UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, STATE OF NEW YORK, STATE OF WASHINGTON, STATE OF CALIFORNIA, STATE OF ILLINOIS, COMMONWEALTH OF MASSACHUSETTS, STATE OF OHIO, and COMMONWEALTH OF PENNSYLVANIA, *Plaintiffs,* v. AT&T INC., T-MOBILE USA, INC., and DEUTSCHE TELEKOM AG, *Defendants.*	Civil No. 11-01560 (ESH)

UNITED STATES' MEMORANDUM IN SUPPORT OF ITS PROPOSED SCHEDULE

The remaining scheduling dispute concerns the date by which the parties must submit expert reports. Defendants propose that the government's expert reports be delivered by November 15, 2011, eight weeks before the close of fact discovery. This date is both (1) unreasonable given the complexity of the issues and the importance of expert testimony in this case, and (2) inconsistent with the *Manual for Complex Litigation*, which recognizes that, in antitrust cases, "some studies may require considerable time to prepare and review."[1] In contrast, the date proposed by the United States, January 5, while aggressive, will permit the parties to develop complete reports well in advance of the trial date.

[1] MANUAL FOR COMPLEX LITIGATION (FOURTH) § 30.2 (2004).

Plaintiffs will be severely prejudiced if they are required to complete their expert reports by November 15. The expert reports in this case will address complex technical, economic and competitive issues requiring the review and analysis of voluminous documents and data concerning the nature, scope and effect of competition in the mobile wireless telecommunications industry, including in 97 of the top 100 local markets specifically identified in the Complaint. To take just one example, the question of whether this merger will result in significant engineering efficiencies is a critical and highly technical issue that will require extensive factual development and expert analysis.

The experts will require as full a factual record as possible as they complete their reports, including deposition and document discovery regarding (1) regional carriers and potential entrants identified by Defendants as potential competitive restraints; (2) business customers identified by AT&T as supporting the merger; (3) numerous enterprise customers that have benefitted from T-Mobile's competitive presence; (4) economic and engineering models Defendants have only recently produced in revised form;[2] and (5) the "real world" support for the assumptions used in these models. This discovery cannot be completed, analyzed and included in expert reports by November 15. Indeed, to complete this analysis and prepare reports by January 5, as Plaintiffs propose, will already require extraordinary effort.

There is no basis for Defendants' claim that Plaintiffs' pre-complaint investigation should allow for the early submission of expert reports. First, although the government obtained a substantial volume of investigative material, critical materials were not produced until late in the

[2] Defendants submitted multiple complex engineering and economic models, which they have continued to revise, and which will require substantial discovery. Defendants have submitted three different versions of a complex engineering model that includes over 22,000 cells of data. Many of the inputs to this model appear to lack factual support. Defendants only very recently submitted a 40-page description of the technical operation of the engineering model, but even that description provides little or no support for the many factual assumptions underlying the model.

investigation and, significantly, the pre-complaint discovery was directed at making an enforcement decision, not preparing for trial. As courts have recognized, Plaintiffs' investigative efforts are not a substitute for pre-trial discovery.[3] Second, the government's pre-complaint investigation and issue analysis is not prepared in the form of expert trial reports, which will be submitted by outside experts retained as trial witnesses. These experts require sufficient time to undertake their independent analysis of the still developing factual record and complete their reports. They cannot reasonably complete this work by November 15.

The fact that the Court has set a trial date one month sooner than originally proposed by Plaintiffs (and three months later than proposed by Defendants) does not change the amount of work necessary to prepare the reports. The expert schedule proposed by Plaintiffs will permit the orderly completion of expert discovery several weeks before the start of trial. For these reasons, Plaintiffs respectfully request that the Court include Plaintiffs' proposed dates for expert reports in Paragraph 11 of the CMO as follows: January 5, 2012 for Plaintiffs' case-in-chief expert reports and Defendants' expert reports on efficiencies of the merger; January 16, 2012 for responsive expert reports for both sides; January 23, 2012 for rebuttal expert reports; January 30, 2012 for completion of expert depositions.

[3] *See, e.g.*, *SEC v. Sargent*, 229 F.3d 68, 80 (1st Cir. 2000) ("Here, even though the [agency] had already conducted a pre-filing investigation, . . . 'there is no authority which suggests that it is appropriate to limit the [agency]'s right to take discovery based upon the extent of its previous investigation into the facts underlying its case.'" (quoting *SEC v. Saul*, 133 F.R.D. 115, 118 (N.D. Ill. 1990))); *see also Saul*, 133 F.R.D. at 118–19 (concluding plaintiff agency "is entitled to review its investigation and avail itself of its discovery rights in order to prepare its case for trial").