CNA Fin. Corp. v. Donovan*, 830 F.2d at 1151–52 & n.139.

[40] *See Chrysler Corp. v. Brown*, 441 U.S. 281, 295–302 (1979).

[41] 47 U.S.C. §§ 457(d)(1), (d)(2).

[42] *Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, GC Docket No. 96-55, Notice of Inquiry & Notice of Proposed Rulemaking, 11 FCC Rcd. 12,406, ¶ 12 (1996).

A. THE INFORMATION AT ISSUE DOES NOT QUALIFY AS A TRADE SECRET FOR PURPOSES OF FOIA EXEMPTION 4.

FOIA itself does not define the term "trade secret."[43] The U.S. Court of Appeals for the District of Columbia Circuit defines a "trade secret" for purposes of FOIA Exemption 4 as "a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort," with "a direct relationship between the information at issue and the productive process."[44] Trade secrets have thus been defined very narrowly for purposes of FOIA Exemption 4. For example, in past cases computer models of the costs of providing telecommunications services have been given confidential treatment only as confidential commercial information, rather than as trade secrets.[45]

Here, the information at issue does not even come close to qualifying under the narrow definition of a trade secret. As described above,[46] Public Knowledge is only challenging confidential treatment of information pertaining to the basic governance of the Joint Operating Entity that the Applicants are creating as part of their spectrum transfer agreement.[47] None of this information is used to process or otherwise prepare any commodities the JOE will offer, nor does the JOE's governance structure show any sign of being the result of "innovation or substantial effort"—it is simply the resolution of basic management decisions that all persons forming a new company must make when they create a new legal entity.

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[43] *See* 5 U.S.C. § 552.

[44] *Pub. Citizen Health Research Grp. v. FDA*, 704 F.2d 1280, 1288 (D.C. Cir. 1983).

[45] *Allnet Commc'n Servs., Inc. v. FCC*, 800 F. Supp. 984, 988–90 (D.D.C. 1992).

[46] *See supra* Section I.

[47] *See* **[BEGIN HIGHLY CONFIDENTIAL]**

[END HIGHLY CONFIDENTIAL]

B. THE INFORMATION AT ISSUE DOES NOT QUALIFY AS CONFIDENTIAL COMMERCIAL INFORMATION FOR PURPOSES OF FOIA EXEMPTION 4.

To qualify under the second prong of the FOIA Exemption 4, "information must be (1) commercial or financial, (2) obtained from a person outside the government, and (3) privileged or confidential."[48] "Privileged" information is a rare justification for non-disclosure and might only encompass the attorney-client privilege.[49] Information is considered "confidential" if its disclosure would be likely to (1) "impair the Government's ability to obtain necessary information in the future" or (2) "cause substantial harm to the competitive position of the person from whom the information was obtained."[50]

Under the first prong, when "pursuant to statute, regulation or some less formal mandate," parties "are *required* to provide . . . information to the government, there is presumably no danger that public disclosure will impair the ability of the Government to obtain this information in the future," so the first prong generally does not apply to situations where, as here, the government can compel parties to submit the information at issue by statute and regulation.[51]

Here, the Commission has ample authority to compel the production of the agreements pursuant to its authority under Section 310(d) over license transfer applications.[52] Indeed, the Commission explicitly acted on that authority when it required the Applicants to submit revised

[48] *Gulf & W. Industs., Inc. v. United States*, 615 F.2d 527, 529 (D.C. Cir. 1979).

[49] *See Wash. Post Co. v. Dep't of Health*, 690 F.2d 252, 267–68 & n.50 (D.C. Cir. 1982).

[50] *Nat'l Parks I*, 498 F.2d at 770; *see Critical Mass Energy Project v. NRC*, 975 F.2d 871, 872 (D.C. Cir. 1992) (en banc), *cert. denied*, 507 U.S. 984 (1993).

[51] *Nat'l Parks I*, 498 F.2d at 770. *See* also *Nat'l Org. of Women v. Social Sec. Admin.*, 736 F.2d 727, 737 n.97 (D.C. Cir. 1984); *Worthington Compressors, Inc. v. Costle*, 662 F.2d 45, 51 (D.C. Cir. 1981).

[52] *See* 47 U.S.C. § 310(d).

copies of the agreements without certain redactions that the Applicants had made in the highly confidential versions of the documents.[53] Moreover, pursuant to its authority under Section 308,[54] the Commission has demanded and received further information about the JOE Agreement, in addition to the agency and resale agreements, including information about how and why the Applicants decided to enter into the agreements and which of the Applicants' respective directors negotiated and agreed to the deals.[55] The Commission's broad authority to compel disclosure of and information about the agreements means that disclosure here will not impair the Commission's ability to collect similar information in the future.

As a result, the information may only fall within FOIA Exemption 4 if it would likely cause substantial competitive harm to the Applicants.[56] In this context, competitive harm is "limited to harm flowing from the affirmative use of proprietary information *by competitors*."[57] Here, there is no likelihood that Applicants' competitors will leverage information about the

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[53] *See* Letter from Rick Kaplan, Chief, Wireless Telecommunications Bureau, FCC, to Michael Samsock, Cellco Partnership, WT Docket No. 12-4 (Mar. 8, 2012); Letter from Rick Kaplan, Chief, Wireless Telecommunications Bureau, FCC, to Lynn Charytan, Vice President of Legal Regulatory Affairs and Senior Deputy General Counsel, Comcast Corp., WT Docket No. 12-4 (Mar. 8, 2012).

[54] *See* 4 U.S.C. § 308(b).

[55] *See* Letter from Rick Kaplan, Chief, Wireless Telecommunications Bureau, FCC, to Michael Samsock, Cellco Partnership, WT Docket No. 12-4 (Mar. 8, 2012); Letter from Rick Kaplan, Chief, Wireless Telecommunications Bureau, FCC, to Lynn Charytan, Comcast Corp., WT Docket No. 12-4 (Mar. 8, 2012); Letter from Rick Kaplan, Chief, Wireless Telecommunications Bureau, FCC, to Steven Teplitz, Senior Vice President, Government Affairs, Time Warner Cable Inc., WT Docket No. 12-4 (Mar. 8, 2012); Letter from Rick Kaplan, Chief, Wireless Telecommunications Bureau, FCC, to Bright House Networks, LLC, WT Docket No. 12-4 (Mar. 8, 2012); Letter from Rick Kaplan, Chief, Wireless Telecommunications Bureau, FCC, to Jennifer Hightower, Cox TMI Wireless, LLC, WT Docket No. 12-4 (Mar. 8, 2012).

[56] *Nat'l Parks I*, 498 F.2d at 770; *see Critical Mass Energy Project v. NRC*, 975 F.2d 871, 872 (D.C. Cir. 1992) (en banc), *cert. denied*, 507 U.S. 984 (1993).

[57] *Pub. Citizen Health Research Grp. v. FDA*, 704 F.2d 1280, 1291 n.30 (D.C. Cir. 1983) (quoting Connelly, *Secrets and Smokescreens: A Legal and Economic Analysis of Government Disclosures of Business Data,* 1981 WIS. L. REV. 207, 225–26) (emphasis in original).

governance of the JOE to competitively harm the Applicants. This information does not pertain to any potential product plans or competitive operations of the JOE or of any of its members, and in fact the Applicants themselves routinely make the identities of their own respective leadership teams available to the public.[58] Verizon Communications, for example, publishes its bylaws on the company's website, including the structure of the company's board of directors and officers.[59] The fact that Applicants routinely make this information available for their own respective companies belies their implicit assertion that similar information about the JOE must be kept highly confidential.

Additionally, as the Commission acknowledges in its protective orders,[60] information that is already publicly available does not fall within FOIA Exemption 4 and therefore the person submitting that information cannot make any claim to confidentiality.[61] Public Knowledge therefore also requests that the Commission also require public disclosure of **[BEGIN HIGHLY CONFIDENTIAL] [END HIGHLY CONFIDENTIAL]**, which only states **[BEGIN HIGHLY CONFIDENTIAL] [END HIGHLY CONFIDENTIAL]** This information is already publicly

[58] *See, e.g.*, Executive Leadership, Verizon Wireless (last visited May 8, 2012), http://aboutus.verizonwireless.com/leadership/executive/index.html; *Verizon Clarifies Succession Plans; Names Lowell McAdam as COO*, Verizon Wireless (Sept. 20, 2010), http://news.verizonwireless.com/news/2010/09/pr2010-09-20.html (announcing McAdam's membership on the Verizon Wireless Board of Representatives).

[59] Verizon Communications Bylaws, Arts. IV-V, *available at* http://www22.verizon.com/investor/bylaws.htm. *See also Verizon Communications Inc.*, BLOOMBERG BUSINESSWEEK (last updated May 8, 2012), http://investing.businessweek.com/research/stocks/people/board.asp?ticker=VZ:US (detailing the names and primary affiliations of Verizon Communication's Board of Directors).

[60] Protective Order at ¶ 2; Second Protective Order at ¶ 2.

[61] *CNA Financial Corp. v. Donovan*, 830 F.2d 1132, 1154 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 977 (1988); *Occidental Petroleum Corp. v. SEC*, 873 F.2d 325, 332 (D.C. Cir. 1989) ("[I]f the information was already public, of course, the documents could not be withheld from disclosure under the FOIA exemption for confidential business information.").

available through the website of the Delaware Department of State Division of Corporations,[62] and the Applicants therefore have no claim of confidentiality to this portion of the JOE Agreement.

CONCLUSION

For these reasons, the Commission should order the Applicants to resubmit their Joint Operating Entity Agreement with the portions discussed above unredacted and available for public inspection.

Respectfully submitted,

/s Jodie Griffin
/s Harold Feld
PUBLIC KNOWLEDGE

May 9, 2012

[62] *See* State of Delaware, Department of State: Division of Corporations, https://delecorp.delaware.gov/tin/GINameSearch.jsp (Entity Name "Joint Operating Entity LLC" or File Number 5069799) (last visited May 8, 2012).

CERTIFICATE OF SERVICE

I certify that on May 9, 2012, I caused a copy of the foregoing Challenge to Confidentiality Designation to be served on each of the following:

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of Application of Cellco Partnership d/b/a Verizon Wireless and SpectrumCo LLC for Consent to Assign Licenses Application of Cellco Partnership d/b/a Verizon Wireless and Cox TMI Wireless, LLC for Consent to Assign Licenses	WT Docket No. 12-4

REPLY TO OPPOSITION TO CONFIDENTIALITY CHALLENGE

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INTRODUCTION

The joint opposition of Verizon, Comcast, Time Warner Cable, and Brighthouse Networks[1] to Public Knowledge's Challenge to Confidentiality Designation[2] is most notable for what it does *not* do. The opposition does not respond to the vast majority of the provisions specifically identified by Public Knowledge as not qualifying for confidential protection. The opposition does not argue that the information at issue constitutes a trade secret. The opposition does not explain how the information at issue could be used by a competitor against the JOE. The opposition does not even attempt to justify their own prior claim that the cover page of the JOE Agreement is highly confidential. Applicants have failed to rebut Public Knowledge's explanations for why **[BEGIN HIGHLY CONFIDENTIAL]** [3] **[END HIGHLY CONFIDENTIAL]** do not qualify for confidential protection and should be made public. As a result, the Commission should require the Applicants to submit the relevant information into the public record in this proceeding.

I. IMPROPER CONFIDENTIALITY DESIGNATIONS IMPOSE SIGNIFICANT BURDENS ON REVIEWING PARTIES.

As a preliminary matter, contrary to Applicants' claims, the fact that some Public Knowledge employees have signed acknowledgement of confidentiality in this proceeding is entirely irrelevant to Public Knowledge's ability to challenge the protection of information that is improperly categorized as confidential. Applicants argue that Public Knowledge should be

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[1] Letter from John T. Scott III, Verizon, *et al.* to Marlene H. Dortch, Secretary, FCC, at 1 (May 16, 2012) ("Opposition to Confidentiality Challenge").

[2] Challenge to Confidentiality Designation of Public Knowledge, WT Docket No. 12-4 (May 9, 2012).

[3] **[BEGIN HIGHLY CONFIDENTIAL]**

[END HIGHLY CONFIDENTIAL]

satisfied with the status quo because a small number of Public Knowledge employees have signed the confidentiality acknowledgements and thereby gained access to the text.[4] By this logic, the Commission's process for challenging confidentiality designations would be utterly useless. Under Applicants' argument, only entities that did not already have access to confidential information could challenge claims of confidentiality, even though they would have no way to ascertain whether the information was confidential or not. Moreover, the protective orders in this proceeding in no way require that confidentiality challenges only be made by those who are ignorant of the content of the documents at issue.[5]

Moreover, designating a document as confidential or highly confidential imposes restrictions both on entities with and without access to the documents. Applicants protest that two dozen entities have access to the documents under the protective orders, but this falls far short of full public review and debate. Those few parties with access to the confidential and highly confidential documents must expend significant time and resources to obtain and protect the information from disclosure. Additionally, these parties are prevented from discussing such information with people who have not signed the necessary protective orders who otherwise would be able to provide valuable analysis and other assistance. For example, Public Knowledge might wish to inform companies that their interests would could be adversely affected by the JOE, but be unable to explain exactly why. The over-classification of non-sensitive documents

[4] Opposition to Confidentiality Challenge at 2.

[5] *See Applications of Cellco Partnership d/b/a Verizon Wireless and SpectrumCo LLC for Consent to Assign Licenses, Application of Cellco Partnership d/b/a Verizon Wireless and Cox TMI Wireless, LLC for Consent to Assign Licenses*, Protective Order, WT Docket No. 12-4, DA 12-50, ¶ 3 (Jan. 17, 2012) ("Protective Order"); *Applications of Cellco Partnership d/b/a Verizon Wireless and SpectrumCo LLC for Consent to Assign Licenses, Application of Cellco Partnership d/b/a Verizon Wireless and Cox TMI Wireless, LLC for Consent to Assign Licenses*, Second Protective Order, WT Docket No. 12-4, DA 12-51, ¶ 4 (Jan. 17, 2012) ("Second Protective Order").

means that PK might not be able to properly solicit the insight of impartial observers (such as academics) or inform members of Congress and their staff of the dangers of the JOE.

II. APPLICANTS HAVE MANIPULATED CONFIDENTIALITY PROCEDURES FOR STRATEGIC ADVANTAGE

The unprecedented and vigorous manner in which Applicants have challenged potential opponents from gaining access to the highly confidential documents—first Netflix, now Frontier—highlights the importance of correct classification.[6] These competitors should have access in the process of a permit-but-disclose proceeding so that they may file comments that inform the Commission's process (that is, after all, the purpose of designating a proceeding permit-but-disclose). Applicants insist on a hyper-technical reading of the terms of the protective order to exclude potential opponents, arguing that this is necessary to protect the integrity of their confidential information. But they waive their objections when potential allies wish to sign the orders,[7] losing all concern about limiting the number of people to whom confidential information is revealed. These actions are inconsistent with a genuine desire to keep confidential information in limited circulation and demonstrate how the Applicants manipulate the protective orders for strategic advantage. The Commission can partially remedy this behavior by removing the information PK has requested from the scope of the protective orders.

Indeed, even designation of material that would rate only confidential as highly confidential has profound consequences with regard to the ability of parties or potential parties to

[6] *See* Letter from John T. Scott III, Verizon, *et al*. to Marlene H. Dortch, Secretary, FCC, WT Docket No. 12-4 (Apr. 11, 2012) (opposing participation of Netflix), *available at* http://apps.fcc.gov/ecfs/comment/view?id=6017029616; Letter from John T. Scott III, Verizon, *et al*. to Marlene H. Dortch, Secretary, FCC, WT Docket No. 12-4 (May 16, 2012) (opposing participation of Frontier), *available at* http://apps.fcc.gov/ecfs/comment/view?id=6017035715.

[7] *See* Comments of Geoffrey A. Manne, Executive Director, International Center for Law and Economics & Berin Szoka, President, TechFreedom, WT Docket No. 12-4 (Mar. 26, 2012), *available at* http://apps.fcc.gov/ecfs/comment/view?id=6017026771.

assess the information and respond in a thorough and complete manner. The Second Protective Order restricts companies' access to highly confidential information much more than the Protective Order restricts access to confidential information. Only outside counsel and outside consultants may access highly confidential information, but in-house personnel may access confidential information, so long as they are not involved in competitive decision-making and have signed the appropriate confidentiality acknowledgements.[8] Companies are less likely to investigate documents to ascertain whether their interests will be harmed by a proposed transaction when they must hire outside counsel to do so for them. As a result, the Commission may not hear from entities with legitimate interests in the proceeding. Accordingly, the Commission should ensure that documents only receive highly confidential protection when they actually qualify as highly confidential.

III. THE COMMISSION MUST TAKE INTO ACCOUNT THE PUBLIC'S RIGHT TO MEANINGFULLY PARTICIPATE IN ITS PROCEEDINGS

For the reasons above, the Commission should reject Applicants' effort to trivialize their improper classification of documents. But in addition to these practical reasons, granting confidentiality only to documents that legitimately deserve it serves a broader goal of public participation and transparency in agency actions. The Freedom of Information Act, for example, "is an attempt to meet the demand for open government while preserving workable confidentiality in governmental decision-making," and its "basic objective . . . is disclosure."[9] This also aligns with the purposes of the procedures set out in the Administrative Procedure Act: increasing the public's ability to access information about agency action and increasing

[8] *Compare* Second Protective Order, ¶ 7 *with* Protective Order, ¶ 5.

[9] *Chrysler Corp. v. Brown*, 441 U.S. 281, 290–92 (1979).

opportunities for the public to give input on agency decisions that will impact the public.[10] The designation of material as confidential or highly confidential is a limited exception designed to strike a balance between the need to protect genuinely sensitive information and the principle that all agency decisions are based on an open record, in a transparent manner that promotes both the principle of civic engagement and the principle of accountability.

IV. THE JOE IS CENTRAL TO THIS PROCEEDING

Applicants also continue to protest that the JOE Agreement is not connected to the proposed license transfer.[11] This argument is incorrect, and ignores the fact that the Commission has already explicitly recognized that the Applicants' side agreements are an integral part of the Commission's review in this proceeding.[12]

The JOE Agreement is properly considered as part of this proceeding. As Public Knowledge has explained, the JOE is intimately connected to the proposed license transfer,

[10] *See* 5 U.S.C. § 551 *et seq*. *See also* United States Department of Justice Attorney General's Report on the Administrative Procedure Act (1941), *available at* http://www.law.fsu.edu/library/admin/1941report.html (including keeping the public informed of agency procedures and rules and providing for public participation in the rulemaking process among the basic purposes of the APA).

[11] Opposition to Confidentiality Challenge at 2.

[12] *See* Letter from Rick Kaplan, Chief, Wireless Telecommunications Bureau, FCC, to Michael Samsock, Cellco Partnership, WT Docket No. 12-4 (Mar. 8, 2012); Letter from Rick Kaplan, Chief, Wireless Telecommunications Bureau, FCC, to Lynn Charytan, Comcast Corp., WT Docket No. 12-4 (Mar. 8, 2012); Letter from Rick Kaplan, Chief, Wireless Telecommunications Bureau, FCC, to Steven Teplitz, Senior Vice President, Government Affairs, Time Warner Cable Inc., WT Docket No. 12-4 (Mar. 8, 2012); Letter from Rick Kaplan, Chief, Wireless Telecommunications Bureau, FCC, to Bright House Networks, LLC, WT Docket No. 12-4 (Mar. 8, 2012); Letter from Rick Kaplan, Chief, Wireless Telecommunications Bureau, FCC, to Jennifer Hightower, Cox TMI Wireless, LLC, WT Docket No. 12-4 (Mar. 8, 2012).

agency, and resale agreements between the Applicants.[13] Additionally, the governance of the JOE gives rise to an attributable interest under Title III and Section 652.[14] When the Commission evaluates the impact of a proposed license transfer on the public interest under Section 301(d), the Commission must first determine who the licensee is, including which entities have an attributable interest in the licensee. The JOE is thus directly relevant to the Commission's inquiry in this proceeding.

Applicants have failed to counter Public Knowledge's arguments that **[BEGIN HIGHLY CONFIDENTIAL] [END HIGHLY CONFIDENTIAL]** does not contain confidential commercial information. Applicants also assert that its competitors keep information similar to the information at issue confidential, but fail to name any actual examples.[15]

It is telling that, even though Public Knowledge specifically described every provision of **[BEGIN HIGHLY CONFIDENTIAL] [END HIGHLY**

[13] *See* Petition to Deny of Public Knowledge *et al.*, WT Docket No. 12-4, at 17-21 (Feb. 21, 2012); Reply Comments of Public Knowledge *et al.*, WT Docket No. 12-4, at 2-6, 22-25 (Mar. 26, 2012).

[14] *See* **[BEGIN HIGHLY CONFIDENTIAL]**

[END HIGHLY CONFIDENTIAL]

[15] Opposition to Confidentiality Challenge at 1. The Applicants note that companies like Google, Microsoft, and Apple create similar joint entities that do not disclose their ownership and governance, but Applicants fail to actually specify any such joint entities. As such, the Commission should pay no heed to Applicants' vague allusion that unspecified entities treat their basic governance information as commercially sensitive. Applicants cite three cases involving FOIA Exemption 4 as evidence that the information PK has requested is properly classified. *See* Percy Squire, *Memorandum Opinion and Order*, 26 FCC Rcd. 14930 (2011); Josh Wein, *Memorandum Opinion and Order*, 24 FCC Rcd 12347 (2009); Johan Karlsen, *Memorandum Opinion and Order*, 24 FCC Rcd 12299 (2009). But just as the applicants merely conclude that the information at issue is properly classified without fully explaining the competitive harm that would follow from its disclosure, they have not demonstrated that the governance and licensing information at issue are analogous to the information discussed in those orders.

CONFIDENTIAL] that should be made publicly available, Applicants only even attempt to specifically justify highly confidential treatment of one provision: **[BEGIN HIGHLY CONFIDENTIAL] [END HIGHLY CONFIDENTIAL]**

Applicants' unsupported assertions characterizing the JOE as a harmless joint research agreement demonstrate exactly why it is so important that the public be able to review and evaluate basic information about how the JOE is governed. Public Knowledge can explain, and has explained,[16] why the JOE poses a competitive threat to the development of vital new technologies in the wireless and wireline markets, but the public cannot be included in this critical debate unless the governance of the JOE is submitted into the public record. The Commission should require the Applicants to resubmit the JOE Agreement with non-confidential information, like **[BEGIN HIGHLY CONFIDENTIAL] [END HIGHLY CONFIDENTIAL]** properly included in the public record.

[16] *See* Reply Comments of Public Knowledge *et al.*, WT Docket No. 12-4, at 6-20 (Mar. 26, 2012).

CONCLUSION

For the reasons above the Commission should grant PK's challenge to the confidentiality designation of certain material. A redacted version of this reply is being filed electronically pursuant to Section 1.1206 of the Commission's Rules and the Protective Orders in this proceeding.

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In the Matter of	)	
	)	
Policies Regarding Mobile Spectrum Holdings	)	WT Docket No. 12-269
The State of Mobile Wireless Competition	)	WT Docket No. 11-186

EX PARTE COMMENTS OF PUBLIC KNOWLEDGE

Introduction and Summary

Public Knowledge (PK) respectfully submits this filing in response to the above-captioned proceedings. While searching the Universal Licensing System (ULS) for data to support policy positions in several spectrum proceedings, PK noticed how challenging it is to gather meaningful information on carriers' spectrum licenses and affiliate control in order to understand the mobile wireless market. In the wake of necessary improvements to mobile wireless policies and the upcoming incentive auctions, it is essential that the ULS is well-organized and transparent. By improving data collection processes, the Commission will help innovators and commenters find and analyze data more easily so they can work to cultivate spectrum use and develop better proposals to spur mobile wireless competition.

This comment explains the difficult process of gathering wireless market data to support policy positions, points out problems with the current ULS database, and suggests (hopefully easy) improvements to make ULS data collection and analysis more efficient for future spectrum-related discussions.

I. ULS data in its current form does not effectively help commenters develop informed spectrum policies or innovators improve the mobile wireless market.

A. In accordance with the Commission's request for comments, PK gathered and analyzed data to support proposals for spectrum screens and other mobile wireless issues.

In light of increasing consumer demand for bandwidth-intensive mobile wireless services, the Commission seeks comments on how to implement a spectrum screen to "promot[e] economic opportunity and competition and ensur[e] that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses."[1] The

[1] *Policies Regarding Mobile Spectrum Holdings*, WT Docket No. 12-269, Notice of Proposed Rulemaking, ¶ 3 (2012) citing 47 U.S.C. § 309(j)(3)(B) (*Mobile Spectrum Holdings*).

Commission asked for specific data and other evidence that support commenters' proposals.[2] PK realized it could offer more meaningful proposals on a flexible spectrum screen that promoted competition and innovation by learning more about the competitive state of the mobile wireless market—which meant knowing the carriers in the market and the spectrum licenses that they control. Anticipating the mobile spectrum NPRM and understanding the complexities associated with ownership and licensing data in the ULS database, PK began compiling and analyzing the data two months before the NPRM's September 28, 2012 release data in order to support upcoming proposals.

B. PK's Data Compilation and Analysis Methodology

The Commission currently requires spectrum licensees to report information so that it and members of the public can use the data to learn about the state of wireless competition. While PK applauds the Commission for requiring these reports, it needs to compile and present the data in an organized and useable manner. Until then, commenters like PK and innovators will have to devote significant resources to methodically compiling and analyzing data to develop new policies, technologies, or business strategies. With no "ULS Best Practices" guide, PK devised a strategy and evolved its methodology along the way. What resulted was a multistep process that can be avoided in the future with a few modifications to the ULS database.

To determine the players and the competition in the mobile spectrum market, PK wanted to know how the carriers in the market and the spectrum licenses they controlled changed throughout the years. The tricky part would be determining the affiliate companies that major wireless service providers controlled because control over an affiliate company generally means control over that company's spectrum licenses. Therefore, PK needed to create a timeline of 1) carriers' controlling interest in affiliate companies, and 2) carriers' and affiliate companies' spectrum licenses. The ULS database is the only public place that holds these two key pieces of information. Both key pieces of information required an unbelievable amount of time and attention to detail.

A few notes on the methodology that follows:

- Date Range of Project:
  - January 1, 2005—October 15, 2012.
  - PK started collecting data from January 2005 to avoid lingering effects of the previous spectrum cap that was phased out in 2004.
- The Databases:
  - ULS Ownership Database downloaded into Microsoft Access
    - The database contains all of the current and proposed ownership disclosure forms from about 2001.

[2] Id. at ¶ 16.

        - PK downloaded ownership data into Access to create queries to find specific information, *e.g.*, an alphabetized list of affiliates controlled by a carrier.
    - Microsoft Excel
        - After querying a chronological list of ownership filings in Access, PK exported the information to Excel to input the ownership information relevant to each filing. PK preserved chronology by inserting rows in the middle of data, which is not possible with Access.
    - Ownership Disclosure Information Search on the ULS website
        - Includes information on carrier ownership and control located in attachments and archived files that are not available in the downloadable Ownership Database.
- Calculating Cumulative Time:
    - The amount of time calculated to complete the project is based on a 40 hour work week.

For the first key piece of information, PK set out to determine what affiliates each major carrier controlled using the three databases described above: the Ownership Database downloaded into Microsoft Access, Microsoft Excel, and the Ownership Disclosure Information Search on the ULS website. It took some time and planning to download the ULS data into Access and format the databases to efficiently input data, but the process resulted in an easy-to-read timeline of carriers' ownership and control. After a few days of siphoning through data and reading the ULS FAQs and Glossary, it was easy to understand the files and information contained therein.

STEP	SETUP	TIME
1	Discussion with experts to develop methodology and determine the specific data to extract from the ULS.	1 hour
2	Download ULS Ownership Database. Export data to Access in order to run queries on the data. Format data by inputting data headings to 1) know what the data represents and 2) complete query searches.	3 hours
3	Learn about the data in the database in order to best organize and analyze it. Research the function and meaning of each set of data within the Ownership Database. Get up to speed on acronyms and rules for filing data.	12 hours
4	Set up a query to put ownership files in chronological order. Realize Access only allows row inputs at the bottom of data columns. Export chronologically-ordered ownership files to Excel in order to add rows under each file entry to input ownership/control information later without disrupting the chronological order of the files.	1 hour
	CUMULATIVE TIME	**17 hours**

Upon completing the setup, PK understood the information in the databases and we began analyzing the ownership data to determine which carriers controlled affiliate companies. PK chronologically inputted the results for each ownership file previously exported to Excel. Then for each ownership file, PK inputted 1) Commission-regulated affiliates of the filer (FRBs in ULS lingo), 2) companies with disclosable interests in the filer (DIHs), and 3) Commission-regulated affiliates of the companies with disclosable interests in the filer (FRBs of DIHs).

The process for obtaining this information involved several steps for each ownership file. First, PK found the file in the Ownership Disclosure Information Search on the ULS website and looked at the FRBs, DIHs, and attachments to determine ownership and control information. The website was crucial primarily because the attachments provided information above and beyond the raw data downloaded to Access. The online searches illustrated corporate ownership structures (*e.g.*, Verizon Communications controls Cellco Partnership controls Alltel Corporation) and explained when actual control contradicted the Commission's "exceeds 50 percent" control rule (*e.g.*, MetroPCS owns 85% of Royal Street BTA but does not control it).[3]

After compiling about one and a half years of data, PK sought ways to speed up the process and checked the efficiency of our methodology with experts. After speaking with someone fluent in the ULS, PK realized there was no simple(r) way to complete the project. Fortunately, an expert helped improve queries so PK could get information on affiliates in a more convenient format from Access.

Armed with the confidence that a slightly more efficient process brings, PK finished the ownership data collection.

STEP	CHRONICLING CARRIERS' CONTROL OF AFFILIATES	TIME
5	Searched the online Ownership Disclosure Information Search month by month starting with January 1, 2005. For every file, learned about the ownership structure and control of affiliates. Then, queried the FRB, DIH, and FRB of DIH information in Access, recorded it under the ownership filer name in Excel, and made adjustments based on information in the online attachments. Compiled eight years of data. Compiling one year of data took about 40 hours.	320 hours
6	Meetings with ULS database experts.	6 hours
7	Obligatory Ownership Disclosure Information Search Breakdown Day. (Thankfully, Commission staff promptly fixed the website after being notified of errors and notified PK when the website was working again.)	12 hours
8	Waited on the always slow ULS website or sometimes slow Access query results.	probably 5 hours
	CUMULATIVE TIME	**360 hours (2.25 months)**

[3] See 47 U.S.C. § 1.2112(a)(6).

Next PK deduced carriers' control of affiliates for the end of each calendar year from the completed chronological timeline of ownership information. (Knowing the yearly, rather than daily, changes in carriers' spectrum licenses that would be pieced together with year-end ownership information would be enough to better understand the wireless market and develop educated spectrum policies.) Sometimes this was straightforward because a major carrier would only have one filing in a particular year. But carriers are required to file ownership information based on when they apply for or alter a spectrum license, so they could have many ownership files throughout the year. Some years major carriers had multiple ownership filings within a year or even within a few days, making it difficult to tell which file was latest in the year.

Sometimes there were obvious errors in the forms such as when a carrier only reported half of its affiliates in between two filings with twice as many reported affiliates. Other times errors were less obvious—certain "omissions" required a combination of comparing all the filings for the year with the filings of the previous and subsequent years to determine whether a carrier still controlled an affiliate. If it was impossible to tell whether or not an error existed, PK analyzed the information as though it were correct.

PK charted the major carriers and the carriers with the most affiliates to quickly see how ownership was changing over time. PK discovered missing data on carriers that existed in given years. For example, there was no information on T-Mobile's ownership disclosures from 2005-2009. Surely T-Mobile must have applied for or altered a spectrum license at least once in five years. An ownership search by T-Mobile's registration number revealed archived files that provided the information. It turns out that the downloadable Ownership Database does not include archived files.

PK might have noticed the downloadable Ownership Database did not include archived files sooner but PK always unchecked the filing-type boxes in the Ownership Disclosure Information Search even though it offers the choice of getting results for any combination of current, proposed, and archived files. Initial monthly searches with checked filing-type boxes resulted in "no matches found." Un-checking all the filing-type boxes produced a bunch of results, so PK stayed with that approach. In the end, PK searched the archived files to fill in missing information on major carriers' control over affiliates using the carriers' registration numbers. A complete picture of year-end ownership information slowly developed.

STEP	**GENERATING YEAR-END RESULTS**	**TIME**
9	Compiling information from archived files.	20 hours
10	Analyzing and formatting data to determine ownership and control of affiliates at the end of each year.	80 hours
	CUMULATIVE TIME	**460 hours (~ 3 months)**

PK now has the plethora of ULS ownership information in an organized and easily understandable database and knows how major carriers control affiliates. But obtaining this information took three *months* and is only the *first* key piece of information to better understanding the wireless market.

It will still be a while before PK concludes which major carriers actually control which spectrum licenses. Gathering this information requires inefficient searches in ULS of specific spectrum license databases and the Advanced License Search to determine the spectrum holdings of each company from January 2005. Then, using the ownership and affiliate control information obtained as described above, PK can devise a list of all the spectrum licenses each major carrier controls.

Only when all the data is gathered and analyzed will PK fully understand the wireless market and have the necessary support for proposals on spectrum screens or other wireless issues that promote competitive and innovation.

II. The Commission can help fix the unnecessarily time consuming, technologically inefficient, difficult, and possibly unreliable ULS database and redirect resources toward developing informed spectrum policies.

A. Problems with ULS data

1. Poor data compilation, inefficiency, and limited technological capabilities

The ULS holds an abundant amount of information that could help corporations, public interest groups, and others develop successful mobile wireless policies, but the data is not useful in its present form. Easy and convenient are foreign concepts in the ULS. Rather, any way to compile the data is inevitably inefficient, frustrating, and generally lousy.

2. Databases do not provide the right types of information

For example, the Ownership database does not include archived files. As another example, instead of collecting the ownership data in chronological order as described above, PK could have collected the data based on spectrum type. Knowing the type of spectrum that carriers were licensing when collecting ownership data would have been useful for PK even without knowing the exact spectrum licenses. But there was no database to download ownership filings by type of spectrum, and the ownership filings themselves do not state the type(s) of spectrum that the carriers license. And even if PK had the option to arrange the data in this order, it still would have been an incredibly time consuming process.

3. Filers do not always submit accurate information

Another difficulty with the ULS database stems from the filers themselves. Numerous filers submitted incorrectly or carelessly filled out forms. Unfortunately, it is not always possible to tell if a filing has errors. Careless errors in a major carrier's ownership or spectrum license

filing can lessen the accuracy of the data analysis and lead to incorrect determinations about the wireless market or unsuccessful policies or regulations.

4. Many parties, likely including the Commission, lack the resources to use ULS effectively

The Commission itself is supposed to be able to use ULS data to learn about the communications landscape before implementing policies or regulating the industry. But with such unorganized and erroneous databases, even the Commission looks to other sources to gather and analyze data. In trying to compile ownership and spectrum license data to learn about the landscape of the wireless market, PK asked the Commission for the data used to calculate local Herfindahl-Hirschmann Indexes (HHIs) in its Mobile Wireless Competition reports thinking that maybe the Commission had already compiled the ownership and spectrum licensing data from ULS in order to calculate the HHIs. Instead, even the Commission avoided ULS and used proprietary data that it gathered from the North American Numbering Plan Administration (NANPA).

While the Commission may be able to get around the flaws in the ULS database, the public relies on ULS for nonproprietary spectrum-related data. Innovators, large or small, should be able to learn about the wireless markets around them in a much more efficient way than is currently possible in order to best implement competitive technologies and business strategies.

B. Quick fixes now

The Commission has the opportunity to help commenters and innovators improve the mobile wireless market by improving its ULS data collection processes. One of the best ways to understand current mobile wireless competition is to know the current market for mobile wireless devices and services and how the market has changed over time. The ownership and licensing data that explains the market is all available in the ULS, and the data will be more useful and drain fewer resources with a few adjustments in the short term. After all, the Commission collects data not for the sake of collecting data, but to understand and improve the wireless market.

1. The Commission should make available all nonproprietary data that it has used in its Mobile Wireless Competition Reports (Reports)

Allowing access to this type of data may allow commenters to better understand and expand on the results presented in the Reports. The Commission should also be sure to not withhold nonproprietary data from the public just because carriers put up a fuss or want to remain secretive about certain business activities.

2. The Commission should ensure that filers comply with, and take seriously, reporting rules

This will help ensure accurate data and analysis.

3. The Commission should include archived files in downloadable databases

Just because an archived file is not current does not mean that someone will not want it to research the history of a company or determine changes in the wireless market.

4. The Commission should consider how parties that care about spectrum might want to use the data

For example, combine the reporting requirements of spectrum license holdings (currently form 601) and ownership (currently forms 602 and 175) into one form for purposes of collecting and uploading the data to ULS. This is only one of many ways to improve data collection in ULS. It is specific to the work PK has been doing, but many others will benefit from this change as the information provides an excellent overview of the wireless market. Then, an innovator or policymaker could learn more about a carrier in the wireless market by reading the form or learn more about the entire market by downloading all the relevant information in a single combined ownership and licensing database. Having all the information in one place will allow a query search that will draw out a major carrier's control of spectrum licenses and avoid a more piecemeal approach to determine the carrier's licenses through the several additional steps of searching separate ownership and licensing databases (described above).

C. Improvements for the future

In addition to these low-tech, quick fixes, the Commission needs to improve the ULS database for the future.

1. Continue updating the technology behind the ULS to make it easier to search

The Commission needs to update the technology behind the ULS or move the data to other platforms. Currently, the Commission is testing GitHub, a potentially inexpensive solution to making ULS data more easily accessible. Since the Commission gathers ULS data for itself and for the public, it should consider what type of information it and other policymakers will want to glean from the databases. The Commission should also realize how better access to the data can benefit the public by encouraging innovators to more easily learn about the marketplace and make competitive improvements.

2. Continue to simplify forms when possible

With simpler forms, filers are more likely to be accurate and truthful, and data analysts can more easily find and use the data they need.

3. Improve and add different types of downloadable databases

This will maximize the availability of downloadable information and avoid the slow processing times associated with searching the ULS website. For example, having more search options and including more databases on specific spectrum bands and licensing will be helpful in looking at certain wireless markets.

Conclusion

Commenters are not always equipped with the resources or knowledge base to quickly and successfully gather and analyze data. The Commission, on the other hand, is responsible for collecting wireless market data and has engineers and data analysts more equipped to efficiently complete data analysis. Information necessary to help promote competition and innovation in the wireless market is not available in any useful or easily attainable form right now. With better organization and transparency in the ULS, commenters can more easily acquire the data necessary to make and support arguments to improve the communications landscape.

Dated: January 17, 20012

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