

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA et al.,

Plaintiffs,

v.

AT&T INC. et al.,

Defendants.

Civil Action No. 11-01560 (ESH)

Referred to Special Master Levie

**MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION SEEKING RELIEF
TO FACILITATE EFFICIENT TRIAL PREPARATION**

To facilitate efficient trial preparation, the Court should permit Plaintiffs to show certain outside lawyers and consultants representing potential witnesses a discrete and limited set of materials—Defendants' efficiencies models and related materials that Defendants have already submitted to the Federal Communications Commission and are at the heart of Defendants' efficiencies defense.

As the Court is aware, the transaction at issue in this litigation is also subject to review by the FCC, which is required to approve the anticipated transfer of radio frequency spectrum licenses. Under FCC procedures, Defendants have submitted voluminous materials to the FCC regarding virtually every aspect of the transaction. The materials at issue on this motion are limited to detailed models and related documents concerning the alleged efficiencies that may arise if the transaction is consummated ("Efficiencies Materials"). (The specific documents at issue are listed in our Proposed Order.) After submitting the Efficiencies Materials to the FCC, Defendants produced the Materials to Plaintiffs in this action in response to a discovery demand

and designated them as Confidential under the Protective Order. Consequently, Plaintiffs cannot share or discuss the Materials with anyone else.

Under FCC procedures, interested parties may participate in the FCC's proceedings, review Defendants' FCC filings, and submit their own responsive filings. Thus, outside lawyers and consultants for such interested parties have the right to access the Efficiencies Materials Defendants submitted to the FCC. But the Protective Orders in the FCC proceeding and in this case erect a wall preventing Plaintiffs from sharing or discussing Materials produced by Defendants to the FCC and then subsequently produced in this litigation, even with outside counsel and experts who have access to the FCC filings. That is, both Plaintiffs and interested parties have the Efficiencies Materials, but cannot discuss them together. Plaintiffs accordingly seek limited relief to permit Plaintiffs in this case to provide and discuss the Efficiencies Materials submitted to the FCC by Defendants with outside counsel and experts who have the right to view the Materials in the FCC proceeding. This request imposes no additional burdens on Defendants, and exposes Defendants to no additional competitive risks beyond those already accounted for and protected against in the FCC's and this Court's Protective Orders.

The requested relief is appropriate for several reasons:

First, discussing the factual assumptions underlying Defendants' models with knowledgeable outside lawyers and consultants will better enable Plaintiffs to present focused testimony relevant to Defendants' efficiencies defense. Issues relevant to that defense could include, for instance, comparing Defendants' claims in their efficiencies models about how wireless firms improve their networks to the way wireless firms actually go about improving their networks. Allowing Plaintiffs to discuss such issues with outside lawyers and consultants in light of Defendants' specific assertions will facilitate identifying the most relevant witnesses

and preparing focused, non-redundant testimony on these issues. This is particularly important here in light of the compressed discovery schedule, the technical complexity of the issues, and Defendants' direct access to, and intimate knowledge of, the relevant technical facts.

Second, under its Protective Order, the FCC already permits outside lawyers and consultants to review Defendants' FCC filings on the condition that the material be used only in connection with the FCC proceeding. *In re AT&T Inc.*, 26 F.C.C.R. 8801, ¶ 9 (6/22/11). Thus, the requested relief would not increase the pool of those who have the ability to access Defendants' models because access through the FCC is already available.

Third, to prevent disclosure of Defendants' confidential business information to competitors' executives, Plaintiffs only seek permission to share the models with outside counsel and consultants, just as in the FCC proceeding.

Fourth, the requested relief merely accelerates a limited disclosure of Defendants' efficiencies defense, which Defendants have focused on during the FCC proceedings and in this action. For instance, the first page of Defendants' Answer is dedicated to the transaction's alleged efficiencies. (Answer to Second Amended Complaint (10/5/11) at 1; *id.* at 24.) Defendants' efficiencies claims will become public at trial (subject to the possibility of sealing the courtroom), so it makes sense for those assertions to be examined now, in advance of trial, to enable a focused record.

Fifth, the requested relief is consistent with the limited disclosure discussed during the last Court hearing. Tr. 10/24/11 at 112 ("Mr. Wayland: ... It would be a relevant set of documents that we narrowed down. The Court: All right.").

The requested relief will help avoid trial by surprise and permit the Court a more focused record respecting the assumptions underlying Defendants' efficiencies defense.

Dated: November 16, 2011

Respectfully submitted,

Richard L. Schwartz
Geraldyn J. Trujillo
Mary Ellen Burns
Keith H. Gordon
Matthew D. Siegel
Counsel for the State of New York

/s/ Joseph F. Wayland
Joseph F. Wayland
Deputy Assistant Attorney General

/s/ Matthew C. Hammond
Matthew C. Hammond

David M. Kerwin
Jonathan A. Mark
Counsel for the State of Washington

Laury E. Bobbish
Claude F. Scott, Jr. (D.C. Bar #414906)
Kenneth M. Dintzer
Christine A. Hill (D.C. Bar #461048)
U.S. Department of Justice
Antitrust Division
450 Fifth Street, N.W., Suite 7000
Washington, D.C. 20530
Tel: (202) 514-5621
Fax: (202) 514-6381
matthew.hammond@usdoj.gov
Counsel for the United States of America

Quyen D. Toland
Ben Labow
Counsel for the State of California

Robert W. Pratt
Chadwick O. Brooker
Counsel for the State of Illinois

William T. Matlack
Michael P. Franck
Counsel for the Commonwealth of Massachusetts

Jessica L. Brown
Counsel for the State of Ohio

James A. Donahue, III
Joseph S. Betsko
Counsel for the Commonwealth of Pennsylvania

José G. Díaz-Tejera
Nathalia Ramos-Martínez
Counsel for the Commonwealth of Puerto Rico